

Reference Material 17.



NEW gTLD DRAFT APPLICANT GUIDEBOOK VERSION 3 PUBLIC COMMENTS SUMMARY AND ANALYSIS

Sources

Public Comment Postings (7 October to 22 November 2009). The full text of the comments may be found at: <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>.

INTRODUCTION AND EXECUTIVE SUMMARY

Background

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market. This includes ensuring that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs.

The policy making process in the ICANN model is driven by people from around the world. Those discussions have involved representatives of governments, individuals, civil society, the technology community, business, and trademark lawyers. The consensus they came to, through discussions in the Generic Names Supporting Organization (GNSO), one of the many groups that coordinate global policy in ICANN, was that new gTLDs were needed and could be introduced.

The current work on implementation of new gTLDs has been in the study and planning stages for more than 3 years. See <http://gns0.icann.org/issues/new-gtlds/>. Its origin goes back even further – to the first two rounds of top-level domain applications held in 2000 and 2003. Those rounds were used to shape the current process.

In June 2008, the ICANN Board adopted the GNSO policy to introduce new gTLDs and directed staff to continue to further develop and complete a detailed implementation plan, continue communication with the community on the work, and provide the Board with a final version of the implementation proposals for the Board and community to approve before the new gTLD introduction process is launched.

In October 2008, a Draft Applicant Guidebook, with six explanatory memoranda was released and a consultation period of 76 days was held on the first draft. An analysis of over 300 comments to the Guidebook resulted in substantial changes, reflected in the second version of the Guidebook published in February 2009. Again, there was substantial commentary reiterating previous positions and staking out new ones for consideration. This process has been iterated through additional cycles of comment to produce the third version of the Guidebook, with incorporation of public feedback and publication of new material for discussion. As a result of this process, the third draft of the Applicant Guidebook

contains a number of areas which have matured in development to a point where they are essentially complete. Discussion continues on a limited number of remaining issues within the program, and these continue toward resolution.

Overview of the Analysis

For the comment period to the third version of the Guidebook, ICANN has followed the approach taken on comments to the previous versions and is providing here a detailed analysis of comments received. The comments were again divided into major categories and then subcategories.

An analysis was written to address issues raised in the categories and subcategories. The analysis identifies commenters and provides a summary of issues with which commenters are associated, and then provides an explanation of the proposed position regarding the issues raised. Therefore, each category is divided into the following sections:

- A summary of the key points made in that category
- A summary where a synopsis of comments and sources is listed
- Analysis, including a summary of the issues raised by that set of comments, a balancing of the issues raised by the comments, and a proposed position for moving forward.

The report analyzes comments by category and balances the different proposals made. The goals of the report are to:

- Analyze the comments in order to develop amendments to the Guidebook that are consonant with the meaningful input of the community, and
- Demonstrate that the comments are taken seriously and carefully considered.

Guidebook Analysis and Changes

ICANN continues to move forward in the implementation of the new gTLD Program while balancing and addressing community concerns on specific aspects of the program. The public comment period on the third version of the applicant guidebook recently closed and work continues to proceed on the resolution of overarching issues and other program details.

ICANN is publishing this analysis of comments to continue progress and the community discussion. Many of these comment areas will be the subject of consultation at the upcoming ICANN meeting in Nairobi. The next draft (version 4) of the Applicant Guidebook is expected in June 2010.

GENERAL CONCERNS/OTHER

I. Key Points

- Supporters have argued, in general, that New gTLDs promote investment, competition, innovation and can help new businesses grow. New gTLDs may also offer greater opportunity, accessibility and diversity for users.
- ICANN should proceed with the program. Applicants for New gTLDs want to see a timeline. If program suffers further delays, it will further harm ICANN's credibility; there should also be consequences for the organization.

- Critics have argued that the program does not serve the public interest, the risks outweigh the benefits and ICANN lacks sufficient public support. Some also oppose the introduction of an “unlimited” number of TLDs.
- Several comments support the delay in the timeline stating more time is needed to address open (overarching) issues and minimize adverse consequences, especially in today’s economy.
- Gap in timing of implementation between the IDN ccTLDs and IDN gTLD should be reduced.
- ICANN should consider the benefits of introducing further TLD categories. Some examples used were .brand, cultural, linguistic, municipal, geoTLDs, community TLDs.

II. Comment Summary

Support for New gTLD Program

In support of expanding the Internet to promote investment and e-commerce, among other things, ICANN should open the Internet to new top-level domains and stop the continuous DAG revisions. *M. Ferraro (13 Nov. 2009). A. McKinlay (17 Nov. 2009). I. Kalitka (19 Nov. 2009). B. Tippkemper (21 Nov. 2009). IH&RA (21 Nov. 2009). RRIH (21 Nov. 2009). Nokia (22 Nov. 2009). M. Neylon (22 Nov. 2009). C. von Veltheim (22 Nov. 2009).*

ICANN should be moving ahead with new gTLDs; we are close to the finishing line for resolving the overarching issues and maintaining the huge success of the Internet and its openness and constant adoption to users’ needs must not be risked. *dotZON (18 Nov. 2009). HOTEL (22 Nov. 2009). EuroDNS (23 Nov. 2009). dotECO (22 Nov. 2009). E. Pruis (23 Nov. 2009). Demand Media (22 Nov. 2009).* Competition in new gTLDs should be open and foster innovation. *P. Mevzek (22 Nov. 2009).*

Moving ahead to open new gTLDs without further delays will help small businesses grow and compete better. *P. Jacxsens (13 Nov. 2009). K. Nahigian (13 Nov. 2009). A. Bell (13 Nov. 2009). A. Toronto (13 Nov. 2009). J. Poelman (13 Nov. 2009). M. Lopez (13 Nov. 2009). R. Seidel (13 Nov. 2009). G. Hale (16 Nov. 2009). A. McNeill (17 Nov. 2009). B. Couture (17 Nov. 2009). M. Boese (17 Nov. 2009). F. Hagale (18 Nov. 2009). S. Storan (18 Nov. 2009). J. Masri-Nahigian (19 Nov. 2009). R. Gerstemeier (19 Nov. 2009). M. Crow (19 Nov. 2009). E. Letchworth (19 Nov. 2009). C. Livingston (19 Nov. 2009). H. Addington (19 Nov. 2009). AmericaSpeakOn.org (19 Nov. 2009). N. Carosella (19 Nov. 2009). G. Houston (20 Nov. 2009). M. Barnes (20 Nov. 2009). D. Motley (20 Nov. 2009). C. Perrone (20 Nov. 2009).*

New TLDs offer greater Internet organization, opportunities, accessibility, diversity and individuality for users at all levels. *C. Daly (17 Nov. 2009).* ICANN should solicit more diverse corporate participation to address the needs of corporations as registrants and TLD applicants. The lack of corporate participation might be the result of companies not being aware of the whole gTLD process. *Nokia (22 Nov. 2009).*

The extensive drafting, revisions and reviews producing the current DAG have resulted in an equitable and sensible process for selecting TLDs and registry operators. The DAG Modules are largely complete. *R. Tindal (23 Nov. 2009).*

Refunds for rejected applications (sec. 6.3.)

It seems that to be accepted an applicant must surrender all his rights. There is no refund policy in cases where the application is rejected based on non-applicant fault, and there is no right to complain or to sue ICANN. *A. Sozonov (Module 6, 23 Nov. 2009). S. Subbiah (Module 6, 23 Nov. 2009).*

Opposition to New gTLD Program

Program does not serve public interest, and risks outweigh benefits

The new gTLD program poses substantial risks to both consumers and businesses that outweigh any potential benefits. NCTA is concerned that the new gTLD program will be approved and implemented without full consideration of the potential risks that may result from the program. The case has not been made for a wholesale, widespread potential deluge of new gTLDs. Assuming there is a documented need for them, measured steps should be taken to expand the top-level domain name space market. *NCTA (22 Nov. 2009). DIFO (21 Nov. 2009).*

ICANN lacks sufficient public support for the new gTLD program. *G. Kirikos (22 Nov. 2009).*

Microsoft restates its opposition to introduction of an unlimited number of new ASCII gTLDs. *Microsoft (23 Nov. 2008).*

Timeline/ Models

Launch timing

It is a positive development that ICANN will no longer announce arbitrary expected launch dates for new gTLDs. Time needs to be taken for further consideration of unresolved issues and to minimize possible adverse consequences, especially given the current world economic situation. *NCTA (22 Nov. 2009). Time Warner (Module 5, 20 Nov. 2009).* ICANN has recognized the need to ensure that solutions to the four overarching issues are identified prior to announcing anticipated launch dates. *MarkMonitor (Module 1, 20 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). ECTA/MARQUES (22 Nov. 2009). BITS (22 Nov. 2009). ABA (22 Nov. 2009). CADNA (22 Nov. 2009). Yahoo! (23 Nov. 2009). ICANN should assume, at a minimum, that at least another 18-24 months will be needed. SIIA (23 Nov. 2009).*

Hearst Communications (19 Nov. 2009). An incremental approach should be taken with financial gTLDs delayed until process and security issues are addressed. ICANN does not have an appreciation for the various state, national and international legal restrictions regarding use of the term “bank” and a vast number of like terms when delivering financial services via the Internet. *ABA (22 Nov. 2009). Consideration should be given to introducing only generic terms in the first round; this would allow ICANN to test the system. Coca-Cola (24 Nov. 2009).*

“Fast track” IDN ccTLDs

Time Warner applauds the ICANN Board moving ahead with fast track IDN ccTLDs. This lets the process focus first on those IDN TLDs needed to satisfy documented demand from users who employ non-ASCII scripts as their primary means of communication. It will also provide a critical testbed for identifying any technical problems before a larger number of IDN gTLDs can be rolled out. *Time Warner (Module 5, 20 Nov. 2009). Yahoo! (23 Nov. 2009).*

ccTLDs and gTLDs

Steps should be taken to reduce the gap in implementation between the IDN ccTLDs (moving faster) and the IDN gTLDs. *RySG (21 Nov. 2009).* IDN gTLDs and IDN ccTLDs should be implemented at the root level at the same time. *D. Cohen (23 Nov. 2009). There should be an IDN gTLD fast track process. CONAC (23 Nov. 2009).*

ICANN should proceed with new gTLDs; applicants need a timeline

dotBERLIN (15 Nov. 2009). dotbayern (16 Nov. 2009). D. Krischenowski (17 Nov. 2009). dotZON (18 Nov. 2009). dotEUS (18 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). G. Werner (18 Nov. 2009). M. Erbach (18 Nov. 2009). S. Lubek (19 Nov. 2009). L. Treutler (20 Nov. 2009). A. Peters (20 Nov. 2009). dotKoeln GmbH (21 Nov. 2009). Asociacion PuntoGal (21 Nov. 2009). dothamburg (22 Nov. 2009). M. Neylon (22 Nov. 2009). HOTEL (22 Nov. 2009). INDOM (22 Nov. 2009). E. Pruis (23 Nov. 2009). NICMexico (23 Nov. 2009). EuroDNS (23 Nov. 2009). U. Stache (25 Nov. 2009). NIC.at (25 Nov. 2009).

Timeline and Priority Categories of Applications

If there is a concern about receiving too many applications, ICANN has the responsibility to divide them into appropriate categories of priority. Social purpose, public interest TLD applications supported by the relevant government authorities should have priority. The next DAG should be published in the first quarter of 2010 and the first round should start before the end of the third quarter. *City of Paris (22 Nov. 2009).*

ICANN should adopt an incremental approach to new gTLD applications, differentiating applications, and start accepting applications by the end of the third quarter in 2010. Further delays harm ICANN credibility. If the application timeline shifts again, then ICANN should be subject to a penalty system and be bound to lower its application fees. *AFNIC (22 Nov. 2009). M. Neylon (22 Nov. 2009).*

Priority application windows

No party is disadvantaged in a multi-window process compared to a single window process. If all TLDs are done at the same time, there will be resource bottlenecks and delays. ICANN should divide the application round into priority windows:

1st—community-based TLDs for which ICANN requires the approval or non-objection of the relevant government authorities.

2nd—other community-based TLDs, but requiring that the applicant demonstrate a clear and ongoing accountability framework to its community;

3rd—standard TLDs other than single-registrant projects. *W. Staub (22 Nov. 2009).*

Timelines and process review

More detail is needed on timelines and level of public data that will be available during the application process. Adding many new gTLDs will have many operational consequences. Post round, a full assessment of the whole procedure as well as adequacy of fees should be conducted. *P. Mevzek (22 Nov. 2009).*

Overarching issues—lack of justification

The four overarching issues were introduced into the new gTLD program without proper examination and they are substantially delaying the process. *Minds + Machines (22 Nov. 2009).*

TLD Categories

Application categories

ICANN should consider the benefits of introducing further categories of applications beyond standard and community-based so that applications can be compared. *ECTA/MARQUES (22 Nov. 2009). NPTA (22 Nov. 2009). EuroDNS (23 Nov. 2009).*

Single registrant TLDs

ICANN has not adequately considered all the issues related to single-registrant registries where the TLD holder is not going to operate as a traditional registry (e.g., different requirements in the utilization of ICANN-accredited registrars, registry/registrar structural separation, the impact on the DNS and the root zone of having numerous such “flat” registries not offering open registrations of second level names). *AT&T (22 Nov. 2009)*.

Decision should be deferred on single registrant TLDs and they should not be allowed in the coming round; they are the one trend that could cause a high rate of change of the root zone size. *W. Staub (22 Nov. 2009)*.

ICANN’s one size fits all approach is inappropriate

The evidence for a differentiated approach to numerous gTLD issues (e.g., types of applications (e.g. corporate TLDs), levels of security, etc.) that optimizes competition and consumer choice is becoming irrefutable but has been ignored in DAG v3. This need should be fully addressed in DAG v4. *COA (22 Nov. 2009)*.

Launch Date Timing

The launch date should be pushed back until unresolved issues such as trademark protection are thoroughly addressed. In the alternative the initial rollout should be limited to community-based and/or geographic gTLDs and should not include so-called “open” gTLDs.

Fast-track step-by-step proposal by cultural, linguistic and municipal interests

We remind ICANN that some cultural, linguistic and municipal interests have previously proposed for ICANN’s consideration a near-term step-by-step process for the application windows. *E. Brunner-Williams (22 Nov. 2009)*.

The flaw in the argument for the step-by-step proposal is contention. E.g., for generic “communities” such as linguistic communities, several applicant groups are known to exist. Which of these would get fast-track status? If non-profits are allowed to go first, it is certain that many of the existing applications will be re-formed as non-profit entities. This approach could be easily gamed. *Minds + Machines (23 Nov. 2009)*.

“dotBRAND” applications--clarify

ICANN should clarify in the DAG if applications for “dotBRAND” gTLDs will be accepted as community-based applications. An entity can always pursue a standard application and restrict registration requirements; however, this clarity is important in the case that multiple corporations apply for the same string, since the DAG currently says that “a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be.” *Thomsen Trampedach (Module 1, 20 Nov. 2009)*.

Lovells reiterates that creation of a third category of applications for brand owners would be beneficial. *Lovells (22 Nov. 2009)*.

“dotBRAND” applications—unjustified costs

In general the program needs to be more friendly to .brand TLDs. The current program is not set up at all to deal with the needs of an entity like IBM obtaining a TLD for a brand and results in significant unjustified costs. E.g., a brand owner would have to use an accredited registrar even if the brand owner has the technical ability to act as its own registrar. This is particularly unjustified where the proposed

.brand will be private or restrict registration to a closed community. In such cases, where the brand owner shows it has the technical ability, the brand owner should be allowed to effect its own registrations without using an external party. In addition, the proposed gTLD regime will impose a requirement for a DNS infrastructure that supports IPv6 and DNSSEC, which may also force brand owners to use third parties even for private or restricted gTLDs; this is not justified where the brand owner has a current sophisticated network infrastructure which can support its .brand TLD. *IBM (22 Nov. 2009).*

Demand for geoTLDs

There is a clear demand for geoTLDs. *dotBERLIN (15 Nov. 2009). dotbayern (16 Nov. 2009). D. Krischenowski (17 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). G. Werner (18 Nov. 2009). D. Rau (18 Nov. 2009). A. Seugling (18 Nov. 2009). S. Lubek (19 Nov. 2009). L. Treutler (20 Nov. 2009). H. Krueger (20 Nov. 2009). dotKoeln GmbH (21 Nov. 2009). dothamburg (22 Nov. 2009). U. Stache (25 Nov. 2009).*

Reduce fees

The economic burden for small geoTLDs (in comparison with ccTLDs) is far too high. *dotbayern (16 Nov. 2009).*

III. Analysis and Proposed Position

Timing and open issues

It is understandable the frustration expressed by some regarding the delays for introducing new gTLDs. It is a challenge to balance on one hand the discussions and solutions for important open issues and, on the other hand, the continuing program development and operational readiness. Significant efforts continue to examine and, together with the community, find solutions to these open issues such as rights protection mechanisms; ways to address malicious conduct; a better understanding of how the coincident introduction of new gTLDs, IDNs, IPv6, and DNSSEC will affect the root zone, and vertical integration.

ICANN has been working toward a timely implementation of the consensus recommendations. The latest timing discussion is in light of the substantial community discussion and formal policy development work that have occurred, and the mission and core values of ICANN. Many of the issues raised that have delayed the introduction are at or near resolution. Specific implementation models to address the potential for malicious conduct and provide trademark protections have been introduced. Additional economic analysis, weighing costs and benefits of new gTLDs is underway. Root zone stability analysis is nearly complete.

ICANN continues to approach the implementation of the program with due diligence and plans to conduct a launch as soon as practicable along with the resolution of these issues.

Staff continues to make progress towards the program development and, at the same time, work with the global Internet community towards a level of consensus on the Program's outstanding issues. Besides the many public comment periods and live consultation events around the world, the Board has recently directed staff to propose an Expressions of Interest model. The model is a direct result of community recommendations during the ICANN Seoul Meeting (Oct 2009). An Expressions of Interest process could hasten the introduction of new gTLDs and provide ICANN and the Internet community important information that will contribute to a better understanding of, for example: the expected

volume of new gTLD applications; the number and kind of strings requested; certainty as to root-zone delegation rates; and inform the program's operational readiness plan. Ultimately, the EOI may assist with the timely resolution of some of the outstanding issues.

ccTLD IDN Fast track New gTLDs timing coordination

The ideal scenario would have been for IDN ccTLD fast track and the gTLD program to launch at the same time. Input received from the GNSO, ccNSO, and others reflected this goal, however, it has also been determined that one process should not be tolled due to timing of the other. The IDN ccTLD Fast Track launched late 2009. Many countries were ready to move ahead with their IDN ccTLDs. Delaying that process would unfairly have deprived registrants in those areas of participating in the DNS in their own language and also raised risks regarding root zone stability. It is important to launch the new gTLD process in a timely manner to maintain an even playing field among competitors in commercial markets.

Multi categories, multi-phased approach

ICANN is a strong proponent of innovative use of new TLDs. This is especially so in cases where TLDs can be delegated to address the needs of specific communities such as intergovernmental organizations, socio-cultural groups and registered brands. Rather than having ICANN limit this type of innovation and identification with certain TLD models, more creativity might be spawned by allowing different groups to self-identify the type of TLD they purport to be and promote that model among their community. If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant. Socio-economic groups, brand owners and other groups can be accommodated under the existing structure and self-identify as a particular type of TLD. Over time, the market and community interests will sort TLD types – a model preferable to having ICANN make that determination a priori.

It may well be that as definitive categories of applicants emerge in practice, and as ICANN and the respective communities gain further experience of possible benefits of additional gTLD categorization over time, organizational structures might be developed with ICANN to reflect these categories. That will be a consequence of bottom-up policy developments by affected participants, according to the ICANN model. Nothing in the current implementation procedures forecloses those future developments.

Significant consideration has been given to the issue of the introducing category-based TLDs in the new gTLD process. The policy recommendations of the GNSO and the GAC principles have resulted in the creation of three gTLD categories or types:

- Community-based TLDs
- Geographic Name TLDs
- Everything else (called standard or open TLDs)

Community comment suggests the creation of several TLD categories: for example, single-owner, country, intergovernmental organization, socio-cultural, community and open. Depending on the category, various accommodations are suggested: for example, no requirements for an ICANN contract, or to use accredited registrars, or to follow consensus policy, or policy provisions outlined in the GAC's ccTLD principles. Some might be restricted to not-for-profit status, be eligible for reduced fees, require registration restrictions, and have names reserved in anticipation of registration by certain parties.

Beyond the accommodations sought, many or all of the suggested categories seem to be variations of community-based TLDs. The preference for community-based TLDs in the evaluation/contention process

is based on policy advice from the GNSO and is intended to ensure that community-based applicants receive the TLD string to which their community is strongly related. Perhaps the most important aspect of the suggested categories is that an applicant within these categories does, in fact, receive the string associated with its community, and that is what the existing process is designed to do.

The introduction of a number of new gTLD categories with a number of different accommodations will lead to a complex and difficult application, administration and evaluation process, in addition to a very complicated contractual compliance environment. Additionally, there will be considerable debate and discussion in the community as to whether certain accommodations should be made. Should certain gTLDs not be required to have an agreement with ICANN or not be required to follow consensus policy? Should certain TLDs be required to maintain not-for-process status?

These discussions and debates will take considerable time and resources and may ultimately not result in consensus.

The structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees.

Several commenters who have concerns about the impact of opening up the namespace have submitted suggestions for a multi-phased approach. Such options were considered during the policy development process, and the earlier stages of implementation. A phased approach could happen in a number of ways, such as a limited first round or establishing a category of applications eligible for a ‘fast track’ process.

In the past, ICANN conducted two limited application rounds: the proof-of-concept round in 2000, limited to a small number of new TLDs that would provide an effective proof of concept, and the sTLD round in 2003-4, limited to sponsored-model applications. The experience from another such round might yield further incremental improvements, but the process would be less inclusive and the benefits less widespread than would be possible with an open launch.

Conducting another limited application process via limiting to a certain number or category, raises the problem of allocation. Random selection of applicants, even if allowed by law, could encourage gaming and favor those with the most money. Auctioning off application “slots” by various methods, including the Dutch auction suggestion, was also discussed earlier in the process and generated very little support for the same reasons. It is also expected that numerical limitations will cause a rush of application volume that could equal or surpass that of an ‘unlimited’ opening.

Other suggestions for a phased approach focused on a first round limited to certain types of applications, such as IDNs, cities, or applications that appear to be non-contentious.

Experience suggests that any criteria defined for participation in a limited early round will incent applicants with aggressive timelines to adjust their applications according to the set criteria. Rules for a limited round would need to be carefully drafted and reviewed by the community, which would retard progress for all potential applicants while benefitting only a select group. Opening the process to any one group to start before others raises issues of fairness, and is difficult to align with stated goals of the process such as diversity, openness, and innovation.

A less-defined set of criteria that involves picking out some ‘simple’ applications would require an objective method for determining in advance which applications are likely to be most and least complex.

It is also certainly possible that an application could become contentious in the middle of the process, resulting in disparate treatment among those ‘simple’ applications. This would be extremely difficult to construct in such a way as to result in a successful, timely introduction round.

ICANN has not ruled out the possibility of phased launches, but currently does not consider that an implementable approach has been developed or that consensus exists to date for any one manner of implementing this. An open launch is preferable as it meets program goals, and to date has continued to emerge as the solution that provides the most benefits.

APPLICATION PROCESS

I. Key Points

- ICANN has designated a limited number of application questions as confidential, for areas likely to contain sensitive information or prone to misuse. Otherwise, the full application will be posted in keeping with the principles of openness and transparency. Evaluation panels and dispute resolution providers will create appropriate procedures for posting of information throughout the application evaluation process.
- How applicants will differentiate themselves within a given market or industry is a decision left solely to the applicants. ICANN is not judging the effectiveness of an applicant’s business model. Rather, ICANN is focused on preventing user confusion, determining if an applicant is able and qualified to run a registry, ensuring DNS stability, and protecting registrant and users.
- The evaluation fee is the average of all costs to administer the process, considering all variations of applications including those that may require additional and extended analysis. Fees will be re-examined after the initial application round based on experience.
- Public comment will be considered in the evaluation and dispute resolution processes.
- All applications are required to provide documented proof of establishment and good standing, and make certain disclosures concerning the applicant’s background.
- Applications are required to be submitted in English to maximize cost and time efficiencies in the evaluation process. However, extensive support is planned in multiple languages to assist applicants for whom English is not the primary working language.

II. Comment Summary

Openness and transparency

There should be openness and transparency in the new gTLD application process. With the exception of confidential information (e.g. financial information and technical wherewithal) new gTLD applications should be publicly available. All objections to an application and responses thereto should be treated as public information and made publicly available. *IBM (22 Nov. 2009)*.

Implementation plan lacks market differentiation

The implementation plan for new gTLDs is contrary to the GNSO Final Report on the Introduction of new gTLDs which calls for their introduction in an “orderly way” as well as including “market differentiation”.

Recommendation 1: In this regard, the final AG should add two questions: (1) Which users/registrants/organization/group/community do you intend to serve? (2) How does your TLD differentiate itself from others in the DNS? With sharper criteria ICANN can approve those TLDs that valuably expand the name space and strengthen diversity on the Internet. Approving applicants irrespective of knowledge that they overlap or undercut other registries is antithetical to the new gTLDs policy development principle that they will benefit registrant choice and competition.

Recommendation 2: ICANN should start the process slowly with these safeguards for an orderly approach to market differentiation and if and when necessary make adjustments in future Applicant Guidebooks. BC (23 Nov. 2009).

The process must include market differentiation. *R. Dandruff (Module 2, 14 Nov. 2009)*.

Five principles to determine new gTLDs/future name space expansion

- (1) Differentiation—must be clearly differentiated from other gTLDs;
- (2) Certainty—must give the user confidence that it stands for what it purports to stand for;
- (3) Good faith—must avoid increasing opportunities for bad faith entities who wish to defraud users;
- (4) Must create added-value competition; and
- (5) Must serve commercial or non-commercial users.

BC (23 Nov. 2009).

Registry evaluation fee estimate (1.5.2)

The estimate of US \$50K for registry services evaluation seems excessive; it would be helpful to see a cost build-up of this estimate. *RySG (21 Nov. 2009)*.

Fees

Fees should be calibrated to the type of application/TLD. Smaller entities would have issues with the \$185K fee. *M. Neylon (22 Nov. 2009)*. The application fee is still too high and should be lower for certain entities (e.g., restricted .brand TLD, charitable organizations). *Lovells (22 Nov. 2009)*. *Visa (23 Nov. 2009)*.

Evaluation fee--refunds (sec. 1.5.1)

The costs of evaluation should reflect the actual cost of doing such evaluation and not be based on a hypothetical average of projected total evaluation costs across all applicants. Such fees should be credited in the case of multiple applications where a specific portion of the initial evaluation is identical, less any minor amount needed for evaluating such portion for multiple gTLDs. Since the IDN ccTLD fast track is ongoing and applied-for strings in the process are not disclosed until a later stage, special full refunds should be provided for applicants submitting an application for a gTLD string that may later be found to have been in conflict with an IDN ccTLD. *RySG (21 Nov. 2009)*.

Public comment

ICANN should provide further detail about the types of public comment that evaluators will consider and what impact public comment could conceivably have on an application. ICANN should restore the requirement that evaluators perform “due diligence” on public comments received to ensure that baseless comments or those filed in bad faith are not considered. *INTA (20 Nov. 2009)*.

Greater clarity on the role of public comment is needed and the deletion of the “due diligence” requirement needs explanation by ICANN. Public comments deemed to be regarding the “formal objection process” should automatically be forwarded to the Independent Objector if they deal with subjects on which he/she is empowered to file an objection. (Sec. 3.1.5 contemplates forwarding public comments to the IO but does not specify which public comments receive this treatment.) Also, the

disparity in how evaluators (must consider) and decision makers in the objection process (discretionary) consider public comments must be justified. *COA (22 Nov. 2009)*.

IDN applicants—languages (sec. 3.1.5 and 3.2.3)

Requiring English as the only means of communication is unfair to IDN applicants. Many applicants may have some objections from the IDN community and it would be more logical and it would be less costly to conduct the arguments in that IDN script and to hire a panelist in that language as well. The odds are always stacked against an IDN applicant and in favor of an English-speaking Western objector. *S. Subbiah (Module 3, 23 Nov. 2009)*.

It should be possible for objections/responses for IDNs to be in the appropriate language, which would make the procedure more accessible for local companies. The translation could be provided by ICANN. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Lifecycle timelines (sec. 1.1.2.9)

Lifecycle timelines enable better understanding of the entire process. *MarkMonitor (Module 1, 20 Nov. 2009)*.

Verified domain name eligibility

Stricter enforcement of gTLD operators' contracts is needed, especially regarding the verification by gTLD operators of a domain name applicant's eligibility, with registry sanctions for failure to act. *Lovells (22 Nov. 2009)*.

Required Documents (sec. 1.2.2)

INTA suggests that ICANN include the following:

Certifications or attestations of a corporation (including individual partners and investors who might be doing business under other names) regarding pending litigation, especially infringement, domain name challenges or the lack thereof; and documentation such as certification of compliance with requirements for disclosure of any regulatory proceedings regarding fraud, omissions or non-compliance with disclosure requirements required by any law or regulation, and any pending proceedings related thereto (such as tax filings or securities offerings). Information submitted should be verified or attested to by specific individuals or third party regulatory authorities. *INTA (20 Nov. 2009)*. Stronger definitions of "good standing" and "the applicable body in the applicant's jurisdiction" are required. *BITS (22 Nov. 2009)*.

Any and all documents required should be clearly described by ICANN. "Proof of good standing" is not clear. *M. Neylon (22 Nov. 2009)*.

Notice of information changes (sec. 1.2.6)

ICANN should state explicitly the consequences where an applicant has to notify ICANN of untrue or inaccurate information in its application, and where ICANN discovers that an applicant has included untrue or inaccurate information. *BITS (22 Nov. 2009)*.

IDN applicants (sec. 1.3)

This section should refer to the need for applicants to comply with requirements for prevention of malicious conduct. ICANN should not allow variant TLDs as this is likely to lead to user confusion. *BITS (22 Nov. 2009)*.

Question and answer forum (sec. 1.6)

The question and answer forum during the submission period is an extremely positive addition and should help reduce the need for Extended Evaluations. *MarkMonitor (Module 1, 20 Nov. 2009)*.

Applications--languages

Why will applications only be accepted in English? *J. Guillon (4 Nov. 2009)*.

Refund of evaluation fee (sec. 1.5.1)

It is proposed that having completed Dispute Resolution, Extended Evaluation, or String Contention Resolution an unsuccessful applicant would be reimbursed 20% of the evaluation fee (\$37K). This seems unreasonable, at least regarding Dispute Resolution. While it may be reasonable to refund some of the fee if an applicant withdraws at the outset of objection proceedings, there will be less incentive to take such an approach if the applicant knows that they will recover this sum whatever the outcome of the dispute resolution. *BBC (19 Nov. 2009)*.

Cost considerations

INTA is pleased with ICANN's elimination of the TAS User Registration Fee. ICANN still has not, with respect to the Registry Services Review Fee, clarified when the 5-person panel would be required (as opposed to a 3-person panel), and has not identified the ceiling on the registrar services review fee (and the justification if that fee exceeded \$50K). Regarding section 1.5.2, ICANN should cap fees wherever possible rather than leave them open-ended. Also, some level of personalized service should be considered, instead of requiring all questions about application preparation to be submitted in writing. It is also of concern that section 1.5.2 suggests only one person could serve as the panel for a community-based objection's dispute resolution; one person is not adequate. *BITS (22 Nov. 2009)*.

Transition to Delegation (sec. 1.1.2.8)

This section should address the expected time to transition for gTLDs utilizing the Verification of High Security program. *BITS (22 Nov. 2009)*.

III. Analysis and Proposed Position

Comments on the application process addressed areas such as transparency and confidentiality, market differentiation criteria, fees, the role of public comment, language considerations, and other details.

Comments expressed support for openness and transparency in the application process. We agree with these points. As noted in draft version 3 of the Applicant Guidebook, the non-confidential portions of all applications are expected to be published. ICANN will continue working with evaluation panelist firms and dispute resolution service providers on an appropriate process for posting of information at subsequent stages of the process. This will require careful balancing of transparency and other factors such as conflicts and international arbitration norms, to preserve the integrity of the process. Some comments suggested that "market differentiation" should be reflected as a criterion in the evaluation process. This point can be interpreted in a number of ways. Implementing market-differentiating criteria could be construed as limiting competition for existing registries and potentially stifling innovation. As with any industry, two or more organizations focused on the same consumer provide that consumer with choice. It is this choice that drives competition which can lead to innovation, product/service differentiation, and price reduction.

The proposed question “Which users/registrants/organization/group/community do you intend to serve?” is already explicitly part of the application for those designating their applications as community-based. It is also implicitly part of the existing question required of all applicants to state their mission and purpose, although this could be articulated more fully. The second proposed question, “How does your TLD differentiate itself from others in the DNS?” might provide an interesting perspective, but it is unclear how responses to this question could be scored, used as a threshold item, or enforced without a significant expansion of the scope of ICANN’s responsibilities.

ICANN’s Core Values include “...depending on market mechanisms to promote and sustain a competitive environment.” How applicants will differentiate themselves within a given market or industry should be a decision left to the applicants and markets. ICANN should not judge the effectiveness of an applicant’s business model. Rather, ICANN is focused on DNS stability, preventing user confusion, determining if an applicant has demonstrated basic competencies to run a registry, and protecting registrants and users.

Regarding fees, comments advocated for changes or requested clarification. For example, a comment requested clarification on the methodology used for the estimated \$50,000 Registry Services Review Fee in section 1.5.2. This was estimated based on historical analysis. However, the historical model was not fully adopted; efficiencies were introduced so that the fee is less than 50% of the current cost per RSTEP evaluation. In the three years that the Registry Services Evaluation Policy has been in place, a small fraction of registry services proposed by existing gTLD registries have resulted in an RSTEP review. Each inquiry involving the RSTEP involves a 5-person panel and costs \$100,000-\$125,000. In the new gTLD process it is anticipated that most cases will be addressed using a 3-person panel. In addition, a lower rate has been negotiated due to the expected volume of reviews.

Comments concerning the gTLD Evaluation Fee (currently set at \$185,000) suggested that some applications might not cost a full \$185,000 to review, for instance, if the same applicant submitted multiple applications for various strings. The evaluation fee is an average and considers all variations of applications, including those that may require additional and extended analysis. Circumstances will be different for each application, and it is not anticipated that there should be a cursory or less rigorous review process for cases where an applicant has submitted multiple applications. It is true that there may be some economies of scale; however, that was part of the analysis in developing the \$185,000 fee and refund levels. Please see <http://icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf> for additional discussion of the \$185,000 fee.

Some comments also stated that fee reductions should be available for particular cases, e.g., a charitable organization, a community group, or a trademark holder using a brand term. It is anticipated that subsequent application rounds will enable adjustments to the evaluation fee based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

Regarding the refund structure in section 1.5.1, a comment noted that a full refund should be available in the case where an application does not pass Initial Evaluation due to contention with a string requested in the IDN ccTLD Fast Track. We agree. In such a case, the string would be a country or territory name and the gTLD applicant would need to acquire the support of the relevant governments, so it is unlikely that the applicant would not be aware of the other developments. However, the principle is accepted, and ICANN will review the current refund structure in light of this point.

Also regarding the refund structure, a comment questioned the relative incentives for applicants to participate in a dispute resolution proceeding or withdraw prior to the dispute resolution process; this will also be examined in review of the refund structure.

Some commenters submitted questions concerning how public comment will be used in the evaluation process. Several questioned the removal of the term “due diligence” from section 1.1.3. This section was edited from previous drafts to take out some repetitive elements. It continues to be the responsibility of all those charged with evaluation tasks in the process take into account public comment: this includes reading comments, weighing the considerations expressed, and checking the sources and authenticity of information provided through the comment process. This section of the guidebook will be reviewed to make this unambiguous. It should be noted, however, that public comment will be encouraged at the earliest possible stage, when most relevant to the evaluation stage that is occurring.

Regarding the forwarding of comments to the independent objector (IO), we agree, this will be clarified. As comments are publicly available, the comments do not need to be forwarded for the independent objector to have access to them. There is no vetting by ICANN staff of which comments deserve consideration by the IO. Indeed, it is part of the IO’s role to take all available information into account when determining whether an objection based on the public interest is justified. This does not mean, however, that all comments received will be relevant to the subject of an objection. The IO can only file objections on either Morality and Public Order or Community grounds. Thus, there may be comments that are not relevant to these areas and are not taken into account.

This is also the reason that the Applicant Guidebook states that dispute resolution service providers (DRSPs) have discretion to consider the comments. A DRSP will be making a determination in a particular subject area: they are not required to take into account comments on other areas. For example, a panel considering a Legal Rights objection would not need to consider comments relating to the applicant’s DNSSEC implementation. Note that public comments are one mechanism for making information available to be considered, and do not in themselves constitute a formal objection. Objectors are responsible for filing a formal objection, and the objection process and timing will be clearly highlighted for those submitting public comments.

Some commenters provided specific suggestions for amplifying or clarifying the documentation requirements for proof of establishment and good standing. Applicants are required to disclose any pending litigation related to financial or corporate governance activities or intellectual property infringement; this is part of question 11 in the application. Documentation of compliance with regulatory proceedings is covered as part of the proof of good standing; this is part of question 9 in the application. Some comments requested additional clarity on the proof of good standing requirements. We agree. This section will be examined so requirements can be amplified. Note that “good standing” applies to the corporate or other entity that is applying. In addition, records of individuals associated with the application are addressed through the background checks discussed elsewhere in this document.

Some comments questioned the requirement that applications and objections be in English. To provide the greatest cost and time efficiencies, the evaluation should be conducted in one language. English was selected as it is the most commonly used language for business transactions across the world. In addition, translation of contracts adds ambiguity that can be avoided. For some documents such as financial statements that are pre-existing to an application, these are expected to be submitted in the

original language, with any resulting translation needs being covered by ICANN. In addition, the Applicant Guidebook, application forms, and other information will continue to be made available in multiple languages, to assist those applicants for whom English is not the primary language. ICANN will encourage dispute resolution service providers to provide similar support for those participating in the objection process.

Additional comments concerned the consequences for an applicant of not reporting changes to information. We agree with these. This is covered in the Terms and Conditions in Module 6; in addition a note will be added in section 1.2.6 to provide additional clarity.

Comments regarding IDN applications indicated that section 1.3 of the guidebook should clarify that IDN applicants must comply with requirements regarding prevention of malicious conduct. These requirements are in the registry agreement and are binding on all new gTLD registry operators, whether the string is IDN or ASCII. Comments also expressed concern regarding IDN variants. The management of IDN variants continues to be a topic of discussion within the community. See the paper at <http://www.icann.org/en/topics/idn/fast-track/proposed-implementation-details-idn-tables-revision-1-clean-29may09-en.pdf> for a discussion of these issues, and the recent recommendations at <http://www.icann.org/en/announcements/announcement-2-03dec09-en.htm>.

Comments indicated that the lifecycle time estimates included in draft version 3 of the guidebook were seen as helpful. There was also a suggestion for an indication of time required to transition for applicants electing verification as high-security zones. This point will be considered as the High Security TLD program is further developed.

Community-Based Applications

I. Key points

- The community-based definitions and descriptions in Module 1 are intended to provide guidance to applicants in noting the factors considered should the need arise for objection resolution or community priority evaluation, without pre-judging the circumstances of particular applications.
- It is important to note that the community-based designation is made by the applicant rather than by ICANN. An examination of the various community aspects of the application occurs in the event of a community priority evaluation, in which case there is deeper inquiry into how the application meets the criteria and factors considered to demonstrate a community-based orientation.
- It is not expected that a “bulk” fee structure will be instituted for translated versions of community name strings. Applications for translated versions of the same string would undergo the complete evaluation process. It is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

II. Summary of Comments

Open or community gTLD

Requiring that the community for whose benefit a community-based application is intended be “clearly delineated” instead of a “restricted population” is a helpful change. INTA (20 Nov. 2009). More clarity is needed on the types of organizations that can submit a community-based application (e.g., a brand owner whose registry will only support employees and suppliers). ECTA/MARQUES (22 Nov. 2009). BITS supports requiring dedicated registration and registrant use policies in conjunction with community-based gTLDs. More than one institution must endorse an application as community-based in the financial services industry and potentially more broadly (secs. 1.2.3, 1.2.3.1). Also, BITS supports the sec. 1.2.3.2 provision that any application can be objected to on community grounds even if it is not designated as community-based. *BITS (22 Nov. 2009)*.

The term change from “open” to “standard” is a better reflection of what this type of application would allow. *Lovells (22 Nov. 2009)*.

Community-based—fundamental principles

In addition to honoring community commitments in the application, two specifications must be added for community-based TLDs: (1) the community TLD organization must demonstrate its ongoing accountability to the community; and (2) the community TLD organization must be granted its own policy-making authority (e.g. charter eligibility, technical performance standards that do not affect the general Internet). This means that the TLD server and Whois service performance are in the ICANN-governed realm, but the EPP server and performance and DNS update intervals are up to the community TLD organization. This is based on the central difference that a community-based TLD is one that has a credible and functioning governance process on the community level, while a standard TLD is one where the governance and policy oversight process is entrusted to ICANN. *W. Staub (22 Nov. 2009)*.

Community-based definition (sec. 1.2.3.1)

The definition of community-based in DAG v3 has some improved clarity but the criteria should ensure (1) a mere customer or subscriber base is not deemed to be a community and (2) to qualify as a community-based gTLD, an applicant must demonstrate that community members would likely self-identify themselves as a member of the community. The definition should preclude an applicant from claiming to be a community with an IDN version of an existing gTLD. The following should be added to the definition of a community-based gTLD: “The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD is a recognized identifier for a UNESCO recognized language.” *RySG (21 Nov. 2009)*.

Community-based: concerns

Maybe the whole notion of community TLD should be scrapped. The brand TLDs or very small/closed community TLDs would seem not to provide any benefit to the Internet as a whole (i.e., TLDs created for the purpose of not being used or being “reserved” to lock others out); these should be limited as much as possible. *P. Mevzek (22 Nov. 2009)*.

Derivative names

If a community name has a derivative (e.g., Bayern/Bavaria), must the applicant apply for both names? There should be a fair reduction of the application fee in such cases if the applicant wants to apply for the community name in different languages. *C. von Veltheim (22 Nov. 2009)*.

Multilingual, community-based application—criteria and fees

The criteria for applying simultaneously for multiple translations of the same string could be (1) that the application meets all community-based criteria; and (2) that the proposed string translation can be found in any dictionary in any language. A single application fee coupled with an optional, additional fee per translation is a fair and equitable approach. A fee of \$185K per translation is unjustified and a barrier to achieving ICANN’s goal of a multilingual Internet. *R. Andruff (Module 1, 14 Nov. 2009)*.

The staff has not addressed the BC’s concerns regarding translations of strings. To best support the use of IDNs, new gTLD registry operators should have the ability to offer registrants their chosen domain names in the many different languages and/or scripts that Internet users wish to register. Fees for each translation should be lower, far less than \$185K. ICANN should encourage registry operators to run IDN gTLD strings as that is a primary purpose for expansion of the gTLD space. The final AG should facilitate the ability of community-based gTLDs to offer their respective communities the option of registering the same string name in any language or script that the registrant may choose. *BC (23 Nov. 2009)*.

Apply similar scrutiny to TLD translations

Similar scrutiny should be followed with the translation versions of the TLDs as with the original one. Wider language rights should be granted only if the supporting community is truly global and globally respected and active in the requested languages. *R. Siren (Module 1, 17 Nov. 2009)*

III. Analysis and Proposed Position

Regarding the definition set forth for a community-based application in section 1.2.3, various comments provided suggestions for elements that should be added to the definition of a community-based application listed in Module 1.

Some suggested that the definition for community-based application should explicitly preclude particular groups or scenarios. For example, there was comment that a customer base or business affiliate group should not be considered communities, and that countries or territories represented by ccTLDs should not be considered communities. In considering these suggestions, it was difficult to rule out every possible community-based construction that would fall into one of the above. It is possible that some of these could be useful as community-based gTLDs, and it is unclear what the basis would be to justify eliminating them from consideration. It is understood that these suggestions are made in the interest of clarity, but it was concluded after deliberation that the definition should not pre-judge applications without consideration of the circumstances.

It is important to note that the community-based designation is not made by ICANN, but by the applicant. This is noted along with the definition in section 1.2.3. ICANN does not evaluate whether the community named in the application is “valid,” i.e., falls into the stated definition. An examination of the various community aspects of the application occurs only in the event of a community priority evaluation or when resolving a community objection. In such cases there is deeper inquiry into how the application meets the criteria and factors considered to demonstrate a community-based orientation.

Thus, the definitions and descriptions in Module 1 are intended to provide guidance to applicants in noting the factors weighed in looking at any particular case. It would be possible to create more specific rules of inclusion and exclusion, but this would necessitate creating an extra step in the evaluation process for ICANN to determine which applications are acceptable as community-based. This would mean added cost, complexity and uncertainty in the process in spite of the additional rules. As the

process is constructed, there is little incentive to claim to be community-based without ability to substantiate the claim, since the application may be eliminated if it does not meet the scoring threshold in case of community priority evaluation, as well as in case of community objections, while, if succeeding, the applicant will be bound by additional community-specific obligations in the registry agreement.

Some suggested that the definition could be enhanced in particular ways. For example, there was a suggestion that the applicant demonstrate self-identification by community members, i.e., prove that the members it identified as part of its community would actually consider themselves part of the community as defined in the application. This is a reasonable expectation and, as is noted in the community priority criteria, there should be an awareness and recognition of a community among its members. This is an area that is examined in the community establishment criterion of the community priority evaluation.

Another suggestion was that the definition should carry some sense of ongoing accountability from the applicant to the community. This is also a helpful suggestion and in line with the intention of having the community-specific obligations in the registry agreement as well as the post-delegation dispute resolution mechanism. It is also partially addressed in the applicant's response to the application question about the community-based purpose. It may be beneficial to further articulate this in the guidebook, and this is being taken into account in revising the relevant sections.

There was concern expressed that a TLD could be awarded based on only one endorsement for an application, and a suggestion that more than one should be required. This was considered but also seemed too broad, as it is likely that there could be a community constituted where there was only one relevant endorsement, especially in case of a very structured community with a single organization representing it. The number and source of endorsements is examined in the community priority evaluation and, if relevant, in the dispute resolution process.

Finally, there was a comment that the community-based definition should tie more closely to the distinction made between existing "sponsored" registry agreements (where the sponsor has delegated policy-making authority) and "unsponsored" registry agreements (where policy development occurs in the ICANN process). The intention with the community-based designation is to implement the GNSO's policy advice on allocation methods, which does not contain the idea of varying delegated authority as with the previous "sponsored" model. Accordingly, a community-based gTLD will not be able to replace consensus policies with its own policies but can stipulate complementary own policies regarding, for example, registration requirements.

Other comments suggested a link between community-based considerations and fee considerations (i.e., multiple translations of a community name should be subject to lower fees), indicating that the process should facilitate the ability of community-based applicants to offer translations of a string in various languages or scripts at a lower cost. Another comment stressed that such instances called for an appropriate level of scrutiny, to include consideration of whether the community was active in the proposed language area and would be committed to providing meaningful support to local communities. As stated elsewhere, it is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available. It is not expected that a "bulk" fee structure will be instituted for the initial application round. Applications for translated versions of the same string would undergo the complete evaluation process.

One comment suggested eliminating the idea of community-based applications altogether. The concept of community-based applications comes from the GNSO's policy recommendations on which the implementation of the New gTLD Program is based. Although they may be small or tightly focused, it is expected that community-based TLDs will add value to the namespace in serving the needs of diverse user groups.

Evaluation

I. Key Points

- The selection process for independent evaluation firms is designed to retain the most qualified resources to perform these tasks. This includes diversity in language and cultural capabilities, to properly consider applications from all regions.
- ICANN will publish details on the code of conduct and conflict policies for evaluators, including procedure for complaint and actions to be taken in the event of breach of these policies by an evaluator.
- ICANN will provide support for applicants, including a customer service function, Question/Answer mechanism, and specified opportunities to exchange information with evaluation panels. This includes support for those applicants for whom English is not the primary language.

II. Comment Summary

Evaluators

ICANN did not include criteria for selection and qualification of evaluators in the DAG v.3. ICANN should include in the next version of the DAG either the criteria or a hyperlink to where they may be found on the ICANN website. *INTA (20 Nov. 2009)*.

Evaluation order and criteria

Are proposals going to be evaluated in a particular order? It is crucial that the evaluation criteria are the same for all applications and evaluation firms. Applicants and evaluators must have a common set of rules and criteria not biased by interpretations made by someone else. *NICMexico (23 Nov. 2009)*.

Two character gTLD IDN strings (sec. 2.1.1.3.2)

The three character requirement as applied to IDN gTLDs should allow for exceptions in Chinese, Japanese and Korean scripts. *RySG (21 Nov. 2009)*.

Confidentiality for answers to certain evaluation questions (attachment to Module 2)

If answering questions could disclose details about operational security at a registry, then the answers should be protected by confidentiality –e.g. aspects of questions 31, 35. *RySG (21 Nov. 2009)*.

Panelists--Conflict of interest (sec. 2.3.4)

There does not appear to be any delineated process in the DAG v3 for handling or managing of conflict of interest complaints (i.e., how should a complaint be filed; who internally handles complaints; how will it be managed by ICANN). *MarkMonitor (Module 2, 20 Nov. 2009)*.

The conflict of interest guidelines should be expanded for panelists to include not only those that meet the currently listed criteria for exclusion but also those that have met one or more criteria in the preceding twelve months. *AIPLA (22 Nov. 2009)*.

The guidelines should be revised to add to the list of prohibited conflicts the ownership or operation of any current contracted party. *Microsoft (23 Nov. 2009)*.

Panelists—languages (sec. 2.3.2)

For an IDN application, it must be required that at least one (and preferably two) panelists on each of the panels speaks that language and is from that community, preferably from the country that has the largest population of speakers. It is not a cost issue, it is the will to do so; in most IDN cases it would cost far less to hire a panelist from the poorer IDN country. *S. Subbiah (Module 2, 23 Nov. 2009)*.

Questions

Parties should have the opportunity to submit anonymous questions for the public record during the application process. *AIPLA (22 Nov. 2009)*.

Applicants should be able to ask questions to the evaluation panels during the preparation of the application, and all questions and answers should be published. Evaluation contractors and DRSPs also should engage in dialogue with ICANN constituent groups to outline draft procedures and obtain feedback. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

IDNs and 2- character strings (sec. 2.1.1.3.2)

There is no technical reasoning for the limit of IDN TLDs to 3 or more characters. Any potential collision with ISO 3166 strings can be solved by providing that 2 letter IDN strings that are visually similar with a string included in the ISO 3166 namespace will not be allowed, but any other strings will be allowed. Visual similarity should be resolved the same way other similarities are assessed as specified in sec. 2.1.1.1 by evaluating the IDN TLD's similarity with all the still available ISO 3166 strings. *Y. Keren (23 Nov. 2009)*.

Extended Evaluation—measures to ensure consistency should be considered

A single panel would ensure consistency. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Extended Evaluation—not available for string similarity issues

The reasons for this exclusion are unclear. Extended evaluation should be available for string similarity for applicants that fail the string similarity review or whose applications are found at risk for string confusion. *IPC (22 Nov. 2009)*.

Extended Evaluation—new submissions (sec. 2.2.1)

The extended evaluation process does not allow the submission of new material to improve the application. This gives competitive advantages to ASCII applicants above IDN-using- and-need applicants. In light of the application fee of \$185K, it is fair to allow the submission of new material to improve the application. *A. Sozonov (Module 2, 23 Feb. 2009)*.

The policy against allowing a one-time possibility of upgrading a rejected evaluation to allow for misunderstanding of instructions is unfair in failing to consider that cultural differences may have led to such misunderstandings, especially for foreign IDN applicants. *S. Subbiah (Module 2, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

Continent or UN region gTLD (sec. 2.1.1.4.1 point 5)

The choice of 69% of countries agreeing and at most one country objecting seems completely arbitrary; what is the precedent or rationale for this? *S. Subbiah (Module 2, 23 Nov. 2009)*.

Scoring range discrepancy (question 50)

The redline version and “clean” version are inconsistent in the Scoring Range (redline 0-3, “clean” 0-2); this may be a typo. *J. Sowder (Module 2, 7 Oct. 2009)*.

Applicant reviews (sec. 2.1.2)

Performance of background checks on applicants, registries and registrants does not appear to be a part of the reviews that ICANN notes in this section. *BITS (22 Nov. 2009)*.

Evaluators—additional information requests (sec. 2.1.2.3)

Providing only one opportunity for clarification (and only upon the evaluator’s request) conflicts with the goal of allowing evaluators to obtain sufficient information to decide applications on their merits. *INTA (20 Nov. 2009)*. *RySG (21 Nov. 2009)*.

Evaluators—code of conduct (sec. 2.3.3)

Panelist impartiality and fairness are crucial, but it is also crucial that panelists be allowed to consider the public interest in avoiding confusion among TLDs. If the “ICANN-approved agenda” does not yet include this concern, INTA emphasizes that it must. *INTA (20 Nov. 2009)*.

Consequences of a reviewer’s breach of the code should be clarified—what effect does a breach have on applications, objections or disputes in which the reviewer was involved? *BITS (22 Nov. 2009)*.

A further check would be to disclose the identity of the evaluator to the applicant and allow a challenge process for cause shown on grounds of bias. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

III. Analysis and Proposed Position

Comments concerning the evaluation process largely concerned the selection, tasks, and conduct of evaluation panels, and the opportunities for applicants to communicate with evaluators.

Comments requested the criteria for selection of independent panels; these were included in section 2.3.2. See also <http://www.icann.org/en/topics/new-gtlds/tenders-eoi-en.htm>, including the original announcement specifying detailed qualifications for each panel. Another comment suggested that panelists should communicate with applicants and constituency groups prior to application submission, for clarification and feedback. As the panelists work on the basis of the Applicant Guidebook, the open comment process on the guidebook is the best mechanism for such feedback and clarification requests.

Some comments expressed concerns about consistency in the evaluation process. We agree. This is an important and valuable point. The evaluators are required to use the same criteria for all applications reviewed, regardless of the order in which they are processed. Depending on the number of applications involved, it may not be feasible for all applications to go through the same panel. However, ICANN is taking care to ensure that the firms engaged to perform evaluation roles give special attention to ensuring consistency via their evaluation and review processes. For example, a candidate to provide evaluation services has recommended a double blind sampling plan to ensure consistency across panels.

In addition, the existing timeline for evaluations includes a “normalization” period where graded applications are compared to ensure consistency.

One comment sought confirmation that background checks are required for all applications. Here it is. Module 2 focuses on the evaluation of all applications through the various components that are part of Initial Evaluation. Besides the technical, operational, and financial information, the application form contains a number of other areas such as proof of establishment and good standing, applicant background, and confirmation of payment information, among others. These are gateway questions – if an applicant does not pass the background check, for example, the application will not proceed to the rest of the Initial Evaluation. These items are reviewed prior to the beginning of Initial Evaluation. The guidebook text will be reviewed to ensure that this is clear.

Some comments concerned the Code of Conduct and Conflict of Interest guidelines for panelists, included in section 2.3. Several inquired about the procedures for reporting, investigating, and handling breaches of the code by evaluators. This area is under review, to be amplified for the next draft of the guidebook. Candidate evaluation service providers were each asked, as part of their proposals, to address the areas of conflicts. The quality of presentation in this area was part of the grade they received. Some comments also had specific suggestions to the policy, such as inclusion of past activities in judging conflicts of interest, or adding ownership in a contracted party as one of the conflict elements. These will be considered for the next iteration of the policy.

A comment stated that panelists should be allowed to consider the public interest in avoiding confusion among TLDs. The String Similarity Panel will compare strings for potential user confusion – their goal (as with all evaluators and the entire process) is to serve the public interest, in this case guarding against user confusion and thereby working to ensure DNS stability.

A comment suggested confidential treatment for the applicant responses to security and abuse prevention questions. The principle is that as much information as possible should be posted, unless it contains sensitive details or would be prone to misuse. Confidentiality designations for each question will be revised in the next version of the Guidebook.

Some comments expressed concern that the process as designed would not allow applicants to give evaluators sufficient information to make a decision. This is a good issue to raise. The evaluation process is designed with the idea to afford several opportunities for clarification and amplification when needed. Applicants are expected to provide complete and accurate applications and supplemental data upon the first submission. A Customer Service function will be available to handle questions from applicants during the Application Submission Period. The Customer Service function will endeavor to provide and publish answers to all relevant questions from all applicants, to the extent practicable, in the applicant’s language of choice. The guidebook encourages applicants to take advantage of this Question/Answer mechanism to address any particular areas of uncertainty before the application is submitted, to reduce the need for additional clarification and review steps. Once the Initial Evaluation has commenced, the evaluation panels and applicants will conduct a coordinated exchange of information, if needed, which should address any remaining oversights or misunderstandings. Finally, applications not passing Initial Evaluation will have the option of requesting Extended Evaluation procedures in which they may provide further data supporting their applications (there is no extra cost to the applicant for electing this option). The availability of these opportunities before, during, and after application submission should allow the applicant to provide all necessary information to the evaluators.

Some comments stated that for an IDN application, each panel should have at least one native speaker of the relevant language. It is ICANN's intention to hire the most qualified resources possible to conduct the application analysis. A key requirement in the selection process is the ability for the firm to convene globally diverse panels that are able to address language and cultural concerns for any given application. ICANN has taken into account the possibility that cultural differences may lead to misunderstandings for certain applicants: this is the reason for posting application materials in multiple languages, for establishing a Customer Service function, and for allowing exchanges between the evaluators and applicant.

A comment suggested that there is no technical reason for the requirement that an IDN gTLD consist of three or more characters. This requirement has undergone review since version 3 of the guidebook was published; see the most recent recommendations at <http://www.icann.org/en/announcements/announcement-2-03dec09-en.htm>. ICANN has published a model for relaxing the three-character requirement under separate cover.

A comment expressed the view that Extended Evaluation should be available for the string similarity review, in the case where an applicant did not pass the review or was assigned to a contention set. This is a good issue – one that has been discussed extensively as both sides of the debate are considered. The goal is to implement a consistent, timely, predictable process that promotes DNS stability and competition. The String Similarity review considers similarities among strings and determines whether these rise to the level of creating a probability of user confusion. Unlike the other review areas where extended evaluation may occur, the determination is not based on information or evidence submitted by the applicant, but is focused on the strings themselves. Since there is no new evidence that can be introduced into this process in a second stage, an extended evaluation would largely consist of the panel looking at the same information. For this reason, no appeal procedure is provided for String Similarity outcomes, as explained in the guidebook and in previous public comment analyses. Based on the same logic, no Extended Evaluation option will be available for String Similarity outcomes.

A comment questioned whether there was a discrepancy in the scoring range on question 50 in the application. This is correct; this was a typo and will be fixed.

TRADEMARK PROTECTION

I. Key Points

- The public comments on trademark protection summarized below were received prior to the ICANN Board's request to the GNSO Council (<http://gnso.icann.org/mailing-lists/archives/council/pdfHmFLGTtyhn.pdf>) for input on certain aspects of the Staff proposed models to address trademark protection in new gTLDs.
- In response to the Board's request, the GNSO Council proposed an alternative model as described in the GNSO'S Special Trademark Issues Recommendations Report (<http://gnso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>), reflecting the consensus view of the Special Trademark Issues (STI) review team convened by the GNSO Council.
- The STI recommendations received the approval of the GNSO Council and were separately posted for public comment (<http://www.icann.org/en/public-comment/#sti>).

- The Staff models for an IP Clearinghouse and Uniform Rapid Suspension procedure, which were the subject of the comments described below, have been modified in accordance with proposals based on the GNSO STI recommendations.
- For further analysis of the proposed solutions to the issues related to trademark protection, please review the summary and analysis of the STI Recommendations located in a companion document to this one.

II. Comment Summary

IRT report misconstrued by ICANN

ICANN seems to have mistakenly viewed the IRT report as a trademark owner “wish list”; ICANN rejected some of the main IRT recommendations and cut others down to a hobbled version for GNSO review. *Time Warner (Module 5, 20 Nov. 2009)*.

More protections exist for trademarks in the new gTLD program

The combination of protections included in the current DAG and others that the ICANN is likely to adopt based on the IRT recommendations will far surpass the trademark protections available in current TLDs. Many new registries are building in additional protections, including proactive policing and takedown measures, adopted from successful ccTLD policies. Thus, trademark owners and others concerned about abuses should welcome new TLDs and the rules that come with them. *Demand Media (23 Nov. 2009)*.

Stronger trademark protection needed

The trademark protections in version 3 of the draft AG are inadequate. ICANN should adopt the more stringent protections of a GPML, a URS, and a trademark clearinghouse. *J. Lake (23 Nov. 2009)*.

Much work remains to be done to address the concerns of trademark owners. *Adobe Systems (20 Nov. 2009)*.

ICANN should incorporate further RPM policy changes in the next version of the DAG as recommended by the IRT. *BBC (19 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *Visa (23 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Yahoo! (23 Nov. 2009)*. *AIPLA (22 Nov. 2009)*. *CADNA (22 Nov. 2009)*.

The basis for ICANN’s rejecting the request for reconsideration process and revised string confusion analysis is not known. The analyses of public comment on the IRT recommendations make no reference to either, notwithstanding the generally supportive public comments received. These recommendations would have resulted in more new gTLD strings clearing the Initial Examination process, an outcome that would have otherwise seemed desirable from the perspective of the ICANN Board. *Microsoft (23 Nov. 2009)*.

Additional measures are needed to prevent frequent cases of cybersquatting that legitimate owners have to deal with. *F. Salamero (20 Nov. 2009)*. *CADNA (22 Nov. 2009)*. A sunrise or other pre-launch RPM, as well as the URS, should be mandatory for all TLDs offering domains to the public. The URS should have the same remedy as the UDRP. *NICMexico (23 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*.

The attempt to find a compromise solution through the GNSO may not be successful. We are dismayed that the GNSO will not be reporting on the crucial issues of the Trademark Clearinghouse or the URS until after the DAG v3 comment period has closed. Measures to protect the rights of others that are

“best practice” will not be effective. E.g., ICANN must ensure that the URS is mandatory and it should be considered for existing TLDs as well. *ECTA/MARQUES (22 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Lovells (22 Nov. 2009)*.

Nokia supports IPR protections in the new gTLD program and for existing TLDs provided that they do not broaden existing trademark rights or create new legal rights. Nokia supports continued use of the UDRP as the primary means of addressing cybersquatting and recommends UDRP’s reform rather than an entirely new scheme should improvements be warranted. *Nokia (22 Nov. 2009)*. *Minds + Machines supports the proposed Trademark Clearinghouse. Minds + Machines (22 Nov. 2009)*. *C. von Veltheim (22 Nov. 2009)*.

Ascended TLDs proposed model.

If ICANN moves ahead with new gTLDs despite the lack of public support for the program, it should use an “Ascended TLDs” model using property rights systems like easements to introduce them and allow the marketplace to resolve conflicts using economic principles (e.g., recognize that each and every owner of abc.com, abc.net and abc.org should have a veto to disallow anyone to have .abc, and the only way for .abc to be allocated is for the prospective TLD owner to buy an easement from each of abc.com, abc.net and abc.org). This approach works with trademark holders and domain registrants alike, strengthening both their rights simultaneously. Abuse at the second level would still require work as well as combating other top-level issues such as morality, etc. *G. Kirikos (22 Nov. 2009)*.

Opposition to new gTLD program

IOC maintains its strong opposition. Enforcement costs posed by the threat of trademark abuse will be worse for nonprofit trademark owners like IOC and it is inappropriate to force them to divert their resources from their missions in order to prevent abuse of their trademarks in the gTLD system. IOC’s recommendations should not be taken as a waiver of its right to proceed against ICANN for damages resulting to the IOC or the Olympic Movement from the implementation of the new gTLD program. *IOC (20 Nov. 2009)*.

GNSO efforts and timing

ICA appreciates the Board’s recognition that the URS and other proposed RPMs are important policy issues requiring further GNSO input and adequate time for GNSO consideration so that balanced consensus policies can be developed. *ICA (23 Nov. 2009)*.

Substantial burden shift to trademark owners

Elimination of the GPML from the DAG v3 will shift the burden and expense of protecting and policing trademark owners’ marks onto trademark owners and increase that burden substantially. The proposed trademark clearinghouse watch service does not appear to have any enforcement mechanism to prevent the filing of potentially infringing gTLD applications. No safeguards are in place to prevent the same or very similar claims from having to be repeatedly litigated. Concerns raised in previous comments of Hearst and other companies have not been fully or satisfactorily addressed. *Hearst Communications (19 Nov. 2009)*. We are extremely disappointed that ICANN rejected the IRT’s proposal for a GPML. It would protect consumers and significantly reduce defensive registrations. ICANN should reconsider its position. *BBC (19 Nov. 2009)*. *MarkMonitor et al. (20 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Adobe Systems (20 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *Visa (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*.

Standard procedures are needed for all new gTLDs regarding pre-launch sunrise periods, Whois requirements and post-delegation disputes, with adequate notice of these measures for brand owners. *Coca-Cola (24 Nov. 2009)*.

GPML as proposed should not be adopted

If ICANN adopted the GPML, it would become mired in litigation about it. *Minds + Machines (22 Nov. 2009)*.

Cost of defending brands.

The program will exacerbate consumer confusion and the costs of defending brands. *NCTA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Trademark clearinghouse fees should be allocated among trademark owners, registries and registrars so as not to impose an unreasonable burden on owners of substantial numbers of trademark registrations. *Hearst Communications (19 Nov. 2009)*.

Periodic re-evaluation of trademark data

Periodic re-evaluation of trademark data must take into account that the terms of trademark registrations may last for varying periods depending on the jurisdiction, up to ten years or more. *Hearst Communications (19 Nov. 2009)*.

Competing marks

Third party-owned marks, which may in fact be registered because the trademark owner permits them to be registered under strict limitations, should not be considered “competing” marks against the trademark owner’s marks in making determinations in connection with URS proceedings or reconsiderations of initial evaluation proceedings. *Hearst Communications (19 Nov. 2009)*.

URS—more operational details

More operational details are needed, including: how examiner panels will be constituted; the examiners’ qualifications; and the mechanism for enforcement by the registrars of panel decisions. The advance payment of fees to the DRSP needs to be clarified. In addition to the “evaluation fee”, ICANN should require an escrow from any registrant to make sure there are funds available to collect in the event of such a dispute. *Hearst Communications (19 Nov. 2009)*.

Uncertainty created by imposing dispute resolution fee

The new gTLD program could be harmed by uncertainty created from imposing the dispute resolution fee (i.e., IP owners may postpone their objection to a future date when they have funds to take legal action). Thus, even if an applicant wins the TLD initially it could lose it later on in a court of law. The complainant could argue that it could not raise money to pay the filing fee. *A. Rosenkrans Birkedal (Module 1, 17 Oct. 2009)*.

Capital City gTLDs

Names of key capital cities of the world raise clear trademark problems for entities with trademarks comprised partially of city names. E.g., the IOC’s “London 2012 Summer Olympic Games” or other marks like “New York Yankees” would be plagued with infringing second level domains in their respective city gTLDs. *IOC (20 Nov. 2009)*.

RPMs should be optional and voluntary

Anything other than voluntary and optional RPMs will constitute a negation of the GNSO Council policy making process. The record shows that there was no consensus for mandating RPMs by either the GNSO or the IP Constituency and to do so now runs counter to that lack of consensus. The guide “A Perfect Sunrise” worked on by the IP Constituency and others would be a good ancillary to the final Applicant Guidebook by providing assistance to potential gTLD applicants in identifying and assessing pre-launch RPMs. *A. Doria (9 Nov. 2009).*

Enforcement of existing legal rights--choice of law

The GNSO Recommendation 3 phrase “enforceable under generally accepted and internationally recognized principles of law” should be left to the applicable laws in each locality. *A. Doria (9 Nov. 2009).*

Protection of rights beyond commercial IP

Per the language of Recommendation 3 giving examples of “existing legal rights,” some effort should be made to ensure that the new procedures protect all rights (e.g., human, civil, political) at least as stringently as they protect commercial IP rights. *A. Doria (9 Nov. 2009).*

Consistent with ICANN’s Affirmation of Commitments responsibilities to the global public interest, the new gTLD processes for community and geographical names must be constructed with the rights of minority, vulnerable, stateless, powerless and economically impoverished communities in mind. ICANN should consult a panel of independent experts on international human rights law and incorporate their recommendations about community and geographical application requirements, string review, DRSPs or other dispute resolution panel and mechanisms, into the final version of the DAG. ICANN’s credibility would also be enhanced by establishment of a permanent panel of experts in international human rights law and the geopolitics of minority and displaced groups who would review all strings and flag potential concerns. *R. McKinnon (22 Nov. 2009).*

Dilution-type protection

The DAG v3 still does not clarify whether dilution-type protection will be afforded without requiring a showing that the applicant’s mark is famous. *AIPLA (22 Nov. 2009).*

III. Analysis and Proposed Position

Several comments raise concerns regarding the scope of protections afforded to trademark holders in AGBv3. Specifically, the failure to adopt all of the IRT’s proposals (such as the Globally Protected Marks List and a mandatory URS) is viewed as substantially weakening the protections for trademark holders in new gTLDs (BBC, Microsoft, Yahoo!).

Other comments supported scaling back the IRT proposals contained in the AGBv3 because ICANN would be providing trademark holders rights in excess of those available under trademark law, and because these proposals were not supported by a consensus among the ICANN community (Demand Media, Minds + Machines, Avri Doria).

The subsequent evaluation by the GNSO’s STI team attempted to balance these concerns and produce a compromise solution. The resulting model, referred to as the GNSO-STI Model, received the unanimous support of the GNSO Council, and resulted in certain improvements for trademark protection, while also providing enhanced protections for innocent registrants. These recommendations have largely been incorporated into the AGB Model for trademark protection.

The AGBv4 further protects trademark holders by incorporating other features into the New gTLD Program such as Thick WHOIS, a Post Dispute Delegation Resolution Procedure, and a High Security Zone Program. In combination, these additional features are designed to facilitate identification of infringing registrants, and protect against possible malfeasance among new gTLD registries.

WHOIS

I. Key Points

- The requirement for a thick Whois model for all new gTLD registries is seen as a positive step. Parties also would like to see expanded requirements containing accuracy of Whois data.

II. Comment Summary

Support

IBM supports the proposal that new gTLDs be required to have a thick Whois. While appreciating freedom of speech and privacy concerns providing legitimate bases for anonymity in some domain name registrations, this must be balanced with the need to stop cyber crime and identify who is behind such cyber criminal activity. A thick Whois offers the ability to register a domain anonymously while providing the additional information about the domain name registrant needed for identifying cyber criminals. *IBM (22 Nov. 2009). BBC (19 Nov. 2009). OTA (30 Nov. 2009). MarkMonitor et al. (20 Nov. 2009).*

NCTA supports thick Whois. ICANN should require existing registrars and registries and any new registries to enforce vigorously the requirement to maintain accurate, reliable and up-to-date information concerning domain name registrants. *NCTA (22 Nov. 2009). Internet Identity (Module 5, 23 Nov. 2009).*

The proposed thick Whois requirement is a step in the right direction. The scope of the Whois services to be provided by the applicant should be further specified and require that the applicant provide (and certify that it has provided) detailed and correct information about registrants and that such information be gathered consistent with the IRT recommendations of a universal Thick Whois model. *INTA (20 Nov. 2009).*

Proxy and privacy registrations

Measures should be taken prior to launch of the new gTLD program to deal with the increased use of proxy and privacy registrations. Their use by bad actors for unlawful purposes is increasing and hinders their identification and the prevention of IP abuse, phishing, and fraud. *Lovells (22 Nov. 2009).*

New processes and guidelines must be developed to ensure that privacy/proxy services comply with their contractual obligations. *IPC (Module 5, 22 Nov. 2009). SIIA (23 Nov. 2009).*

If a proxy service is shielding an abusive registrant, they should be held responsible. Proxy services should not be allowed, or in the alternative, should be permitted only if address details are provided in case of a dispute. *Hearst Communications (19 Nov. 2009).*

Privacy and data sharing

Data sharing with affiliates and third parties should be changed to an opt-in process with clear and concise policies provided to businesses and users at the point of customer interaction. The mounting

abuse to such practices is currently under review by both the EU and FTC. It is suggested that ICANN adopt the applicable OTA Online Trust Principles to proactively stem this practice <http://otalliance.org/resources/principles.html>. *OTA (30 Nov. 2009)*.

Accuracy of data

ICANN must enforce its Registrar Accreditation Agreements to ensure accurate Whois information. ICANN must also set, and enforce, universal proxy standards. Mere study of the issue while marching forward with an unbridled gTLD expansion displays a serious disregard for trademark owners' interests. *IOC (20 Nov. 2009)*.

All new registries should be required to cancel the registrations of any party supplying incomplete or false Whois details within a reasonable period (e.g. 30 days). This is the standard used by several ccTLDs. *ECTA/MARQUES (22 Nov. 2009)*.

As pointed out by the IPC, ICANN needs to require in the registry agreement that registries take proactive steps to ensure that registrars comply with obligations regarding complete and accurate Whois data which they collect in the new gTLDs. *COA (22 Nov. 2009)*.

Registries taking these steps and committing to these policies should receive extra points in the evaluation process. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

ICANN should require strict proxy or anonymous registration guidelines to prevent circumvention of the thick Whois requirement, including requiring the applicant to disclose the "true registrant" upon request by a brand holder protecting its trademark rights or to escrow such proxy/anonymous data to be available upon the occurrence of specified triggering events. *INTA (20 Nov. 2009)*. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Privacy considerations

If thick Whois is mandated, each registry operator should have a public webpage on a designated address which would display the registry country and laws in effect related to customer data privacy and the way the registry uses the personal data, besides access through the IRIS server. *P. Mezvek (Module 5, 22 Nov. 2009)*.

Reference to thick Whois is insufficient, and no assurances regarding registrant privacy appear to have been forthcoming; this needs to be addressed. If ICANN can "get it right" for .tel, why can't it do the same for new gTLDs? *M. Neylon (22 Nov. 2009)*.

Mandate IRIS

The new gTLD should be the ideal occasion to mandate IRIS and completely forbid Whois over tcp port 43 both at the registry and registrar level. In the case of thick registry, ICANN should mandate all information to be available through the registry IRIS server, without any information to be available through the registrar IRIS server. *P. Mezvek (Module 5, 22 Nov. 2009)*.

III. Analysis and Proposed Position

Various comments expressed support for the thick Whois model. This requirement will remain in the Applicant Guidebook.

Several comments also urged that the guidebook institute requirements for new registries with regard to maintaining accuracy of Whois data. Such comments mentioned measures for enforcement of the Registrar Accreditation Agreement and proposed use of the registry agreement to mandate registry enforcement concerning registrar actions. ICANN has reviewed the scoring to consider where feasible and appropriate enhancements based on registry efforts to promote Whois accuracy can be instituted. Such an undertaking would require so change to Whois policy in order to amend the proposed registry agreement. Note that the High Security Zone TLD Verification program included a mechanism for registries to institute accuracy requirements among registrars – this elective is considered a sign of a high trust zone. Some comments also indicated that even where a thick Whois model is required, the registry should make available an information page concerning its privacy policies and applicable privacy laws. Telnic’s model for .TEL was cited as an example of a Whois model that addressed registrant privacy concerns.

Some comments suggested that the Applicant Guidebook should institute rules and guidelines for proxy and privacy services. This comment highlights an area of community discussion. Such services are generally instituted at the registrar level and below, and are less relevant to registry operations. This issue is best addressed through the policy process, where the GNSO is currently studying Whois issues and weighing the various stakeholder considerations.

A comment recommended adoption of the Online Trust Alliance principles regarding data sharing. ICANN appreciates the reference and will review these principles to see how they might be incorporated into the process.

Another comment suggested that the introduction of new gTLDs offered an opportunity to establish IRIS at the registry level as the primary protocol and phase out the current Port-43 Whois system. The GNSO is investigating IRIS in connection with internationalized registration data, and the current Whois provisions in the registry agreement could be updated via the amendment process if there is community support for making a transition from Whois protocols that are currently in use, to IRIS.

ECONOMIC ANALYSIS

I. Key Points

- ICANN has contracted to retain the services with recognized and independently recommended economists to provide additional economic analysis.
- The second phase of the study, due in June 2010, will be targeted to: (i) perform empirical analysis of the proposed gTLD market to estimate the cost of defensive registrations, (ii) develop a metric to assess whether overall expected benefits outweigh the costs for the new gTLD program, (iii) develop a process for assessing whether net economic consumer harm might result from individual applications.

II. Comment Summary

Rationale needed

ICANN should justify the necessity of the new gTLD program by providing the economic rationale requested by the Board several months ago to support ICANN's proposition that consumer benefits outweigh potential costs to the consumer. The costs of cybersquatting with respect to globally recognized brands would outweigh the benefits obtained under a much wider gTLD regime. *IBM (Nov. 22 2009). Adobe Systems (20 Nov. 2009). Yahoo! (23 Nov. 2009). ECTA/MARQUES (22 Nov. 2009). AIPLA (22 Nov. 2009). G. Kirikos (22 Nov. 2009).*

No one has shown any solid or substantial basis for concluding that the new gTLD program is truly needed. If the program does proceed, there is a need for a reserved list of Olympic trademarks. *IOC (20 Nov. 2009).*

Currently, there is not a strong business case for financial gTLDs and the benefits are unclear. *ABA (22 Nov. 2009).*

Importance of economic study

In many ways the economic study is the most important overarching issue and it is incumbent on ICANN to base its decision on the best possible empirical data. At the Seoul meeting ICANN staff made a number of potentially conflicting oral statements about the next steps to be taken. Time Warner looks forward to reviewing and commenting on a written plan from ICANN about how it plans to resolve this critical threshold issue. *Time Warner (Module 5, 20 Nov. 2009).*

The economic study that ICANN posted in March 2009 on competition and price did not evaluate the global demand for gTLDs or the economic impact on registrants, particularly in light of the global recession. A study to evaluate actual demand and a phased approach to new gTLD introduction would be prudent (especially given the results of the Root Scaling study). Further economic study of the cost of defensive registrations and the impact on consumers is also supported by the Government Advisory Committee. A study evaluating actual demand versus derived demand might suggest that ICANN launch a controlled TLD program targeted first to IDNs or geographic-based TLDs that are supported by significant community demand. *BBC (19 Nov. 2009). NICMexico (23 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). AT&T (22 Nov. 2009). SIIA (23 Nov. 2009). Visa (23 Nov. 2009).*

INTA supports commissioning a new truly independent study based on the empirical realities of the domain name marketplace, the results of which should be assessed by the community and integrated into the new gTLD program. *INTA (20 Nov. 2009).*

Opposition to another economic study

Nothing suggests that doing another economic study will give anyone insight into what is going to happen with new gTLDs. This issue should be dropped. It is clear that there is sufficient demand to launch new gTLDs. *Minds + Machines (22 Nov. 2009). Demand Media (23 Nov. 2009).*

Launch Date

The threshold question of whether the new gTLD program will improve the public welfare has not been answered satisfactorily. ICANN needs to begin this work immediately and begin meeting its responsibilities under the Affirmation of Commitments. *INTA (20 Nov. 2009). Visa (23 Nov. 2009).*

III. Analysis and Proposed Position

Additional economic analysis is being undertaken. ICANN has contracted to retain the services with Greg Rosston of Stanford University and Michael Katz of Berkeley University (both in the US) to provide additional economic analysis. They have been retained to address specific questions.

In the first phase of the work, the economists will: survey published studies and resources that describe the potential impacts of new gTLD introduction; examine theoretical arguments about benefits and costs of increased gTLDs; consider and propose empirical studies to identify areas where additional work can serve to assess costs and benefits. The studies should be planned and structured to address open questions. A verbal report on results will be presented in the Nairobi meeting. The feedback received in those discussions will inform a report that is due on 15 February 2009.

The second phase will occur after review of that work by ICANN to define specific, additional selected areas of study. The economists will execute that additional study after review and approval by ICANN. The deliverable will include development of models describing how the selection criteria for new gTLD applicants and mechanisms to mitigate potential harm can promote consumer welfare.

As guided by the results of the first phase, that second phase of the study will be targeted to: (i) perform empirical analysis of the proposed gTLD market to estimate the cost of defensive registrations, (ii) develop a metric to assess whether overall expected benefits outweigh the costs for the new gTLD program, (iii) develop a process for assessing whether net economic consumer harm might result from individual applications.

The second phase study is targeted for completion by 10 June 2010, in time for publication for consideration at the ICANN meeting in Brussels. The results, to the extent necessary, will be incorporated in the next version of the Guidebook.

The final phase, to be undertaken if indicated by the work of the previous phases will seek to develop mechanisms to increase the net benefits from introduction of additional gTLDs. It is impossible at this point to determine what such mechanisms might be, but we expect them to result from the studies in phases 1 and 2.

After posting a public reports at each phase, this team will develop with ICANN, a plan for incorporating study results into the new gTLD implementation procedures.

MALICIOUS CONDUCT

I. Key Points

- Several measures to mitigate potential for malicious conduct have been implemented through the draft Guidebook.
- Working Groups are developing two other methods to deal with malicious conduct in relation to the new gTLD program: the High Security Top Level Domain (“HSTLD”) and the Centralized Zone File Access (“ZFA”) programs.
- ICANN is working with the GNSO to focus on malicious conduct activities possible through reseller activities in the new gTLD program.

II. Comment Summary

Further recommendations

The malicious conduct explanatory memorandum is a good first step but does not go far enough. ICANN should require registry operators to include provisions on protecting against malicious conduct in their agreements with registrars that sponsor registrations in the new gTLDs. ICANN also should:

- (1) reconsider its refusal to require registries to pass-through to registrars any obligations regarding Whois data accuracy or even simply to require new gTLD applicants to disclose their policies for ensuring the accuracy and currency of Whois data and steps they will use to enforce this with registrars and resellers of domain names in the new TLDs;
- (2) To strengthen due diligence, expand the disqualification of any applicant, officer, partner, director or manager who has been, in the preceding 10 years, convicted of a felony or misdemeanor related to financial or corporate governance misconduct. An application should be disqualified if any of these parties has a criminal conviction for copyright infringement, product counterfeiting, or other offense against intellectual property laws, whether or not the crime is labeled a felony;
- (3) Mandate the high security zone program, because it is not effective to make it voluntary. This is an especially troubling example of the shortcomings of ICANN’s policy of steadfast refusal to draw any distinctions among applications or to classify them in any way. Even if it is challenging to define the category of new gTLDs in which the high security zone requirements must be applied ICANN is not free to shirk that challenge given its obligation to make decisions in the public interest, per the Affirmation of Commitments. *Time Warner (Module 5, 20 Nov. 2009)*.

High Security Zones Verification—not an appropriate role for ICANN

The HSZV proposal is not within ICANN’s limited technical coordination mission related to Internet identifiers, would expand ICANN’s authority to address malicious uses for domain names; put ICANN into direct competition with organizations that are already capable of performing this function; and the demand for such zones could be met more effectively by registries in cooperation with existing security organizations. Regarding the proposal, it is questionable whether registries will be able to ensure the registrars’ compliance with its requirements. It has not been demonstrated if or how this program will deliver better security and reduced malicious activity. It is also a question why ICANN is getting involved in the market, and why the program should not be open to all registries, instead of just new gTLD registries. The associated controls and audit in the program will impose undefined financial and resource costs on new TLD registry operators. IP concerns should not be added to it, as alluded to in the explanatory memorandum. ICANN should not circumvent the policy making process by offering game-changing inducements; such opt-in programs can become de facto requirements in the registry space. *RySG (21 Nov. 2009)*.

ICANN must hold all applicants to and enforce the additional measures it has identified for combating malicious conduct and must make specific reference to these measures in the DAG—i.e., enhanced background checks, DNSSEC deployment, no wildcarding and removal of glue records, thick Whois, anti-abuse contact and documented policy, and the Expedited Registry Security Request Process. *BITS (22 Nov. 2009)*. *ABA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

The High Security Zones Verification (HSZV) Program must be mandatory

COA (Module 5, 22 Nov. 2009). *IPC (Module 5, 22 Nov. 2009)*. *BITS (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

In addition to being mandatory, there should be a right to file an objection against any applicant for a financial services domain that seeks to avoid high security verification. Such avoidance should be grounds for denial of the application. *ABA (22 Nov. 2009)*.

The HSZV must be mandatory and transparent with appropriate levels of public notice (e.g. regarding unresolved deficiencies of a registry or nonrenewal of verified status for failure to meet standards). *INTA (20 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

The High Security Zones Verification Program should be mandatory for certain types of zones and extended to industries like health care and insurance that have similar issues of privacy and security as does the financial industry. It would make sense to look at some of the proposed remedies in this area for inclusion in general gTLD security. *Internet Identity (Module 5, 23 Nov. 2009)*. *INDOM supports the High Security Zone concept as proposed. INDOM (22 Nov. 2009)*.

High Security Zones—questions

Regarding consideration of this issue at the Seoul meeting: (1) Where did this issue come from and why was it introduced now?

(2) Why is ICANN looking to compete with commercial entities in the security field and with registries and registrars?

(3) How can ICANN offer this without expanding the scope of its charter?

(4) How much will this cost, and where will ICANN get the budget to do this?

(5) How can ICANN do this and remain neutral on issues of security and stability, especially with respect to RSEP and Consensus Policies? *VeriSign (22 Oct. 2009)*.

How would ICANN work with existing commercial providers to ensure that anything ICANN would do in this arena would not be competitive in nature (assuming the private sector can and does provide the service), and how would the vetting of these items work in the RSEP as far as ICANN adhering to its coordination role as opposed to being a provider of services? *VeriSign (27 Oct. 2009)*.

Eligibility (sec. 1.2.1)

It is commendable that additional safeguards prohibit registry ownership of more than 15% by those convicted of a felony, a financially-related misdemeanor, subject to ICANN disqualification, or involved in cybersquatting or other domain name-related fraud. *MarkMonitor (Module 1, 20 Nov. 2009)*. *BBC (19 Nov. 2009)*. *Lovells (22 Nov. 2009)*.

Any new eligible applicant should declare that it will not engage in the same conduct in the future. Some of the disqualification factors should be clarified (e.g. question 11(f) should be rephrased to cover all allegations of IP infringement in connection with the registration or use of a domain name). *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

ECTA/MARQUES strongly support barring applicants with a history of cybersquatting. ICANN should create a formal reporting procedure for any person to inform the evaluators if they know that an applicant has been involved in the practice; perhaps it could be an additional role for the Independent Objector. *ECTA/MARQUES (22 Nov. 2009)*. *Visa (23 Nov. 2009)*.

This provision needs to be strengthened and to recognize situations in which a larger number of application participants exists such that no one party rises to the 15% threshold. There should be some background checking for key participants in such a scenario. A stronger and more explicit definition of

“good standing” is required. Who will perform background checks and the process are unclear—further definition is needed. *BITS (22 Nov. 2009)*.

Eligibility requirements should be clarified, and there should be a challenge mechanism for disqualifications. *M. Neylon (22 Nov. 2009)*.

Mechanism against bad actors running registries

The proposed mechanism is deficient. Because bad actors often set up “shell” companies, ICANN should have flexibility to deny a “bad actor” applicant which it discovers is an “alter ego”, “related entity” or “funder” of the applicant. It should also be able to disqualify not just on the basis of past record of an entity owning 15% or more of the applicant, but also on the record of that entity’s officers, directors, or controlling stockholders. *COA (Module 5, 22 Nov. 2009)*. *IPC (Module 5, 22 Nov. 2009)*.

Mandatory and expanded background checks

ICANN should make background checks mandatory and expand them to include the applicant, any officer, partner, director or managers of the applicant and any person or entity owning a controlling interest in the applicant and any funder of any of the foregoing. ICANN should consider having applicants and related persons submit fingerprint cards with the application. *INTA (20 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

Background checks should be performed beyond the application period, at a minimum at any point there is a registry ownership change and at contract renewal. Additional checks should be done at random intervals or in response to criminal complaints against a particular registry. Registries must be contractually bound to comply with such requests. Registries must perform background checks on all key employees. Results should be kept on file, be updated on a regular basis, and be auditable by ICANN compliance staff at any time. *OTA (30 Nov. 2009)*. *Internet Identity (Module 5, 23 Nov. 2009)*.

ICANN should add additional measures for vetted registry operators

Specifically, reduce to 5% the ownership threshold of persons or entities for whom/which “prior bad acts” is relevant; extend the class of persons to include persons who operate, fund, or invest in the Registry Operator; render denial of applications automatic; make any felony grounds for disqualification; eliminate temporal restrictions so that any disqualification at any time is relevant; include the language “is the subject of a pattern or practice of either liability for or findings of bad faith in connection with, trademark infringement or domain name registrations”; and add a new category that covers a material breach of an existing Registry Agreement or the RAA. *Microsoft (23 Nov. 2009)*.

Further study and work is needed

There is some overlap between trademark protection and malicious conduct. More study is needed and if new gTLDs are to be made available, it should be done on a limited basis (e.g., geographic/community names). *Hearst Communications (19 Nov. 2009)*.

Additional work is necessary to ensure that the risk areas regarding malicious conduct are identified and specific solutions are implemented. ICANN should form a working group combining members from the security industry and the ICANN community to help develop and assess solutions and specific implementations of proposed mitigation measures. *BBC (19 Nov. 2009)*. *MarkMonitor et al. (20 Nov. 2009)*. *Lovells (22 Nov. 2009)*. *AT&T (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Proposals to date for preventing malicious conduct are inadequate

INTA encourages ICANN to develop mandatory processes to address high levels of DNS-related crimes and fraud perpetrated through phishing attacks, malware, and other forms of malicious conduct. ICANN

must specify how it will effectively ensure that all these new registries will comply with the new requirements. To date there is not a specified course of enforcement actions that ICANN may or will take or an explanation of how ICANN will enforce agreements and address malicious registry or registrar conduct after applicants are approved. Also, to address the overarching issue, the existing domain name registration process must be significantly reformed to ensure the ongoing integrity of domain names and registry data. *INTA (20 Nov. 2009)*.

Additional grounds for denying registries

The grounds proposed by ICANN are a good start but are ultimately inadequate. ICANN should expand the grounds as follows:

--If any funder or corporate affiliates of funders of an applicant or any officer, partner, director or manager or other affiliate or any person or entity owning 15% or more of an applicant are disqualified by any of the items (a) through (f) specified in Item 1.

--Section 1(a) should make clear that crimes related to financial or corporate governance misconduct will preclude an otherwise qualified applicant from becoming a registry operator (existing language is unclear as to whether it is all felonies or only felonies related to financial or corporate governance misconduct).

--Subsection (f) is vague and should be reworded--to include an applicant that is “associated with a pattern or practice of either liability for, or bad faith in connection with, trademark infringement or domain name registrations, including:”

--Subsection (f) (iii) should be restated: “registering domain names primarily for the purpose of disrupting the business of, or diverting Internet traffic from, a competitor; or”

--ICANN should add new subsections (g) and (h) which would add as grounds for disqualification findings that an applicant has previously violated registrar or registry agreements as follows: “g. is the subject of a material breach of an existing ICANN registrar or registry agreement(s); or h. intentionally submitted or provided fraudulent information in connection with its application, the review of that application or the defense of any objections to that application.” *INTA (20 Nov. 2009)*.

Financial gTLDs

Any domain name associated with financial services should be restricted to financial services companies with substantial restrictions, guidelines and proof of eligibility. ICANN has not sufficiently addressed the recommendations of the financial services sector. No panel to evaluate the special nature of financial services applications has been established nor have higher levels of security for such applications been mandated. The use of “.bank”, “.trust” and similar words should be restricted to avoid the potential for substantial user confusion and potential fraud. Much more work is needed with ICANN’s GAC and others to understand the legal and other implications of having financial domains both at the gTLD and ccTLD levels. *ABA (22 Nov. 2009)*.

Registry transfer risks

Any proposed change in control of more than 25% of the ownership of a registry over time should be submitted to ICANN for prior review and written approval. *INTA (20 Nov. 2009)*. There should be enhanced change of control requirements so that registries cannot be easily “flipped”. *ECTA/MARQUES (22 Nov. 2009)*.

Changes of registry control should be approved in writing by ICANN subject to requirements that prevent “flipping” and ensure that the new entity is qualified to be a gTLD Registry Operator (e.g., the substantive equivalent of the full range of evaluation criteria for new gTLD applicants). *Microsoft (23 Nov. 2009)*.

Risks after registries are approved

More is required for dealing with registries that become bad actors post-delegation. ICANN should adopt measures to prevent registries from passively allowing malicious conduct. The registry agreement requires strong mechanisms to hold registries responsible for conduct by registrars and their registrants. ICANN's registry contracts should require, rather than just suggest, that registries to negotiate stronger standards for business and security practices with accredited registrars. *INTA (20 Nov. 2009)*.

Protections required in registry-registrar contracts

ICANN should require registries to mandate specific measures in the registries' contracts with registrars to deliver adequate protection against malicious conduct. *COA (Module 5, 22 Nov. 2009)*.

Recommendations for a more unified and comprehensive approach

The proposed procedures to combat malicious conduct are inadequate. A more unified and comprehensive approach is warranted. ICANN should continue its efforts by forming a group of experts drawn from the GNSO and broader Internet community to develop further proposals to be subjected to independent community review and a separate public comment period. IPC offers the following recommendations:

- (1) All proposed mechanisms should be considered required elements of the new gTLD program, not voluntary options. Exceptions could be granted in rare cases to registry operators when justified by extraordinary circumstances.
- (2) A non-trademark related Rapid Domain Name Suspension process should be developed to address malicious conduct in new gTLDs.
- (3) Current procedures used to register gTLD domain names and to deal with DNS-related abuse issues must be improved in order to ensure the integrity of domain names and registry data. *IPC (Module 5, 22 Nov. 2009)*.

Documented registry level abuse contacts and procedures

The proposal for documented registry level abuse contacts and procedures should be adopted, and would likely have the greatest impact on how criminals access and use domains of any of those proposed in the malicious conduct memorandum. This provision should be extended to registrar operators as well. *Internet Identity (Module 5, 23 Nov. 2009)*.

Capabilities of new registries

Provisions should be included in the DAG to, among other things, require that all new registries meet basic operational and training standards in the areas that are exposed to malicious behavior (e.g., customer support, network security, legal and fraud detection). *Internet Identity (Module 5, 23 Nov. 2009)*.

Ongoing policing of registries and registrars

ICANN must also police registries that become bad actors, or that enter into business with bad actors, after they are approved. Meaningful enforcement mechanisms must be in place to address registries that engage in behavior such as that specified in subsection (a) through (f) of the proposed disqualification criteria on page 7 of the explanatory memorandum. While it claims to follow up on all RAA violations, ICANN lacks a well publicized process to allow third parties to submit complaints to ensure enforcement of registry agreements. There is also no transparent or set process and remedies or sanctions for violations of the RAA. ICANN needs to have the ability to audit registries. ICANN should consider conducting another similar vetting process on applicants delegated the right to operate a new gTLD on a periodic basis (e.g., every three years). *IPC (Module 5, 22 Nov. 2009)*.

Domain name resellers—work is required in this area

The malicious conduct memorandum did not cover the issue of domain resellers and their identification, responsibilities and liabilities. Without better transparency and accountability, the reseller area will have more exploitation as the gTLD market expands. This area needs more attention as part of the new gTLD process and a process not unlike that for obtaining EV SSL certificates should be considered. *Internet Identity (Module 5, 23 Nov. 2009). OTA (30 Nov. 2009).*

ICANN should insist on appropriate changes to the RAA to take action regarding resellers, which are a large source of registrar-related misconduct. *INTA (20 Nov. 2009).*

Enforcement of security

Enforcement mechanisms must back up standards for security of the DNS. ICANN's domain name registration process must be reformed to ensure the integrity of registration data. *IPC (Module 5, 22 Nov. 2009).*

Requiring DNSSEC, prohibiting wild carding and encouraging removal of Orphan Glue Records will only be effective if these standards are enforced in a timely manner to prevent malicious conduct and the resulting damages. *INTA (20 Nov. 2009).*

Wildcarding prohibition

This prohibition has good merit. *Internet Identity (Module 5, 23 Nov. 2009).*

Orphan glue records

This provision removing orphan glue records when a name server entry is removed from the zone is enthusiastically supported to prevent criminals from using loopholes in the DNS to help perpetuate their schemes. *Internet Identity (Module 5, 23 Nov. 2009).*

The issue of orphan record management requires more discussion—e.g. what criteria will evaluators use to evaluate it. *RySG (21 Nov. 2009).* ICANN should require registry operators to remove orphan glue records. *Microsoft (23 Nov. 2009).*

Accuracy of Whois information

ICANN should place emphasis on the accuracy of Whois information, and require new gTLD registries to spell out their policies to require registrars (who collect the Whois data) to ensure the accuracy of the data, to respond promptly to reports of false Whois data and cancel registrations based on false Whois data that is not promptly corrected. *IPC (Module 5, 22 Nov. 2009). SIIA (23 Nov. 2009). Microsoft (23 Nov. 2009).*

Combating identified abuse

This can be helped by requiring and enforcing thick Whois records, centralizing zone-file access, documenting registry and registrar level abuse contact and policies and making an Expedited Registry Security Request process available. *INTA (20 Nov. 2009).*

Expedited Registry Security Request process--support

This recommendation is a logical extension of work already done by ICANN and the existing registries. It should be supported and be non-objectionable since it is a methodology for a registry operator to obtain contractual relief for large-scale abuses that they help curtail. *Internet Identity (Module 5, 23 Nov. 2009). Microsoft (23 Nov. 2009).*

Centralization of zone-file access-support

Centralizing access to the daily zone files, which already must be provided, will likely be beneficial to both consumers of zone file data and registries through costs savings and stronger overall security and reliability. *Internet Identity (Module 5, 23 Nov. 2009)*.

Rapid Domain Name Suspension process

INTA supports development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. *INTA (20 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

ICANN should require registry operators to adopt and implement rapid takedown or suspension systems. Microsoft is amenable to having one or more of its security and enforcement employees work on an ICANN-convened group to develop such systems. *Microsoft (23 Nov. 2009)*.

Evidence for malicious conduct predictions as a result of new gTLDs

ICANN needs to ask those who predict an increase in malicious conduct from new TLDs to produce some evidence. While there are legitimate reasons to be concerned about new TLDs, the “malicious conduct” issue is a canard, and there is not a shred of evidence to support it. E.g., there is substantial evidence that scammers are not constrained in the least by the current domain name setup. In contrast, new TLDs will have significant new protections (e.g. rapid takedowns) which make it less likely that malicious conduct will be conducted under the flag of a new TLD. *Minds + Machines (Module 5, 22 Nov. 2009)*.

III. Analysis and Proposed Position

Comments on malicious conduct in relation to the gTLD process focused on many aspects of malicious conduct including the need for more stringent focus on the overall issue of malicious conduct, support and questions for the High Security Zone TLD (“HSTLD”) program, eligibility, enforcement of measure to mitigate malicious conduct and suggestions for control activities that would reduce malicious conduct.

Comments requested additional study and work related to the reduction of malicious conduct activities as a component of the new gTLD program. ICANN agrees with this and is continuing work in this area. For instance, ICANN is developing a program called the “High Security Top Level Domain” (HSTLD) program and is in the process of gathering input from representatives in the community to define good control practices to reduce the possibility of malicious conduct within TLDs. Additional information about the HSTLD program can be obtained on the HSTLD wiki page located at: https://st.icann.org/hstld-advisory/index.cgi?hstld_advisory_group.

Comments suggested that the HSTLD program should be mandatory and not voluntary in nature. Related to these comments, comments also questioned if the HSTLD program was an appropriate role for ICANN to undertake. Although the HSTLD program is still under development (current published documents are concept or development only), it is currently anticipated that the resulting standards created by the HSTLD program will be voluntary in nature. This position may be subject to change, as the ICANN community will ultimately decide the overall course of the HSTLD program, including the voluntary or mandatory nature of the program. This position will be established through a multi-stakeholder process.

Comments raised specific questions regarding the origination of the HSTLD program, including:

- (1) Where did this issue come from and why was it introduced now? The HSTLD concept was initiated through the request of several community members. For an overview of some of the

requests that initiated the HSTLD concept, please refer to the minutes of the January 20th 2010 HSTLD advisory group. The minutes to this meeting can be reviewed as an mp3 recording and can be located at the following home page: <http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm>. During this meeting, one of the key topics covered by the advisory group was the initial community interest in a program designed to improve security and controls at various TLDs. This interest led to the formation of the HSTLD program.

- (2) Why is ICANN looking to compete with commercial entities in the security field and with registries and registrars? ICANN is not seeking to compete with commercial entities in the security field or with registries and registrars. Rather, the HSTLD program has now progressed to the formation of an advisory group that is focused on seeking community consensus on the definition, agreement and documentation of good and acceptable security controls for use in improving TLD security. The acceptance and application of these controls on individual TLDs is currently anticipated to be a voluntary decision, made by individual TLD operators.
- (3) How can ICANN offer this without expanding the scope of its charter? ICANN will not offer this program or any certification/verification related to the program directly. ICANN is acting as the overall facilitator for a program that will ultimately be offered by a separate administrator, should the program development reach a stage where this is necessary.
- (4) How much will this cost, and where will ICANN get the budget to do this? Overall HSTLD program costs and budget are still being determined, as the HSTLD program is in concept development state. An advisory group, formed with members of the community, is currently developing the program. Once the program has been accepted as actionable by the community, a cost analysis will be completed.
- (5) How can ICANN do this and remain neutral on issues of security and stability, especially with respect to RSEP and Consensus Policies? ICANN's role in the HSTLD program is to assist in the coordination of community development and consensus necessary to develop the HSTLD program. This is consistent with ICANN's overall mission.

Comments requested ICANN continue to maintain its role as a coordinator of activities designed to reduce malicious conduct in new gTLDs, and not become a provider of specific services. These requests are consistent with ICANN current approach. ICANN is focusing on malicious conduct as a component of its overall direction to support the community. ICANN will continue in this direction, until a multi-stakeholder process agrees to pursue an alternate direction, or a specific program.

Comments raised questions around the eligibility section 1.2.1 of the draft applicant guidebook version 3. Specifically, questions around safeguards prohibiting registry ownership by convicted felons, financially-related misdemeanors and/or other domain related fraud were raised. ICANN will review this section of the Guidebook, to determine which elements can be clarified or augmented.

On the specific point raised about establishing a formal reporting procedure, the proposed evaluation process allows for a period of public comments, which should support this type of procedure.

On the specific point of "good standing," good standing relates both to the standing of a company or entity that is applying for a new gTLD and to the method of background checking that supports the new gTLD application. ICANN is addressing eligibility in terms of both good standing issues. Currently, it is mandatory that an applicant submit to a background check as a component of their application. ICANN is continuing to focus on the issue of "good standing" and will take these comments into consideration.

Comments indicated that some in the community believe proposals to date for preventing malicious conduct are inadequate. Specifically, commenters raised the issue of ICANN developing mandatory processes to address high levels of DNS-related crimes and fraud, perpetrated through a variety of bad behaviors. As mentioned previously, ICANN will continue to work with the community on the HSTLD and other initiatives. The HSTLD program was strongly supported by international law enforcement during ICANN's most recent global meeting in Seoul Korea in the session on DNS abuse (<http://sel.icann.org/node/6961>).

On the subject of enforcement, ICANN will enforce the new gTLD agreements through provisions in the registry agreement, through various methods including regular audits and investigations of third-party complaints

Other matters outside of the new gTLD program are matters of policy development.

Comments suggested a variety of additional grounds for denying registry applications, including:

- Denial if any funder or corporate affiliates of funders of an applicant or any officer, partner, director or manager or other affiliate or any person or entity owning 15% or more of an applicant are disqualified by any of the items (a) through (f) specified in Item 1.
- Section 1(a) should make clear that crimes related to financial or corporate governance misconduct will preclude an otherwise qualified applicant from becoming a registry operator (existing language is unclear as to whether it is all felonies or only felonies related to financial or corporate governance misconduct).
- Subsection (f) is vague and should be reworded--to include an applicant that is "associated with a pattern or practice of either liability for, or bad faith in connection with, trademark infringement or domain name registrations, including:"
- Subsection (f) (iii) should be restated: "registering domain names primarily for the purpose of disrupting the business of, or diverting Internet traffic from, a competitor; or"
- ICANN should add new subsections (g) and (h) which would add as grounds for disqualification findings that an applicant has previously violated registrar or registry agreements as follows: "g. is the subject of a material breach of an existing ICANN registrar or registry agreement(s); or h. intentionally submitted or provided fraudulent information in connection with its application, the review of that application or the defense of any objections to that application"

Some of the additional grounds for denying applications mentioned above are addressed in the terms and conditions section of the Guidebook (module 6). Other suggestions are being considered, to determine if they are helpful additions.

Comments requested that domain names associated with financial services should be restricted to financial services companies. At this point, ICANN is not creating a specific financial services sub-category, as a component of the Guidebook. ICANN is focusing on the issues of user confusion and fraud through other programs like the HSTLD advisory group (see above).

Comments addressed a risk in the transfer of registry operations, which results in a change in control of ownership of a registry over time. A notice requirement for a change of control has been included in the registry agreement, to ensure ICANN has sufficient opportunity to ask questions regarding a proposed transaction in the event there are any concerns. In addition, Section 4.3 of the agreement provides protections for ICANN and the community in the event the registry operator fails to perform its material obligations following any change of control of the registry operator.

Comments requested additional work to define the mechanisms for dealing with registries that become “bad actors” post registry delegation. There are mechanisms currently in place to address registries that become “bad actors” post registry delegation. In addition to the mechanisms currently in place, ICANN is currently discussing additional post-delegation mechanisms (such as PDDRP and RRDRP) with the community.

Comments requested that ICANN police registries that become “bad actors” or that enter into business with bad actors, after they are approved. ICANN currently has the ability to audit registries for contractual compliance on a regular basis. In addition, existing mechanisms are in place to receive and investigate complaints related to registry agreements.

Comments requested a more unified and comprehensive approach to combat malicious conduct in the new gTLD space. As mentioned previously, ICANN is focusing on the issues of malicious conduct with programs like the HSTLD advisory group. ICANN is working on the comments related to this issue.

Comments requested that provisions be included in the Guidebook to require all new registries meet basic operational and training standards in the areas that are exposed to malicious behavior. ICANN believes these are good suggestions, and will look into training or operational procedures in the registry agreements, or in subsequent support mechanisms.

Comments suggested that the malicious conduct memorandum did not cover the issue of domain resellers and their identification, responsibilities or liabilities. Reseller activities happen primarily at the registrar level. Contractual requirements and restrictions are being discussed to determine if the registry agreement would be a suitable place for imposing such restrictions. At this point, it seems that additional terms in the registry agreement would not affect, in a way beneficial for registrants, the registrar-reseller relationship. Issues concerning resellers are being discussed in the GNSO group considering changes to the RAA. This is an independent process.

Comments requested that additional enforcement mechanisms be created in line with any new security standards established for the DNS. Specific focus of the comments related to requirements of DNSSEC, the prohibition of wild carding and the removal of Orphan Glue Records. Although currently considered a voluntary program, ICANN is currently working on establishing community standards for security of the DNS with efforts like the HSTLD program. In line with this comment, DNSSEC deployment is currently a requirement in the new gTLD program. Additionally, the new agreement now requires the removal of glue records of deleted names from registry zones and prohibits the deployment of wildcards. The community continues to exert effort related to the other issues, including wild carding/non-existent domains. A working group is being formed between members of the CCNSO. For additional information regarding wild carding, please refer to the following link: <http://www.icann.org/en/topics/new-gtlds/nxdomain-substitution-harms-24nov09-en.pdf>. Overall, ICANN continues to work with groups like the Anti-Phishing Working Group (APWG) and other active members of the community on the issues security and abuse as they relate to DNS.

Comments requested that ICANN place an emphasis on the accuracy of Whois information and suggested methods of enhancing Whois accuracy. In response to public comment, the proposed registry agreement now contains a requirement for the maintenance of a thick Whois database. ICANN will review new gTLD application scoring to consider, where feasible and appropriate, enhancements based on registry efforts to promote Whois accuracy. Thus far, these discussions have indicated such a change

requires some policy consideration before such changes can be made. In addition, efforts like the HSTLD program are focused on community definition and support for control structures that would help to increase the accuracy of Whois information.

Comments requested the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. Significant work has been done by the IRT and STI (see Trademark sections) to develop a Uniform Rapid Suspension system for the takedown of names that clearly and blatantly are abusing trademark rights. In addition, existing gTLDs and ICANN are working together to create a procedure to address blatant abuse. This report has been published under separate cover.

Comments requested centralization of access to daily zone files. Version 3 of the Guidebook (in the proposed registry agreement included a requirement to provide centralized access to zone data. ICANN has formed an advisory group called the “Zone File Access” (“ZFA”) cross-constituency advisory group to focus on this issue. This group will deliver a report for consideration and public discussion at the Nairobi meeting. The report will recommend one or more models seeking to satisfy this request.

Comments requested ICANN ask for evidence to support community discussions that suggest or predict an increase in malicious conduct as a result of the new gTLD program. ICANN will take this into account and will ask community members to support their positions where possible.

SECURITY AND STABILITY

I. Key Points

- DNSSEC is currently being deployed in advance of the new gTLD program, which should help reduce the potential stability risks associated with the introduction of DNSSEC in parallel with the delegation of new gTLD’s. It is important to note that the delegation of new gTLD’s will only happen once the entire application process for the new gTLD has been successfully completed.
- gTLD application volume does not directly tie to an instantaneous new gTLD delegation volume. A plan for new gTLD delegation will be created, once the total volume of new gTLD applicants is known. If the volume of new gTLD applications is high, a staged plan for new gTLD delegation will be created, to minimize the threat of stability of the DNS during new gTLD delegation.
- A new gTLD applicant’s DNSSEC implementation is a requirement of draft version 3 of the Applicant Guidebook.

II. Comment Summary

Risks of new gTLD program

The Scaling Report seems to suggest that there are significant risks attendant to increasing the size of the root without first deploying DNSSEC. It is prudent for ICANN to slow the process of increasing the size of the root with the introduction of new gTLDs until it has managed these risks properly (e.g., deployed DNSSEC). *BBC (19 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). Time Warner (20 Nov.*

2009). *AT&T* (22 Nov. 2009). *Microsoft* (23 Nov. 2009). *NICMexico* (23 Nov. 2009). *ECTA/MARQUES* (22 Nov. 2009). *SIIA* (23 Nov. 2009). *ICA* (23 Nov. 2009).

Substantial work remains for ICANN to ensure that the stability of the DNS will not be harmed by the new gTLD program. INTA remains concerned that efforts in this area were not completed prior to the decision to attempt implementing an unlimited number of new gTLDs to the Internet. *INTA* (20 Nov. 2009).

One hundred new TLDs per year should not be a problem, even if DNSSEC is deployed in parallel. *HOTEL* (22 Nov. 2009).

Proposed DNSSEC implementation

ICANN should examine each applicant’s proposed DNSSEC implementation for stability or security issues as part of the core evaluation process, as would be the case for all required registry services. *RySG* (21 Nov. 2009).

Security and stability definitions (sec. 2.1.3.1)

The definitions require revision (they are also found in other places such as the draft registry agreement para. 8.3). The definitions also conflict with and exceed the draft gTLD agreement, and misunderstand IETF practices and definitions. The contract must be revised to adhere to proper terminology. The security definition should have this language: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.” The language in the stability definition, “authoritative and published by a well-established, recognized and authoritative standards body,” is unacceptable. ICANN should not leave language open-ended and subject contracted parties to any and all standards bodies. ICANN needs to enumerate the standards and name the authoritative body, which is IETF. Application of additional standards should be considered via the consensus policy process. *RySG* (21 Nov. 2009).

Application processing limitation

It would be helpful for applicants to know if there is a “back-end processing limitation” (the number of changes in the root zone per year that the technical community thinks prudent at this time) on the earlier processing stages, up to the initial evaluation at 1-5, and the administrative completeness check at 1-4. *E. Brunner-Williams* (Module 1, 22 Nov. 2009).

Entry into Root

Comments offered to express a types-as-queues representation widely available, so that the controlling issue in terms of rate of service of applications, ignoring all causes for application failure, is visible. *E. Brunner-Williams* (Module 1, 22 Nov. 2009).

III. Analysis and Proposed Position

Comments in relation to the gTLD process focused on potential stability issues with the expansion of the existing root zone, the review of DNSSEC implementation plans as a component of the gTLD evaluation process, the current definition of “Security” and “Stability”, and entry of new gTLD’s into the root.

Comments expressed a concern regarding increasing the size of the current DNS root as a component of adding new gTLD’s to the root, in parallel with ICANN’s deployment of DNSSEC. DNSSEC deployment in the root zone is already underway. ICANN believes that the deployment of DNSSEC in the root zone is

the most important structural improvement to the DNS to happen in twenty years. The deployment of DNSSEC is proceeding with widespread involvement of the Internet's technical community, and is being carefully staged so that any unintended consequences of the deployment can be identified and mitigated promptly. The current plan is to have DNSSEC deployment in the root zone completed by July 1st, 2010. This should allow for the completion of DNSSEC deployment well before the new gTLD program is ready to delegate new gTLD's.

Comments raised a concern regarding the impact of the new gTLD program on the stability of DNS. Specifically, comments focused on the introduction of "unlimited" new gTLD's to the DNS. It is important to note that the current "unlimited" status for new gTLD applications does not necessarily tie with an immediate and unlimited delegation of those new gTLD applications that are approved and contracted. ICANN will develop an appropriate plan for delegation of new gTLD's into the root zone as a component of the overall gTLD program. The plan will be created once the total number of applications has been determined and will be developed with stability as a guiding principle.

Delegation rates have been modeled for several application rounds. Four demand scenarios for application volumes have been modeled: below expected, expected, above expected and significantly above expected. For each demand scenario, there's an assumption that only a fraction of the applications will lead to delegations, and that the processing time for the successful applications will be spread out. If there are more than, say, 500 applications, the processing will be batched further spreading out the delegation rates. These models will be published some time before the Nairobi meeting.

Some commenters requested that ICANN examine each applicant's proposed DNSSEC implementation for stability or security issues as part of the core evaluation process. We agree. As noted in draft version 3 of the Applicant Guidebook, a review of the applicant's DNSSEC implementation is included as question 43 of the application.

Some commenters requested a revision of the definitions of security and stability in section 2.1.3.1 of the Applicant Guidebook. Specifically, commenters recommended the security definition should use the following language: "Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards." In addition, the commenter recommended additional enumeration of the authorities body (IETF) into the definition of stability. These were excellent suggestions. The current definitions are found in existing registry agreements and can also be found in the Registry Services Evaluation Policy ("RSEP") (<http://www.icann.org/en/registries/rsep/rsep.html>, which was adopted as an ICANN consensus policy. The definitions are intentionally broad -- anything a registry might do that could harm other systems on the Internet would be considered a security/stability issue and could cause ICANN to not grant its permission to a registry to initiate a service. These definitions are critically important terms and part of a process that has a significant impact on the DNS. A change to what is already agreed and working should be subject to a broader stakeholder discussion.

Geographical Names

I. Key Points

- Applications for strings representing a country or territory name, as defined in the Applicant Guidebook, will be accepted in the new gTLD process and will require the support or non-objection of the relevant government or public authority..
- An application for a string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard, will require the support or non-objection of the relevant government or public authority.
- An application for a string that is a city name will not require the support or non-objection from a government or public authority if the applicant does not intend to use the string to represent the city.

II. Comment Summary

Definition and list

The scope of the definition of geographical names is uncertain and potentially very broad-ranging. ICANN should try to achieve a higher level of certainty; an exhaustive list of such names should be established. The process done for the launch of .EU by EURid should be considered by ICANN. *Lovells (22 Nov. 2009)*.

Geographical Names Process (GNP)

INTA's recommendation that an applicant should have the opportunity to challenge a GNP decision was not reflected in the DAG v3. This appears necessary to address situations in which the GNP decision may be that the application for the new TLD is a geographical name. *INTA (20 Nov. 2009)*.

Country and territory names

The ccNSO does not agree that an untested and wholly theoretical demand by governments for .country TLDs justifies the introduction of meaningful representations of countries or territories on the ISO 3166-1 list into the generic TLD space. The GAC explicitly states that country and territory names should be excluded from the gTLD space. *ccNSO (21 Nov. 2009)*. *DIFO (21 Nov. 2009)*. *UNINETT Norid (21 Nov. 2009)*. *NPTA (22 Nov. 2009)*.

GoDaddy reiterates from its previous comments that it opposes inclusion of ISO 3166-1 alpha 3 codes in the definition of geographical names. *GoDaddy (22 Nov. 2009)*.

The requirement for government approval in the DAG v3 does not address or resolve the many legitimate concerns previously expressed. The fundamental distinction is that ccTLDs are country or territory designations, while gTLDs are not. The ccNSO strongly opposes changing this fundamental policy based on unsubstantiated demand particularly during the pendency of the ccTLD IDN policy development process which provides a mechanism to consider this issue (in respect to non-ASCII characters) comprehensively in the relatively near term. ICANN has proposed to make this change without addressing the significant legal and policy challenges that are certain to arise as a by-product of blurring the longstanding distinction between ccTLDs and gTLDs. The DAG v3 fails to acknowledge that its proposal does not in any way address the ccNSO's view that restrictions should not be limited to strings on the specifically delineated list set forth in the DAG but should apply to any meaningful representation including abbreviations of a country or territory on the ISO 3166-1 list. *ccNSO (21 Nov. 2009)*. The previous definition of "meaningful representation" of a country or territory name should be

reinstated and expanded according to the comments made from the ccNSO in April 2009. *UNINETT Norid (21 Nov. 2009)*.

The DAG v3 fails to consider the many complex post-delegation issues ICANN is likely to face if country/territory names are introduced in the gTLD space. For example, how will ICANN and/or IANA respond when a government that has endorsed a .country gTLD demands redelegation of the gTLD, citing its authority to do so under domestic law or even under a written agreement with the registry operator? Is ICANN prepared to ignore a change of heart by a government whose rights and interests it has previously explicitly acknowledged by conditioning the delegation of the gTLD on its consent? Since ICANN does not yet have a policy developed on how it would handle potentially competing interests of governments and country/territory TLD operators in the new gTLD process, it is profoundly unwise for ICANN to introduce gTLDs that constitute meaningful representations of countries and/or territories on the ISO 3166-1 list. *ccNSO (21 Nov. 2009)*. The DAG v3 should provide that ICANN must respect a legally binding decision from the relevant/local court regarding the compliance with a geo-TLD agreement between relevant governments and the registry, including carrying out a re-delegation if that is the court's decision. *NPTA (22 Nov. 2009)*). In addition, there will be conflicts with the interest of the local Internet community; the different regimes in place for a country code TLD and a country name gTLD will be confusing to users (different privacy policies, language requirements for registrars, dispute resolutions, etc.) *UNINETT Norid (21 Nov. 2009)*.

Permission or non-objection for geo GTLDs

AIPLA is concerned that efforts to obtain permission or non-objection from local governments or public authorities could be subject to demands for payment of financial remuneration or other benefits. If a gTLD applicant has IP rights in a string mark containing the proposed gTLD, ICANN should simply require gTLD applicants to identify and contact the respective authorities for the geographical areas and give them the opportunity to note their objections and state their reasons. Any objections to such a gTLD should not by themselves prevent the awarding of a gTLD to the applicant. *AIPLA (22 Nov. 2009)*.

City names (sec. 2.1.1.4)

This section is unacceptable. Cities and municipalities should have the right to have control over TLDs that can be linked to them. Further, the need for the cities to own the TLDs may arise later. Cities and municipalities must be consulted before using their names, even if the intended use is not associated with the city. The application must contact the administration of the city or municipality in question, not only governmental bodies. Consent by the city or municipality must be explicitly expressed and documented in writing before the registration can take place. Request for support or non-objection must be written in the official language of the city or municipality in question and include a standard explanation of the scope and implications of what is being requested. The gTLDs registered with consent must not be transferable to third parties without written consent of the city or municipality in question. *CEMR (Module 2, 30 Oct. 2009)*.

Geo-gTLDs objections (sec. 2.1.1.4.1 end)

If an application survives the geographical review, can a government later object on community grounds (section 3)? If so, this seems unfair and this should be prohibited. Can an indirect existing competitor object on community grounds to the geo gTLD (e.g., a capital city gTLD applicant sponsored by a government and an existing national ccTLD)? This should not be allowed if the purpose of the new gTLD program is more competition. There normally would be no case of confusing similarity. *S. Subbiah (Module 2, 23 Nov. 2009)*.

Define the response timeframe for government support/nonobjection (sec. 2.1.1.4.3)

The timeframe for a needed support/non-objection letter from government should be defined to eliminate risk for the applicant. Open-ended timeframes for go/no-go outcomes does not reflect maturity of the application process. *S. Subbiah (Module 2, 23 Nov. 2009).*

Capital names protection

Capital names need to be protected. *dotBERLIN (15 Nov. 2009). M. Maller (18 Nov. 2009). M. Tofote (18 Nov. 2009). K. Jager (18 Nov. 2009). G. Werner (18 Nov. 2009). D. Rau (18 Nov. 2009). F. Hagale (18 Nov. 2009). S. Lubek (19 Nov. 2009).*

The final guidebook must reflect the complex nature of communities and territories making their presence known on the Internet –e.g., issues have already been raised about the position of state capitals versus cities with the same name. This will require an adequate solution with a view to avoiding subsequent conflicts. *F. Salamero (20 Nov. 2009).*

The DAG v3 still seems unclear about how there will be special consideration for capital cities. It should be explicitly stated that capital cities will only require documentation of support or non-objection from the relevant government or public authority from that country. *City of Paris (22 Nov. 2009). AFNIC (22 Nov. 2009).*

GeoTLDs protection

GeoTLDs need to be protected against copycats. *dotbayern (16 Nov. 2009).*

Strings representing a continent or UN region (sec. 2.1.1.4.1, point 5)

It is not appropriate to assign any specific and largely arbitrary percentile to the requirements. They should be examined case-by-case in consultation with the GAC. *RySG (21 Nov. 2009).*

Geo TLDs—overriding presumption

If in looking at the string there is clearly no association with the geographic location, the new TLD application should be able to override the presumption in favor of the geographic entity. *RySG (21 Nov. 2009).*

COUNTRY AND TERRITORY NAMES

Should the definition of country and territory names include ‘meaningful representation’ given that the term has been adopted for the IDN ccTLD Fast Track process?

The ccNSO continues to raise concerns about the revised definition of country and territory names that appears in this latest version of the Applicant Guidebook, and finds it inexplicable that ICANN could accept the concept of ‘meaningful representation’ in the IDN ccTLD Fast Track process but not for the gTLD process. GoDaddy reiterates its earlier comments that it opposes the inclusion of ISO 3166-1 alpha-3 codes in the definition of geographical names; and Lovells considers the scope and definition of geographical names is uncertain and potentially very broad ranging.

Throughout the process of developing a framework for new gTLDs the Board has sought to ensure a combination of clarity for applicants and appropriate safeguards for the benefit of the broader community. A considerable amount of time has been invested in working through the treatment of country/territory names to ensure it reflects these twin objectives of clarity and safeguards. Following discussion at the Mexico City meeting the Board resolved that it was generally in agreement with the

proposed treatment of geographic names at the top level, and that the Guidebook should be revised to provide greater specificity on the scope of protection for country/territory names listed in ISO 3166-1, and greater specificity in the support requirements for continent names, with a revised position to be posted for public comment.

The resulting definition continues to be based on ISO 3166-1 and provides greater clarity about what is considered a country or territory name in the context of new gTLDs. It also removes the ambiguity created by use of criteria to apply the term ‘meaningful representation.’ While the revised criteria may have resulted in some changes to what names are afforded protection, there is no change to the original intent to protect all names listed in ISO 3166-1 or a short or long form of those names.

With regard to safeguards, the definition is based on a list developed and maintained, as objectively as possible, by a recognised international organisation. There are safeguards provided in the Guidebook based around the application and string assessment process, notably the requirement for support of or non-objection from the relevant government or public authority. In addition, the objection mechanisms provide an important secondary avenue of recourse for government (and others) to raise concerns about prospective names which fall outside ISO 3166-1.

It is accepted that the proposed combination of clarity and safeguards could be seen as minimal rather than optimal, but they represent the clear view of the Board taking into account the views in particular of the ccNSO, the GAC and the GNSO as well as a wide range of public comments on this issue with regard to version 2 of the Guidebook.

ICANN has accepted the concept of ‘meaningful representation’ of a country or territory in the context of the IDN ccTLD Fast Track. This reflects the objective of rapid initial deployment of IDNs and the associated need to remove as many potential obstacles as possible. As you are aware, there have always been particular sensitivities about geographic names where non-Latin scripts and a range of languages are involved. It does not follow that these considerations should automatically apply to the broader ccTLD and gTLD spaces.

What is the distinction between a ccTLD and a gTLD?

The ccNSO, and others, do not agree that an untested and wholly theoretical demand by governments for .country TLDs justifies the introduction of meaningful representations of countries or territories on the ISO 3166-1 list into the generic TLD space and notes that the GAC explicitly states that country and territory names should be excluded from the gTLD space. The ccNSO argues that the fundamental distinction is that ccTLDs are country or territory designations, while gTLDs are not and strongly opposes changing this fundamental policy based on unsubstantiated demand particularly during the pendency of the ccTLD IDN policy development process which provides a mechanism to consider this issue (in respect to non-ASCII characters) comprehensively in the relatively near term.

It was in the context of the GAC Principles regarding new gTLDs, that many of the requirements relating to the consideration of geographic names in the Guidebook were developed. The GAC communiqué of June 2008, expressed concerns that the GNSO proposals did not include provisions reflecting GAC principles 2.2 and 2.7. While the ccNSO notes that the GAC explicitly states that country and territory names should be excluded from the gTLD space, GAC principle 2.2 states “ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities”. The treatment of country and territory

names in the Guidebook was developed to specifically to adhere to GAC principle 2.2, and was interpreted as the GAC holding the view that governments should not be denied the opportunity to apply for, or support an application for, their respective country or territory name. While the GAC appears to have moved away from this, in favour of the ccNSO position, through language in recent communiqués, the GAC has not formally amended their principles document. ICANN, like the ccNSO, as outlined in a recent communication to the GAC regarding draft principles on IDN ccTLDs, considers that GAC principles “stand as a clear, definitive position from governments on key issues and have been afforded considerable policy priority and operational adherence”. In developing the Guidebook, this has certainly been the case.

The distinction between ccTLDs and gTLDs is an important and valid one that has been part of the DNS for many years. However, it should be recognised that the distinction is based on reasons of policy and administration rather than any contemporary technical requirements. In practice, developments in the market and user preferences are blurring the distinction, with some in the GNSO community citing the use of .TV, .NU and .ME (and possibly .CO in the near future) as examples of ccTLDs operating as gTLDs with the agreement of relevant national authorities.

At the time the DNS hierarchy was developed the number of characters was the distinguishing factor between a ccTLD (two characters) and a gTLD (more than two characters), a distinction reflected for some time in the ICANN website glossary. This remains a valid distinction for the Board – indeed, the only practical one, and the only one on which all parties are likely to agree - until the community indicates a desire for fundamental change.

The Board is aware of the possibility of entities seeking a .country name with appropriate government support, although this possibility is not the only consideration with regard to geographic names. If one of the practical characteristics of a ccTLD is to remain (for the time being) its two-character nature, then the only mechanism for delegating and deploying such strings is that of a new gTLD. As a basic principle, ICANN would not want to be in a position of opposing such delegation against the clear wishes of a national government, nor would it be appropriate to appear to be second-guessing problems post-delegation.

Should an entity (with appropriate government support) seek to have a .country name established within the gTLD space, there would of course be significant opportunities for contact with ICANN through the registrar accreditation framework and other mechanisms aimed at workable and accountable gTLD operations. Such opportunities for practical dialogue on operational matters would be no less than those available through the more “hands-off” way in which ccTLDs are administered, and may well be a useful platform for better communication and fewer misunderstandings should the gTLD space increase significantly.

POST DELEGATION CONSIDERATION

What avenues of recourse are available to deal with ‘redelegation’ type requests from governments who withdraw their support for an applicant, post delegation?

The ccNSO considers that Guidebook version 3 fails to consider the many complex post-delegation issues ICANN is likely to face if country/territory names are introduced in the gTLD space, such as redelegation requests.

It is acknowledged that post-delegation problems may arise with a .country name where a government may wish to see different arrangements apply because of changed circumstances. There is always the possibility (and, over time, the probability) of circumstances changing after delegation, whether for gTLDs or ccTLDs, and there are a range of options for working them through. A government or public authority has the option of applying conditions on a TLD operator as part of their initial support for a .country name, thereby putting itself in a position to influence the policies of the operator. In addition, if a geographic name TLD designates itself as a community TLD it will have specific restrictions in its agreement which, if breached (for example, through registration restrictions), enable the government to lodge an objection and the decision maker can order the registry to comply or face sanctions. It is possible that a Government may take some comfort from the existence of a contract between ICANN and the .country operator, particularly if the government does not have a mechanism to provide input or contribute to the operations and management of its ccTLD.

The ICANN gTLD Registry Continuity Plan was developed to transition a TLD to a successor operator in the event that a registry or sponsor is unable to execute critical registry functions, and continue the operation of a TLD in the longer term. This plan will be amended in light of the new gTLD process and, in the case of geographical names as defined in the limited manner by this process, will require the approval of the relevant government or public authority.

OBJECTION PROCESS

Why is it not possible to appeal decisions made by the Geographic Names Panel (GNP)?

Some concerns have been raised about the inability to appeal decisions made by the Geographic Names Panel (GNP).

The role of the GNP, among other things, is to assess applications and determine if a string is a geographic name as defined in the Guidebook. In the event that an application is a geographic name, the GNP will ensure that the supporting document is provided and will also validate its authenticity. In circumstances where the applicant did not know that the string requested represents a geographic name as defined in the DAG, the applicant will be given 60 days to contact the relevant government or public authority to acquire the necessary support or non-objection to the use of the string.

The protection of geographic names in the Guidebook was developed in light of the GAC Principles regarding new gTLDs, with the intention of respecting the sovereign rights of governments in the process. For strings that are not obvious or obscure, but the GNP believes that it does represent a geographic name, it is anticipated that the GNP will liaise with the relevant government or public authority for confirmation.

There is a defacto appeal mechanism in that applied-for names can be objected to on community based grounds. A gTLD application for a geographical place name might be the subject of a successful objection. See below.

Can an application that survives the GNP process, be objected to on community grounds?

As stated above, the purpose of the GNP is to assess applications and determine if a string is a geographic name as defined in the Guidebook. If the applicant passes this step in the evaluation process,

it does not quarantine the application from an entity with standing objecting to the string on community grounds, or other grounds as specified in the Guidebook. A successful objection might be lodged on community grounds.

Each of these tests is described in further detail in the Applicant Guidebook.

CITY NAMES

Why don't all city names require support or non-objection of the relevant government or public authority?

What protections are afforded to capital city names?

As stated in the Explanatory Memorandum on Geographic Name Applications, city names offer challenges because a city name can be a generic term, and in many cases no city name is unique. Evidence of support or non-objection will be required for capital cities of the countries or territories on the ISO 3166-1 list, and for city names where an applicant declares that it intends to use the TLD for purposes associated with a city name. It is considered that the objection process provides an appropriate avenue of recourse, for local governments or municipalities.

The Draft Applicant Guidebook states that “an application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166- standard” and “an application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city” require documentation of support or non-objection from the relevant government or public authority.

This requirement means that an application for .paris, regardless of whether the applicant intends to represent Paris, Texas; Paris, France; or the fragrance Paris, will require documentation of support or non-objection from the relevant government or public authority, which, in accordance with the capital city requirement, in this case would be France.

It is important to note that this rule applies only to capital city names of a country or territory on the ISO 3166-1 standard. Given the GAC Principles regarding New gTLDs and general principles of conservatism, the process identifies the limited number of capital city names as being important to government / sovereign interests. Other city names require government approval only if they claim to represent a city in the application, and only from the relevant government of the city they claim to represent. The relevant government in the case of city names depends on the location for example, an application purporting to represent Newcastle, England requires the approval of a different government than an application representing Newcastle, Australia. An application for “Newcastle Ale” or any other brand or unspecified purpose requires no government approval except in the cases of national capital cities described above.

GOVERNMENT SUPPORT

**What is the timeframe for providing government support or non-objection for an application?
Will support from the government or public authority come at a cost?**

The government support or non-objection must be available to the applicant at the time the application is submitted; therefore there is a finite timeframe. In the event that an applicant has unknowingly applied for a string that is a geographic name, the applicant will be contacted and given a limited time frame to provide the documentation.

The AIPLA has raised concerns that efforts to obtain permission or non-objection from the relevant governments or public authorities could be subject to demands for payment of financial remuneration or other benefits: “If a gTLD applicant has IP rights in a string mark containing the proposed gTLD, ICANN should simply require gTLD applicants to identify and contact the respective authorities for the geographical areas and give them the opportunity to note their objections and state their reasons. Any objections to such a gTLD should not by themselves prevent the awarding of a gTLD to the applicant.”

The protection of, and safeguards provided for, geographic names in the Guidebook was developed in light of the GAC Principles regarding new gTLDs, with the intention of respecting the sovereign rights of governments in the process. While understanding the concerns raised by AIPLA, the manner in which the relevant government or public authority provides support in these limited cases is a matter for them to determine, it cannot be a matter for ICANN.

How was the percentile determined for Strings representing a continent or UN region? Would it be more appropriate for the GAC to be consulted on such strings?

At the Mexico City meeting, the Board asked staff to provide greater specificity. The new definition provides applicants with more clarity about what qualifies as a regional or sub-regional name and the degree of approval required. The requirement for 60% approval means that a super-majority of governments in each area affirmatively approve the application and the applied for string. In this case, mere non-objection does not apply. The reasonableness 60% figure was checked by calculating at the number of countries / territories required for approval within each of the UN defined regions. The requirement that there be more than one written objection means that no single government has a veto power. The mechanism adopted is aligned with UN practices (which in most cases is by a simple majority in committees of the General Assembly: http://www.un.org/ga/60/ga_background.html). The GAC is not an operational arm of ICANN and as such there is no mechanism to enable the GAC to fulfill the suggested role.

The Applicant Guidebook Version 3, has a typing error—the next version of the Guidebook will revert to a 60% approval.

GAC member involvement in evaluations has been discussed in previous meetings. The GAC is not an operational arm of ICANN and as such there is no mechanism to enable the GAC to fulfill the suggested role.

STRING SIMILARITY

I. Key Points

- Comments continue to diverge on the scope of string similarity in Initial Evaluation, where some claim that aural, semantic and even concept similarity be covered. Others state that nothing beyond visual similarity should ever be regarded, especially for IDN gTLDs, The

proposed position, balancing comments and for reasons of practicability, is to maintain the current approach: to check all proposed strings for visual similarity during the Initial Evaluation, while String Similarity Objections can be assessed based on a wider range of similarities, in line with the adopted policy.

- A comment asserts that exceptions from the prohibition against confusingly similar strings should be granted for gTLD registries applying for an IDN version of its existing string. The issue of exceptions is a delicate matter where no clear policy guidance is at hand and it is the proposed position not to attempt development of exception rules until clear policy advice is available in that regard.
- The process for securing string examination panel services is underway and will be reported in an open way.
- A process for addressing collisions between the IDN fast track and the new gTLD processes has been published.

II. Comment Summary

IDNs (section 2.1.1.1.3)

Similarity should be limited to “visual” and “aural and meaning similarity” should be removed. The GNSO IDN working group concluded that only visual similarity will lead to actual user confusion. This was done to abstain from granting current registries an unjustifiable right to have equivalent TLDs in all languages. *Y. Keren (23 Nov. 2009).*

Meaning of similarity (sec. 3.1.2.1)

The guidebook is not clear on the meaning of similarity—is it just appearance as in the String Similarity Review of Module 2 (Evaluation Criteria)? There is also no basis for similarity on the grounds of aural or meaning across IDN scripts/languages as was established by the GNSO IDN working group. *S. Subbiah (Module 3, 23 Nov. 2009). A. Sozonov (Module 3, 23 Nov. 2009).*

Is visual similarity the only factor considered? *A. Mykhaylov (Module 3, 23 Nov. 2009).*

String similarity review—IDN version of gTLD name (sec. 2.1.1.1)

ICANN ignored RySG’s recommendation that it now makes again, that when performing the string confusion review against existing TLDs an appropriate exception should be allowed in cases where the applicant is applying for an IDN version of its existing gTLD name. *RySG (21 Nov. 2009).*

String similarity review –IDN ccTLD and IDN gTLD

To reduce the risk of unfairness and to promote transparency, ICANN should consider setting a deadline for IDN ccTLD applications at least one month before the deadline for gTLD applications. *IPC (22 Nov. 2009). SIIA (23 Nov. 2009).*

String similarity review and trademark reserved names list

INTA objects to ICANN’s continued exclusion of trademarks from the string similarity review; this could be pointed to as substantiating allegations of ICANN’s institutional bias in favor of its revenue collectors (e.g., existing gTLD registries) and against trademark owners. INTA reiterates its support for a trademark reserved names list and its application to the string similarity review. *INTA (20 Nov. 2009).*

String similarity standard

The DAG v3 contains inconsistent articulations of the standard of string confusion. A single standard should be adopted based on the rubric of “likelihood of confusion”, a concept widely used and understood in trademark and unfair competition jurisprudence worldwide. A probability of confusion or actual confusion is too narrow a standard. The standard should be motivated by the principle that any substantial number of consumers confused or defrauded is too much—that most consumers would be confused should not be necessary. *INTA (20 Nov. 2009)*.

String similarity assessment

INTA continues to recommend that the string similarity assessment should include similarity in sound and meaning, not simply similarity in appearance. Absent more detail on what weight the algorithm test results will carry, INTA is concerned that those results will carry disproportionate weight. *INTA (20 Nov. 2009)*.

Section 2.1.1.1.3 could be improved with a more detailed definition of the term “similarity of meaning” (e.g., do synonyms meet these criteria). *BITS (22 Nov. 2009)*.

The string confusion standard should include phonetic and conceptual similarity. *Microsoft (23 Nov. 2009)*.

String similarity panel

String similarity examiners should have experience in the field of trademark and unfair competition law or consumer behavior research so that they more adequately evaluate the issue of string similarity and user confusion. *INTA (20 Nov. 2009)*.

More details are needed about the panel and who will serve on it. *CADNA (22 Nov. 2009)*.

ICANN should publish the names, affiliations and qualifications of the String Similarity Examiners (SSEs) and require them to comply with a strict conflict of interest policy and allow applicants to submit to ICANN written objections to having a particular SSE assigned if the applicant has reason to believe the SSE has a conflict of interest. *Microsoft (23 Nov. 2009)*.

Translations and Database

DAG v3 does not include INTA’s recommendation that strings be translated and that a database be created and maintained for examiners to use in evaluating strings. This would be a useful addition and possibly necessary to ensure that potential string contention issues are dealt with appropriately. *INTA (20 Nov. 2009)*

Concept confusion

There should be a new requirement for the gTLD concept to be described in all applications—both standard and community-based. A gTLD could conflict with an existing sTLD (or community-based TLD) not through the string but through the concept it claimed to support. This would highlight confusingly similar concepts, of concern to both sponsored TLDs and community-based TLDs, and could be a justification for an objection. *Telnic—minority position in RySG (21 Nov. 2009)*.

III. Analysis and Proposed Position

Scope and rules

A couple of comments advocate an extended scope for the string similarity check in Initial Evaluation, including aural and semantic similarity. Given the number of potential string checks that can be performed and the complexity thereof, the current approach remains to check all proposed strings for visual similarity during the Initial Evaluation. String Similarity Objections (in Module 3), which can be assessed via a Dispute Resolution Service Provider, provides the ability for a wider range of similarity checks. This approach is in accordance with the adopted policy developed by the GNSO. Regarding a detailed comment suggesting a definition of "meaning" in 2.1.1.1.3 in the Guidebook, it should be noted that this section is not a proper place for definitions since it is merely exemplifying and clearly refers to Module 3.

Translations

A comment suggests developing a database of string translations for use by examiners, implicitly calling for a checking of "meaning" during the Initial Evaluation. Leaving aside the issues whether all strings can be translated, whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis through the objections and dispute resolution procedures that are in place. This is the more practical approach: in view of the sheer number of languages in the world, it would be impracticable to check every combination of every application during Initial Evaluation. The cases when a party states there might be confusion due to translation are better left for dispute resolution.

IDN gTLDs

Two comments bring up string similarity specifically regarding IDN gTLDs, one supporting the GNSO IDN WG finding that only visual similarity should ever be considered, the other claiming that exceptions should be made to visual similarity exclusions for applicants applying for IDN versions of their existing ASCII gTLDs. As the string similarity check during Initial Evaluation is limited to visual similarity, no change is called for in that respect. Both comments relate principally to the handling of potential string similarity objections by the Dispute Resolution Service Provider. It should be noted that the issue of exceptions is a delicate matter where no clear policy guidance is at hand and it is the proposed position not to attempt development of exception rules until clear policy advice is available in that regard. The one area of "exception" might be in the case of variant TLDs. It is anticipated that rules will be developed where variant TLDs will be delegated under certain circumstances. Variants are discussed elsewhere in the new gTLD materials.

Trademarks

A comment proposes that strings be checked for similarity to trademarks in general. This would considerably widen the scope of the string similarity check in Initial Evaluation, without providing any clear benefits since resolution of conflicts with trademarks can occur thru the Legal Rights Objection Process (Module 3). Even if an applied-for TLD is identified in the string similarity check as matching or being similar to an existing mark, that does not create a right violation absent some other finding. That finding will occur in the rights objection process. Adding a trademark similarity check would add significant costs in process development and processing without the existence of a controversy over the use of the name. The proposed position is not to change the string similarity check in this way.

Examiners

A couple of comments regard the string similarity examiners, requiring disclosure, conflict of interest provisions and competence requirements. We agree. Those comments are all well taken and in line with the process currently underway for selection of the examiners and the evaluation process. Regarding a

comment expressing concern about the use of the algorithm – we also agree with its limited role. The approach remains that the algorithm has only an advisory function and that its usefulness is expected to grow for future rounds, based on experiences and refinements, as needed. ICANN intends to take a conservative approach in the first round and thoroughly evaluate this tool as experience is gathered. This may imply manually checking string combinations that score far below any "threshold", both to gain experience and to catch and rectify any potential errors in the algorithm scoring.

Standard

A comment requires more precision regarding the standard for string similarity, claiming that a finding of confusing similarity should only require that "a substantial number of consumers" would be confused, not "most consumers". This view is close to the intention of the Guidebook and staff will consider if it can be better captured in the drafting.

Inter-process contention

Two comments suggest a deadline for IDN ccTLD applications a month before opening the gTLD round, presumably with a view to avoid inter-process contention cases. The IDN ccTLD Fast Track process was launched in January 2010 and there is no deadline set – until the conclusion of the ongoing ccNSO Policy Development Process regarding IDN ccTLDs. Although it is unlikely that any inter-process contention case would occur, due to the requirements in both the Fast Track and New gTLD processes, there are clear procedures foreseen to handle such an eventuality. A deadline for the Fast Track for this reason would be inappropriate and counter the existing policy work.

STRING CONTENTION

I. Key Points

- Self-resolution of contention is stated as a preferred method in some comments, with requests to facilitate such resolution thru joint ventures. The proposed position is that, although joint ventures may result, such solutions would have to be arranged thru side agreements while keeping the identity of the formal remaining applicant unchanged, in order to avoid considerable delays.
- Multiple comments relate to the threshold for winning a Community Priority Evaluation, with some agreeing with the current threshold (14 of 16) while others argue for a lowering to 13 out of 16 points. The scoring will be assessed until the publication of the 4th version of the Guidebook.
- Ongoing compliance matters for community gTLDs are brought up in some comments. It is the proposed position that foreseen contractual obligations will adequately address such concerns, in combination with the post-delegation dispute resolution process that is available for communities.
- Among the comments regarding auctions, one identifies an inconsistency in the Guidebook that will be corrected and further clarity will also be given to other provisions, while comments calling for very long periods between auction rounds and alternatives to auctions to resolve "double winner" situations in CPE will not be retained as proposed positions.

II. Comment Summary

Existing legal rights (sec. 4.1.1)

Existing legal rights should also be taken into consideration when resolving string contention. It is unfair to legal rights owners to have to bid against third parties to the financial benefit of ICANN. Where there are legitimate competing rights, a more sophisticated mechanism should be adopted for allocating the relevant gTLD which reflects the nature, breadth and longevity of those rights. *BBC (19 Nov. 2009)*.

Contention between community-based applications

The current process design that two contending community-based applications will go to auction if both of them meet the community priority standard is bad policy. The process should be capable of giving priority to the community TLD that is more desirable from a public policy perspective. A panel must be able to use good judgment instead of blindly relying on a much too general scoring system. An auction should only take place between community-based applications if the applicants agree. If they do not agree and no preference can be determined on public policy principles, then the result should be the suspension of all applications that were determined to be community-based in that contention set. *W. Staub (22 Nov. 2009)*.

Community priority (comparative evaluation)

The only purpose of comparative evaluation criteria is to resolve string contention. Why has Nexus criteria (e.g. “uniqueness”) been implemented to only qualify applicants not facing string contention (thus not the need for comparative evaluation)? *RySG (21 Nov. 2009)*.

The system of allocating points may not be correctly calibrated yet; in addition to meeting a minimum threshold, all community-based applications in Community Evaluation should be re-evaluated. *ECTA/MARQUES (22 Nov. 2009)*.

There is no avenue for appeal of the community priority evaluation procedure for the applicant being evaluated or other applicants affected by it; there is no requirement for a written opinion by the panel giving a rationale for the scores awarded. ICANN should consider requiring the panel to document the basis for scoring and to provide an avenue for appeal. *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Legal rights (Module 3) and String Contention (Module 4) interplay is unclear

Where two applicants both have bona fide rights in the same or similar mark but coexist in the real world because of good/services distinctions, it is unclear how ICANN will assess likelihood of confusion. Could a commercial brand owner and a community-based applicant for the same or similar string advance past the legal objection stage into the string contention stage if both have legitimate rights in the same or similar mark desired for use as a gTLD? If so, the community-based applicant would automatically prevail in string contention as long as its community claim is approved. ICANN should address whether a commercial brand owner’s objection to a community-based application would be considered a “relevant” objection in the community endorsement portion of the community evaluation. *AIPLA (22 Nov. 2009)*.

During evaluation of “eligibility”, “name selection” and “content and use” categories, would a lack of policies and procedures to prevent domain name registrations and use that might create confusion with the commercial brand owner cause the community applicant to lose the available points in those categories? *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Defaults and apparent inconsistency—sections 4.3.3. and 4.4

It is unclear when each section applies and on their face they seem inconsistent with one another. In addition, ICANN should clarify that a runner up who is offered the gTLD after the initial winner defaults will not be considered in default and subject to penalties if it refuses the offer. *AIPLA (22 Nov. 2009). IPC (22 Nov. 2009).*

Community Priority (Comparative Evaluation): Scoring

Community nexus scoring should be returned to 13 out of 16 points to allow one point (plus or minus) due to human error based on subjectivity by evaluators. The staff may be using the threat of “gaming” to ignore the larger ICANN community’s loud and clear call to allow for 13 of 16 points as a fair demonstration of nexus to community. This breeds mistrust. Also, the staff analysis statements that “additional testing has occurred,” which is hard if not impossible for the community to measure or verify, creates frustration. ICANN should publish these test methods and results for community review. ICANN needs to allow for more subjectivity in the scoring, and to lower the threshold for community-based applicants to give some priority benefit to those that should be favored in this process. Otherwise the narrow parameters will lead to a significant number of unnecessary auctions. In making it so difficult to prove a reasonable demonstration of nexus to community ICANN makes it exceedingly difficult for community-based applications to succeed. *BC (23 Nov. 2009). dotECO (22 Nov. 2009). C. von Veltheim (22 Nov. 2009).*

Contrary to ICANN’s public interest obligations, this change means that whenever there is a non-community competitor to one or more community-based applications for a particular string, the contention is extremely likely to be resolved not on the basis of community preference but rather on the basis of who has the deeper pockets. For all the detailed reasons set forth in COA’s comments, the DAG v3 changes reinforce the likelihood that the community priority evaluation procedure will turn out to be an intricately designed anteroom to an auction. *COA (22 Nov. 2009).*

The scoring gives no significant weight to an applicant that is bringing an innovative TLD to the DNS, notwithstanding that innovation is one of the primary reasons cited for expanding the DNS. *IPC (22 Nov. 2009).*

The bar is set too high for meeting the community status threshold. This needs to be fixed. *Minds + Machines (22 Nov. 2009).*

Returning the minimum score needed to demonstrate nexus to a margin of three, i.e., 13 of 16, maintains the rigor but removes the risk of false negatives. ICANN will never be able to remove all subjectivity so staff needs to factor it in to the scoring evaluation. In this way ICANN ensures that community-based applicants go through a rigorous but fair and equitable process. *R. Andruff (Module 4, 14 Nov. 2009).*

Big Room supports 14 out of 16 points needed to win a community evaluation. A high bar is appropriate since an applicant can write responses to the community establishment, string nexus, and registration policies criterion themselves without any community engagement. *Big Room (Module 4, 22 Nov. 2009).*

In sections 3.4.4, Community Objection and 4.2.3, Community Priority, ICANN has made appropriate adjustments to the community definitions and scoring so only true, discrete communities can use the designation and/or objection. *Demand Media (22 Nov. 2009).*

The estimated Comparative Evaluation fee is helpful, but it would be appropriate at this point in the DAG drafting to provide a fee range with an upper limit. *INTA (20 Nov. 2009)*.

Review of scoring system

The scoring system should be reviewed and evaluated after the first round of applications is processed and strings allocated to determine whether the system results in an accurate assessment of the legitimacy of community applications. *INTA (20 Nov. 2009)*.

Subjectivity

The amended notes and scoring system in relation to the Evaluation Criteria handle subjectivity in part by allowing the Community Priority Panel to use information sources outside the application itself to verify circumstances when assessing Criterion #1. This same option should be available to the Panel for assessment of each Criterion. The DAG v3 does address INTA's other concern about subjectivity that the assessment of the applicant's claim should require the applicant to demonstrate how they will comply with the Evaluation Criteria post-delegation. ICANN could address this concern by adding a criterion concerning post-delegation compliance and requiring the applicant to demonstrate how it plans to satisfy this criterion. *INTA (20 Nov. 2009)*.

Community establishment (criterion 1)

Big Room supports the explanatory notes in criterion 1, community establishment. What defines a community could use greater specificity particularly regarding scope, including geographic (i.e., global, country or city). Capture by a particular stakeholder or group is a risk. Applicants could be required to define their community, including geographic scope, and that delineation should also be expressed in the registration policies. Another risk is the inability to evaluate community endorsement due to differing delineation. To resolve this, a mechanism could be established to be employed by an independent evaluator in cases where two differently defined communities are applying for the same string. *Big Room (Module 4, 22 Nov. 2009)*.

Speculators favored over real communities in the current rules

Under the current rules for what constitutes a community and the proposed scoring, speculators are favored over real communities. ICANN needs to lower the threshold to achieve community status. *Minds + Machines (Module 4, 22 Nov. 2009)*.

Registration policies (criterion 3)

Big Room supports ICANN's criterion for name selection, content and use, and enforcement. There is some risk from the lack of a requirement for an ongoing governance process to be put in place for community TLD policies; this could allow a community minority or the TLD registry operator itself to create or change policies in the future without consulting the community. To address this, all community applicants could be required to outline how the community can engage in the ongoing governance of policies and practices of the community TLD. *Big Room (Module 4, 22 Nov. 2009)*.

Community priority criteria

An additional factor should be added—the relevance of the registry operator to the community and the community project it intends to serve. There should be a clear distinction between registry operators pursuing a non-for-profit model to help their community with funding projects, and commercial operations that wish to use the support they got from a community for their own profit. Objective criteria for the registry operator could be: legal status (for-profit, not-for-profit); commitment to allocate certain percentage of profits to fund community-based activities, the larger the better. This should be audited to see if the registry keeps its commitments. *DotSport (Module 4, 18 Nov. 2009)*.

The community priority criteria (sec. 4.2.3) is correct. *E. Brunner-Williams (Module 4, 23 Nov. 2009).*

Community endorsement—levels of support (criterion 4)

The lack of a mechanism to distinguish between levels of support for and non-opposition from a defined community for a particular community TLD application poses the risks of an inability to compare and stakeholder marginalization. To address these risks: (1) community establishment and string nexus should be evaluated prior to evaluating registration policies and community endorsement. Contention sets may be reduced simply on the basis of these two criteria; and (2) the reference to obtaining endorsements from alliances in the community (which could lead to disproportionate representation and inequitable evaluations) should be removed, and recognition for outreach to marginalized stakeholders should be encouraged. Applicants should have to show extra effort to communicate with disadvantaged stakeholders. Related to the risk of capture, endorsements and community support that are materially affected should be disclosed. Community TLD applicants should also be required to provide documentation on how they have engaged stakeholders in their community. Evidence of non-opposition and broad consultation should also be considered as endorsement indicators. Independent evaluators should have the expertise to determine in terms of breadth and depth the overall level of community support that the applicant has been able to generate and the level of effort taken to reach out to their entire community. *Big Room (Module 4, 22 Nov. 2009).*

Self-resolution joint venture (sec. 4.1.3)

Self-resolution of a string contention by recreating the application as a joint venture is not an accepted solution in the current draft. This should be reconsidered. *A. Sozonov (Module 4, Nov. 2009).*

ICANN's financial argument for throwing out the joint venture seems illogical and inconsistent. *S. Subbiah (Module 4, 23 Nov. 2009). RySG (21 Nov. 2009).*

Self-resolution—settlements (secs. 4.1.3, 4.3)

BBC objects to ICANN's proposals. It is highly unlikely that a brand owner would be prepared to share or relinquish control over its brand to a competing brand owner either in the same industry in a different country or a different industry in the same or a different country. It is not possible to reconcile the conflict between national trade mark rights and the global nature of the Internet. *BBC (19 Nov. 2009).*

Community evaluation—eligibility to object (sec. 4.2.3)

Given the scoring and objection process for community TLD applicants, it is appropriate that existing TLD operators should be excluded from opposing in any comparative evaluation. *A. Sozonov (Module 4, 23 Nov. 2009). S. Subbiah (Module 4, 23 Nov. 2009).*

ICANN's self-appointed evaluation role--competing community applications (sec. 4.2.3)

ICANN's self-appointed role of evaluating, as between competing community applications, the preferred applicant is highly problematic. Problems of competing communities are already arising in .eco, .gay, .food, and so on. An unsuccessful applicant, with an arguably equally legitimate right to a community TLD will be shut out from owning the relevant gTLD. These problems will inevitably increase as the rollout of new gTLDs moves forward. *BBC (19 Nov. 2009).*

Evaluator expertise regarding communities

Lack of knowledge and understanding about the community by evaluators could lead to ill-informed evaluation processes and misallocation of points. Mechanisms should be developed for evaluation panels to better understand the breadth and depth of the communities they are evaluating by providing access to a diverse pool of experts and leaders, who could serve as interviewees or informational

resources. Surveys could also be useful as mechanism for checking the assertions of evaluators. *Big Room (Module 4, 22 Nov. 2009).*

Auction—Community Priority Evaluation

INTA’s primary concern that 2 or more “clear winners” under the Community Priority Evaluation will need to compete for a disputed word string at auction has not been explicitly addressed in DAG v3. *INTA (20 Nov. 2009).*

Auction rules

Auction rules should be published as soon as possible. *ECTA/MARQUES (22 Nov. 2009).*

Auctions—problems and future changes

INTA is concerned that auctions will result in gTLD awards to those with the most money not necessarily the best applicant, and that a considerable number of contention sets will go to auction. *INTA (20 Nov. 2009).* *AIPLA (22 Nov. 2009).* *IPC (22 Nov. 2009).* *SIIA (23 Nov. 2009).*

The system as proposed has practical problems. The payment period for the winning bidder is too long. Default penalties for failure to timely pay for a winning bid need to be refined—in some cases they could be excessive; an alternative may be to set a maximum threshold penalty. ICANN needs to specify that the default penalties apply to both the initial winner and subsequent winners if the initial winner defaults. In general, given the potential for significant changes in the auction rules from what is proposed in the DAG v3, it is difficult for any party to assess and consider the practical impact of the auction system if it is potentially subject to such change. *INTA (20 Nov. 2009).* *IPC (22 Nov. 2009).*

The current auction design can be described as brutally revenue-maximizing. The auction process should be redesigned to give opportunities for negotiation during the auction. There should be weeks, not hours, between auction rounds. The objective must not be to force applicants to pay as much money as possible but to resolve the contention as amicably as possible. *W. Staub (22 Nov. 2009).*

Agreement to resolve string contention (sec. 1.1.2.7)

Sec. 1.1.2.7 does not mention agreement between contending parties as a way to resolve string contention; this should be clarified. *IPC (22 Nov. 2009).*

String contention

The staff got it right when deciding that if two public authorities collide for a string, then block is appropriate. Where staff got it wrong is putting a public authority at the same level as a private applicant and this makes geo-squatting a reasonable economic activity, as public authorities have very limited non-planned liquidity with which to gamble on auctions. *E. Brunner-Williams (Module 2, 22 Nov. 2009).*

III. Analysis and Proposed Position

Self-resolution

A couple of comments bring up the possibility of self-resolution of contention situation through agreements between the concerned applicants, suggesting more latitude for joint ventures to that effect, while one comment questions whether voluntary agreements are at all realistic in certain cases, notably between brand-owners. While agreeing that contention resolution through voluntary agreement(s) between the concerned applicants is a preferred solution from most perspectives, ICANN staff underlines that such arrangements require the withdrawal of one or more applications. It is indeed

expected that agreements may lead to the forming of joint ventures, but this must be established by side agreements without changing the formal applicant of the remaining application in order not to prompt a restart of the process with a renewed Initial Evaluation and other time-consuming steps which may also delay the conclusion of the whole round.

Comparative Evaluation Threshold

Multiple comments raise the issue of the scoring threshold for winning a Community Priority Evaluation, currently at 14 out of 16 points. Some find it correct and express support, while others find it too high and recommend a return to 13 out of 16, as in a previous Guidebook version. Those claiming that the threshold is too high invoke the need for an allowance to account for unavoidable subjectivity in the assessments, the desire to avoid false negatives, the risk for unfair opposition wrecking the score, the alleged implicit preference given to "speculators" and the undesirability to have many contention sets requiring resolution by auction, adding to the expenditures for applicants. While full consensus on where the perfect balance is in this respect may be unachievable, it is noted that these arguments may give reasons to further reflect on the threshold value. Guidebook preparation focused on criteria modifications and explanations with the intention to provide more clarity and to achieve reasonable outcomes without changing the overall threshold for winning. In further developing the practical steps of the evaluation process in ongoing discussions with potential providers, these comments will be kept in mind as well as potential options, where one option may be a non-integer threshold value combined with averaging scores from evaluators.

Comparative Evaluation Criteria

A comment suggests that all community applications be re-evaluated in the Community Priority Evaluation step. However, there is no need for evaluation of the "community" aspect of applications prior to this step – it only is necessary in cases of contention, so the notion of a re-evaluation at this step is misplaced. There will be community applications without any string contention situations and those would not require any Community Priority Evaluation to proceed to delegation, provided they have passed the preceding steps.

A comment suggests that criteria and scoring be evaluated after the first round. We agree. It can be noted that an evaluation of all aspects of the first round is already foreseen, as required by the adopted policy.

Criterion 1, Community Establishment

In response to a comment suggesting that Community Establishment and Nexus be assessed before other criteria, it can be noted that the evaluators will follow the criteria sequence as reflected in the Guidebook when performing their assessments.

A comment recommends to take due account of the community delineation. We agree. This is already considered a key factor in the assessment, of importance in relation to all criteria.

A commenter expresses concerns over nascent competing community strings and foresees difficulties in choosing between them. ICANN staff shares the concerns that undesired contention situation may emerge but wishes to highlight that community establishment, and most notably the pre-existence of a community, is a factor of considerable importance in the scoring that may simplify such choices in practice.

Criterion 2, Nexus

A comment expresses doubts about whether "uniqueness" is relevant, alleging that a "unique" string, by definition, would not end up in a contention situation. In the scoring, uniqueness gets a point but it is not required for success. It should be noted that "uniqueness" relates to the meaning of the string. It is quite possible that a string has the "uniqueness" property, although ending up in direct contention with a confusingly similar string.

Criterion 3, Registration Policies

A commenter asks whether lack of policies and procedures would lead to a lower score. The answer is Yes, if the application lacks policies and procedures that would be relevant in line with the scope and nature of the foreseen community TLD.

Criterion 4, Community Endorsement

A comment suggests scrutiny of proof of engagement of stakeholders and various notions of support, such as evidence of non-opposition and of broad community consultations. These suggestions are helpful for unclear cases, when evaluators would need to investigate the situation to arrive at a final score. As expressed in earlier comments analyses, needs for research and verifications by the evaluators may well arise in practice.

A comment proposes that opposition from existing TLD operators should not be permitted or considered. Such an overall exclusion seems inappropriate, since the evaluators have to consider opposition from the relevant community to assess the score and it may happen that a TLD operator is a member of that community. The evaluator is not required to change a score merely because opposition is lodged.

A commenter asks whether a brand-owner's opposition to a community application would be seen as relevant. The answer is Yes if the brand-owner is a member of that community.

Additional criteria

A comment suggests that legal status (profit/not-for-profit) of the foreseen registry operator should be taken into account, proposing a higher score for a not-for-profit registry. However, such a distinction would in practice limit the choice of registry operator for the community. Such a scoring distinction might also be the subject of abuses. The proposed position is not to incorporate this suggestion in the scoring.

Comparative Evaluation Evaluators, Fees

A comment suggests that the evaluators should be assisted by pools of experts and possibly surveys to best understand the communities they are evaluating. The primary objective is to select providers that can draw on extensive and varied expertise for their assessments, but additional means may be required in special cases. ICANN staff is currently performing the selection of providers and once the selection is finalized the Comparative Evaluation fees can be stated in greater detail, in response to a comment received. A commenter asks whether the evaluators will have to justify their findings. Each panel will be required to furnish a report of their findings, not just the decision.

Comparative Evaluation Appeal possibilities

With respect to a request made in the comments for the opportunity to appeal a scoring outcome, the proposed position is not to accept that suggestion. Adding an appeal opportunity to the scoring process would add complexities to the process and impose substantial delays for the process and for all applicants involved. The result of an appeal is not necessarily dispositive. Say an appeal results in a

different outcome – can't the original winner appeal that decision? After all, the score is now one to one. This reasoning is in line with the approach taken for most sub-processes, with a view to maximizing the overall efficiency of the New gTLD process.

Comparative Evaluation Legal rights concerns

A couple of comments relating to legal rights in conjunction with contention resolution deserve to be elaborated upon for clarification. Legal rights can be invoked as a basis for objections by right-holders, regardless of whether they are applicants themselves or not. This is a step that precedes the string contention resolution. If such an objection has not been upheld and the application in question proceeds to the string contention resolution phase, there would be no valid reason to bring up legal rights anew as a factor to consider in the latter phase.

Auctions

Multiple comments mention auctions as the least desirable contention resolution method, being onerous for the winner and not necessarily leading to selection of the "best" application. It should be highlighted that an auction is the contention resolution method of last resort and does have the advantage of always enabling resolution if other options fail. Negotiation and settlement are encouraged to avoid auctions. Comments also require added clarity in the auction rules, which will be forthcoming. One comment states that no auction should occur between multiple "winning" community applicants that are in direct contention and have scored above the threshold unless they all agree to it. Otherwise the panelist should elect a winner based on "public policy principles" and if that's not possible, suspend the applications. We agree with the desire to find an amicable solution but note that this approach may leave the whole contention set unresolved, while a final auction only involving the "winners" is a much clearer and preferred method for resolving the few such cases that can be expected. It would be a poor result if the desired TLD string were to remain unallocated.

A comment demands a clarification on whether a penalty as foreseen for an initial auction winner in default should also apply by inference to the number two, if defaulting, etc and highlights an inconsistency between sections 4.3.3 and 4.4. We agree and will redraft section 4.4 to be in line with 4.3.3. Regarding default penalties, they will only apply to defaulting "number twos" if they default after initially responding affirmatively when given the opportunity following a default of the original winner.

A comment suggests longer periods between auction rounds, "weeks not hours", and opportunities for negotiations in-between rounds. This would delay the whole process and the final resolution considerably, and consequently it is not retained as proposed position. There will be weeks to prepare for the auction so that parties can come in with well thought out plans.

Community gTLDs, Compliance matters

A couple of comments bring up how compliance can be assured, once a community gTLD is in operation. It should be noted that any community-based gTLD will be contractually held to its commitments to the community and the restrictions in its registry agreement. This will be the case regardless of whether the application has gone straight through the process unchallenged or passed a Community Priority Evaluation. Accountability to the community is further safeguarded thru the opportunity for the community to lodge a post-delegation objection if the gTLD deviates from its dedication to the community.

OBJECTION AND DISPUTE RESOLUTION

I. Key Points

- Consolidation of objections by dispute resolution providers will and has been strongly encouraged, but it is ultimately left to the discretion of the DRSP to evaluate and balance the efficiencies of consolidation and possible prejudice that might result from it. Each DRSP has published its rules that include statements on consolidation.
- There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.
- It is expected that DRSPs will select experts who are well qualified in the subject matter of the application and the objection, as well as the language of the parties.

II. General Process Comments

Purpose of dispute resolution process (sec. 3.1)

The word “limited” should be removed from the first sentence of section 3.1 so that it is not misconstrued by the ICANN community (e.g., replace it with “defined”). *INTA (20 Nov. 2009)*. What is meant by reference to “applicability of this gTLD dispute resolution process”? *Microsoft (23 Nov. 2009)*.

Challenges to existing gTLD operator (sec. 3.4.2 point 4)

The new gTLD process is not the place to object to TLD operators to date. The clause “or operates TLDs or” should be deleted. *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Independent dispute resolution process

To connect this qualified language to the objection grounds, Section 3.1 should be modified to read: “The independent dispute resolution process is designed to protect the interests and rights covered by the scope of the objection grounds set out below.” *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. The phrase “and competence of the designated experts to issue decisions in this process” should be added to Section 3.1 paragraph 2 and Section 3.3.4. *IPC (22 Nov. 2009)*.

DRSPs—objection process

It should be specified that each DRSP has exclusive competence to handle the Objections for which it has been designated, unless ICANN appoints additional DRSPs for the same categories of objection. ICANN should also specify what happens if an objector files with the wrong DRSP. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

III. Analysis and Proposed Position

Some general comments have been received with respect to the overall objection process. Those include specific suggestions for word changes, requests for clarity and making reference to competence of the dispute resolution providers.

All suggestions that can help clarify language are welcome. ICANN will consider the suggestions for specific language changes and will make revisions in the next published version of the applicant guidebook, if appropriate.

One comment requested clarification of the phrase “applicability of this gTLD dispute resolution process.” This statement refers to the New gTLD Dispute Resolution Procedure (the “Procedure”), the current draft of which was posted as an annex to the Draft Applicant Guidebook version 3. Applicants for new gTLDs and objectors to such applications must accept that their dispute arising from the objection will be resolved in accordance with the Procedure. See Article 1(d) of the Procedure, which states:

By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval the relevant DRSP

With respect to the dispute resolution provider’s competence, the Procedure tries to make the exclusive competence of the respective DRSPs clear: Article 3 of the Procedure identifies the single DRSP that has competence to handle each specific category of objection. Article 7(b) stipulates, in part, that “[t] he Objection must be filed with the appropriate DRSP...”, and Article 7(e) sets out the procedure to be followed in case an objector files an objection with the wrong DRSP. ICANN will look to see if this can be further clarified although at first glance, no further changes appear necessary.

Procedures

Objection filing timeframe (sec. 1.1.2.4)

The two week period for filing objections is too short; it should be extended to thirty days at a minimum. *MarkMonitor (Module 1, 20 Nov. 2009)*. *INTA (20 Nov. 2009)*. *Coca-Cola (24 Nov. 2009)*. *Microsoft (23 Nov. 2009)*. *BITS (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

The extended time to 30 days would allow trademark owners to wait and see if an application fails evaluation before preparing an objection. *ECTA/MARQUES (22 Nov. 2009)*.

The objection time period is too short; ICANN should allow a reasonable time (e.g., opposition period in the U.K. for new trademark application is now two months). Since the two week window will close before the outcome of an Extended Evaluation, there appears to be no opportunity to object to applications which fail the Initial Evaluation but are subsequently successful in the Extended Evaluation. *BBC (19 Nov. 2009)*.

Response timeframe (sec. 3.1.4)

Given the limited time to respond to objections especially in English for an IDN applicant and the resources and substantial investment that an applicant has put into the process, it seems unfair to immediately dismiss an application just because an objector pays a few thousand dollars and spends a few days to prepare an objection and the applicant takes more than a couple of weeks to respond. *S. Subbiah (Module 3, 23 Nov. 2009)*. Allowing more response time might be reasonable. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Objections—languages

Why must objections be filed in English? This is unreasonable. *M. Neylon (22 Nov. 2009)*.

Response filing fee

Forcing an applicant to pay a fee to defend themselves is unreasonable. *M. Neylon (22 Nov. 2009)*.

Resubmission of corrected objection (sec.3.3.1)

If rejected on an administrative basis without bias will there be time to re-submit a corrected objection and will that require another fee? *S. Subbiah (Module 3, 23 Nov. 2009)*. In-person hearings can be cheaply conducted over the Internet. Objectors should be given a brief opportunity to rectify any errors where their objection does not comply with procedural rules. *BBC (19 Nov. 2009)*.

Consolidated objections (sec. 3.3.2)

Presumably consolidation of objection results in reduced cost for each objector? *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *A. Sozonov (Module 3, 23 Nov. 2009)*.

Brand holders should be able to consolidate complaints against the same party. *Visa (23 Nov. 2009)*. Both consolidated objections and responses should be possible. *Microsoft (23 Nov. 2009)*.

Each DRSP should publish the criteria it will use in making a decision to consolidate objections and should be encouraged to consolidate similar objections into one proceeding if requested by either the applicant or any objector. *RySG (21 Nov. 2009)*.

Separate objections may become burdensome if a number of community-based applications are filed. ICANN should consider the financial organization of the objector in setting and determining fees. *BITS (22 Nov. 2009)*.

Consolidated objections (sec. 3.2.1)

There should be a single objection in the cases of (1) a single objector objecting to two applications by a single applicant on the same grounds (e.g., the same trademark rights); and (2) in the event a single objector has two different grounds to object to an application (e.g., legal rights and community grounds). *BBC (19 Nov. 2009)*.

Consolidated objections (sec. 1.1.2.6)

DRSPs should be required to consolidate objections where feasible. *RySG (21 Nov. 2009)*. Applicants and objectors should be able to refuse consolidation of objections proposed by the DRSP. *Microsoft (23 Nov. 2009)*.

Expert panel—liability exclusion (3.3.4)

This provision should be clarified to allow the exclusion of the potential liability of a panel as a whole and not just the liability of experts individually. *IPC (22 Nov. 2009)*.

Publication of DRSP panel decisions

Every panel decision from a DRSP should be published on the DRSP website and made publicly available. This is discretionary in the DAG v3 and there are no guidelines set forth about it. *AIPLA (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Time extensions—negotiation/mediation (sec. 3.3.3)

The proposed limit on time extensions to allow for negotiation/mediation (30 days) will not encourage resolution in practice. Trademark proceedings could be a useful model to follow—in many jurisdictions the parties are encouraged to put the proceedings on hold to facilitate settlement. *BBC (19 Nov. 2009)*.

Why shouldn't automatic extensions be granted (30 days or less) if all impacted parties agree and request them? Also, all or part of the DRSP fees should be refunded when disputes are settled by negotiation without DRSP intervention. *RySG (21 Nov. 2009)*.

The new gTLD Dispute Resolution Procedure enabling the parties to suspend the proceeding or extend its deadlines pending negotiation is very helpful. The objector may require formal guarantees from the applicant prior to withdrawing the objection. The applicants should be able to document additional guarantees and commitments as an addendum to the TLD application, and the addendum should be published and enforceable under the PDDRP policy. *W. Staub (22 Nov. 2009)*.

DRSP decision—timeframe and effect

Timely action by DRSPs is an important part of the process. ICANN still has not answered why it deleted text about a 45 day decision timeframe target for DRSPs. *RySG (21 Nov. 2009)*. ICANN should clarify that the ICANN Board will take action in accordance with the expert determination in making a final disposition of the application. *Microsoft (23 Nov. 2009)*.

Objector prevails by default

If an objector prevails by default, a new application for the same objected-to string should not be permitted to be filed unless the application includes documentation of the objector's written consent. *Microsoft (23 Nov. 2009)*.

Three person panel (article 13)

Why was there no response to the suggestion made in the DAG v2 comments that there should be an option for a three person panel? *RySG (21 Nov. 2009)*. Each party should have an opportunity to request a three person panel with the additional costs to be borne by the requesting party. *Microsoft (23 Nov. 2009)*.

Expert determination (sec. 3.3.6)

For financial gTLDs, some expertise from the financial services industry should be included in the expert determination process. *BITS (22 Nov. 2009)*.

Panel—IDN applications (sec. 3.3.4)

For IDN applications, in each of the panel types, even if there is only one panelist on the panel at least one panelist must be from that IDN community—a native speaker of that IDN and from that country/countries where that language is predominantly spoken. *S. Subbiah (Module 3, 23 Nov. 2009)*. *Y. Kwok (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *A. Sozonov (Module 3, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*. *D. Allen (24 Nov. 2009)*.

Hearing (sec. 3.3.5)

A hearing should be part of the dispute resolution process, not only in extraordinary cases. It may be a very effective way to evaluate disputes. The case of a TLD dispute is not a regular domain dispute evaluated under a UDRP, but is a much more substantial and complex case. A hearing conducted on a conference call can be done with very low cost and be very productive for all parties. *Y. Keren (Module 3, 23 Nov. 2009)*. *S. Subbiah (Module 3, 23 Nov. 2009)*. *Y. Kwok (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*.

Full and fair adjudication (sec. 3.3.5)

Cost is an important factor, but rapidity of resolution should not take priority over ensuring that there is full and fair adjudication. The proposed time limits throughout the dispute resolution procedures are very short. *BBC (19 Nov. 2009)*.

Appeal rights

Objectors in a dispute resolution proceeding must not be forced to give up all legal rights beyond the ICANN proceeding, particularly the right to seek redress in court. *IBM (22 Nov. 2009)*.

DRSP rules

DAG v3 did not respond to this suggestion made regarding DAG v2: the rules and procedures used by the different DRSPs should be published and made available for comment. *RySG (21 Nov. 2009)*.

Analysis and Proposed Position

Comments on specific procedures encompass many particulars that have already been addressed and in response to which changes have already been made to the procedures.

One major topic of discussion is consolidated objections. Consolidation conditions are set forth in Guidebook § 3.3.2 and Article 12(c) of the Procedures. In the appropriate circumstances, the dispute resolution service provider may elect to consolidate certain objections. A specified example is multiple objections to the same application based upon the same grounds. Consolidation will and has been strongly encouraged but it is ultimately left to the discretion of the DRSP to evaluate and balance the efficiencies of consolidation and possible prejudice that might result from it. Indeed, it is anticipated that consolidation will reduce the costs for all parties involved in consolidated proceedings, at a minimum with respect to the panel fees. Further, the individual providers may also have specific rules relating to consolidation (which have been published). For example, see Draft WIPO Rules for New gTLD Dispute Resolution at <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>.

Many comments revolve around the panel, its expertise, holding of proceedings and the determination. It is required that DRSPs will select experts who are well qualified in the subject matter of the application and the objection, as well as the language of the parties. Further, the current version of Article 13(b) of the New gTLD Dispute Resolution Procedure provides for three-person panels for morality and public order objections and permits the option of a three-person panel if all parties agree in proceedings involving legal rights objections. The holding of a hearing can greatly increase the cost and duration of a dispute resolution procedure. However, in some cases, this increased cost and duration may be justified, especially if measures can be taken to minimize the costs and delay of a hearing (such as using videoconferences and limiting the duration of the hearing). Article 19 of the New gTLD Dispute Resolution Procedure seeks to balance these competing interests. In a further attempt to ensure efficiencies, and contrary to one comment, ICANN has not deleted the 45-day time limit for the Panel to render its determination. Article 21(a) of the New gTLD Dispute Resolution Procedure provides that the “DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel.”

Article 22 of the New gTLD Dispute Resolution Procedure stipulates an exclusion of liability that is quite broad. It is similar to the exclusions of liability incorporated in the rules of major international arbitration institutions. It is unnecessary to refer to the panel as a whole in such an exclusion of liability.

Finally, Article 22(g) of the New gTLD Dispute Resolution Procedure provides that, unless there are exceptional circumstances, the decisions should be published on the providers website.

In terms of time extensions for negotiation and mediation, because the objection and resolution process is taking place prior to delegation, it is not expected that there will be the same issues and evidence that might result post-delegation. It is not intended for the pre-delegation process to be lengthy, which is why the process will not be automatically suspended. If it is appropriate to do so, such considerations will be left to the discretion of the DRSP or the panel itself. The parties remain free to discuss settlement and to attempt mediation notwithstanding the fact that the proceedings are pending. In terms of refunds, the current draft guidebook provides that different types of disputes will have different types of costs and fees associated with them, and it permits the DRSP to determine and publish the costs and fees that are appropriate for the given dispute. The discretion to refund fees will be left solely with the DRSP. The DRSP may determine that, under the circumstances of a given case (e.g., if the dispute is settled immediately after the appointment of the expert(s) and the parties' payment of the advance on costs), a portion of the costs paid by the parties should be refunded to them.

Some comments ask for clarity about administrative review

Objectors shall indeed have an opportunity to rectify errors that are identified in the DRSP's administrative review of the objection. See Article 9 of the New gTLD Dispute Resolution Procedure, which includes the following provisions:

(c) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, the DRSP shall have the discretion to request that any administrative deficiencies in the Objection be corrected within five (5) days. If the deficiencies in the Objection are cured within the specified period but after the lapse of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure, the Objection shall be deemed to be within this time limit.

(d) If the DRSP finds that the Objection does not comply with Articles 5-8 of this Procedure and the applicable DRSP Rules, and the deficiencies in the Objection are not corrected within the period specified in Article 9(c), the DRSP shall dismiss the Objection and close the proceedings, without prejudice to the Objector's submission of a new Objection that complies with this Procedure, provided that the Objection is filed within the deadline for filing such Objections. The DRSP's review of the Objection shall not interrupt the running of the time limit for submitting an Objection stipulated by Article 7(a) of this Procedure.

Morality and Public Order Objections

Morality section

The "morality" section should be removed in its entirety. Most of the issues could just as easily be covered under "illegal activities." *M. Neylon (22 Nov. 2009)*.

Morality and public order objection—amendment

The M&PO objection provision should be amended to make reference to legal instruments addressing freedom of expression and freedom of association (i.e., the U.S. Constitution's 1st Amendment, Articles 19 & 20 of the Universal Declaration of Human Rights) so that they are part of the criteria for assessing the validity of an objection. The name of a gTLD is an issue at the content layer of the Internet and not

simply a matter for the logical layer of the internet and thus needs to be addressed within the legal and constitutional frameworks that protect speech and association. This will enable ICANN to make reasonable judgments precisely to protect the rights of applicants, communities and ICANN itself. *APC (23 Nov. 2009)*.

Morality and public order objection—“quick look”

ICANN must clarify what is meant by the “quick look” evaluation of these objections so that stakeholders can ensure that their role as conscientious participants in a bottom up policy development process is retained. *CADNA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

Morality and Public Order objection – grounds for objection

Is “increased potential for financial fraud” a ground for a morality and public order objection? *BITS (22 Nov. 2009)*.

Analysis and Proposed Position

Some still do not like the Morality & Public Order section at all, others would have the standards amended to refer to legal instruments, and still others are not sure of the standards.

It is clear that there will be an objection process for those claiming that applied for strings might violate Morality & Public Order. The standards for such objections are set forth in DAGv3, § 3.4.3, and the factors to be considered are enumerated. Furthermore, the policy recommendation itself for objections on such grounds, which will be part of any expert’s review, include reference to various legal instruments and treaties. The experts will make determinations upon the facts and circumstances of each case keeping in mind the relevant standards.

Some comments ask for clarification of the “quick look” evaluation. Additional clarification will be provided in the next version of the applicant guidebook.

Independent Objector

Independent objector—qualifications, term

ICANN should specify the type and breadth of experience in Internet and legal communities required of successful IO candidates. The IO should also be subject to performance review before any renewal of his/her term, and ICANN should consider public comments on the IO during this review process. *INTA (20 Nov. 2009)*.

A panel of three independent panelists may be more appropriate. Any outside counsel retained by the IO must be independent of any new applicant, existing registry or registrar. *ECTA/MARQUES (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

More information is needed about the IO and its role. *CADNA (22 Nov. 2009)*.

The “highly objectionable” character of an application is in the sole discretion of the IO. *IPC (22 Nov. 2009)*.

Independent objector—fee coverage (sec. 3.1.5)

All filing and administrative fees arising from actions taken by the Independent Objector (IO) should be covered by the new gTLD application fee proceeds. The current proposal to have the IO cover these fees with a refund only in cases where it prevails means that the IO will likely file objections only when a favorable ruling is certain and may shy away from questionable but still important cases. The IO should be required to conform to the new gTLD Application Program Code of Conduct to prevent any real and apparent conflicts of interest. *MarkMonitor (Module 3, 20 Nov. 2009)*.

It is not clear who will provide the IO's budget and funding. *BITS (22 Nov. 2009)*.

Independent objector-neutrality

Why has the IO been introduced within potential group objections? How can ICANN guarantee neutrality when choosing an independent objector? If there is an "ICANN-approved" procedure, is there any chance for an outsider to see and discuss it? *CONAC (Module 3, 23 Nov. 2009)*.

ICANN should adopt sound policies to ensure IO impartiality, including transparency and accountability mechanisms. *INTA (20 Nov. 2009)*.

The IO should be unaffiliated with any gTLD applicant or existing gTLD operators. *IPC (22 Nov. 2009)*.

To ensure independence, ICANN should consider having an independent constituency appoint the IO instead of ICANN. *BITS (22 Nov. 2009)*.

Independent Objector—proper function

The role of the IO may have some value where its role is limited to providing a means for those who are not financially able to file an objection to be able to be heard, subject to following certain tightly defined requirements. *RySG (21 Nov. 2009)*.

Analysis and Proposed Position

Comments received relating to the Independent Objector (IO) include discussion of the IO's qualifications, terms of service, independence, impartiality, funding and role.

The current Draft Guidebook, §3.1.5, provides that the IO will be "an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant." The intent behind this description was to establish minimum standards for the IO without being too specific so that qualified candidates would not be foreclosed from serving. Given the breadth of areas in which the IO may serve, i.e. from morality to various communities, a point-by-point job description may be too limiting, but any further input as to IO qualifications is welcome.

The term of the IO is limited to the time necessary to carry out his/her duties during a single round of gTLD applications. Guidebook version 3, § 3.1.5. ICANN will naturally review the IO's performance, taking into account public comments, prior to renewing the IO's term.

With respect to the IO's neutrality and independence, the current draft Guidebook, §3.1.5, states that the "IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence." These standards are believed to encompass the standards in the code of

conduct. Further, while it is impossible to guarantee neutrality, it is believed that every step that can be taken to ensure neutrality will be followed. First, the IO would be selected through an open and transparent process. Moreover, recommendations from the community are welcomed. Additionally, the current proposal would require that the IO be independent from and unaffiliated with any of the gTLD applicants. In this regard, it is believed that the best practices to ensure neutrality have been followed and that ICANN's process will ensure independence by the IO, to the extent possible. As for any outside counsel engaged by the IO, ICANN agrees that such counsel must also be free of conflict before agreeing to perform services for the IO.

All filing and administrative fees arising from actions taken by the IO are intended to be covered by the new gTLD application fee (see DAGv3, §3.1.5). The rule providing that the loser pays the winner's costs is intended, in part, to discourage frivolous objections, but parties operating under this rule often initiate proceedings in cases where the outcome is questionable but the issues are important. ICANN will take proper steps to ensure that it engages an IO who will file objections whenever they are appropriate. To that end, ICANN anticipates that a sole IO can perform the duties incumbent upon him/her and does not think it is necessary or efficient to incur the cost and delay of having a three-person panel act as IO.

Legal Rights Objections

Legal Rights Objection—inappropriately limited scope (secs. 3.1.1, 3.1.2.2. and 3.4.2)

Section 3.1.1 and the glossary definition of legal rights objection do not appear to fully encompass GNSO Recommendation 3, which addresses infringement of “the existing legal rights of others under generally accepted and internationally recognized principles of law.” The DAG v3 inappropriately limits the scope of this objection to trademark infringement. In order to conform to the GNSO's Recommendation, section 3.1.1 and the glossary definition of a Legal Rights Objection should be described in a manner similar to the present Morality and Public Order Objection, incorporating the specific direction as to scope provided by the GNSO. GNSO Recommendation 3 also suggests a significantly broader scope to the phrase “existing legal rights” than that articulated by the term “rights” in present section 3.4.2. The scope for objection on grounds of ownership of other intellectual property rights or other non-intellectual property rights arising under “generally accepted and internationally recognized principles of law” (see examples in Recommendation 3) should be clarified. *H. Forrest (Module 3, 23 Nov. 2009)*.

Legal Rights Objection—clarifications needed

The LRO lacks detail, such as the threshold of legal rights one must surpass to be considered a rights holder. How many trademarks must be filed and in which geographic areas the marks must be valid and other pertinent information should be provided. Not specifying these details in the DAG will allow for potential confusion. *CADNA (22 Nov. 2009)*.

Greater certainty on how the listed factors would be applied would be helpful—e.g. how would WIPO resolve an objection where both the objector and applicant have legal rights in the same mark, but the geographic scope of the objector's rights far exceeds those of the applicant's or the objector's mark is more well-known than the applicant's. Also, ICANN should clarify if determinations made in legal rights objection and string confusion proceedings will have any preclusive effect and, if so, to what extent. *Microsoft (23 Nov. 2009)*.

Legal Rights Objection—standing

Both owners of collective and certification marks should have standing to file LROs. The reference to “rights holder” in section 3.1.2 should be clarified to include an exclusive licensee. The LRO sentence in section 3.1.1 should be modified to replace the term “objector” with an expanded “rights holder” term (suggested amendment: Legal Rights Objection – the applied-for gTLD string infringes the existing legal rights of the rights holder (including those of any exclusive worldwide licensee of such rights holder). *INTA (20 Nov. 2009)*).

Legal Rights Objection--three experts

Parties should have the option of selecting three experts in LRO proceedings but subject to approval of both parties, which the DAG v3 appears to be silent on. *AIPLA (22 Nov. 2009)*.

Legal Rights Objection—court appeal

Parties should have the right to challenge in court ICANN’s decision regarding an LRO. Module 3 does not address whether ICANN’s decision is appealable or otherwise subject to challenge. *AIPLA (22 Nov. 2009)*.

Legal Rights Objection—likelihood of confusion standard

AIPLA supports a likelihood of confusion standard and supports the revision protecting unregistered marks for LROs. AIPLA remains concerned that the language “whether the objector’s acquisition and use of rights in the mark has been bona fide” is unclear. A more practical statement would be: “Whether the objector’s acquisition of rights in the mark, and use of the mark, has been bona fide.” *AIPLA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*.

Legal rights objection (sec. 3.4.2 point 1)

The guidebook also needs to state explicitly that all existing TLD string operators can only object via the string confusion mechanism and not the legal rights objection since they already have a special mechanism to object. The legal rights objection should be reserved for those who have legal rights and not already an existing ICANN TLD registry operator. Absent this restriction for the existing TLD registry operators, they will unfairly have the opportunity to block an IDN for example on “similar meaning” and in effect own rights within ICANN to that meaning in every language, and the IDN domain process will be opened up to Western speculators at the expense of poor native speakers of the language. *S. Subbiah (Module 3, 23 Nov. 2009)*. *A. Mykhaylov (Module 3, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

ICANN has ignored the informed work of those who do know IDN, the GSNO IDN Expert Working Group. Is it any surprise that the result once again favors incumbent actors rather than those who need and use such TLDs? *D. Allen (24 Nov. 2009)*.

The “existing mark” across IDN scripts should be considered for the legal rights objection only in cases where this mark is registered in the country where this language/script is used and spoken as an official language. *A. Sozonov (Module 3, 23 Nov. 2009)*.

Analysis and Proposed Position

Comments on the Legal Rights Objection vary from concern over the limitation to trademark rights and those who might be in a position to object on such grounds, the lack of detail as to what rights might be required to prevail, the number of panelists in a proceeding, whether the panel will be asked to decide

whether one party's rights are "stronger" than another, and the preclusive effect or appealable nature of a determination

It is true that as implemented the Legal Rights Objection has been limited to trademark rights, including both registered and unregistered marks, and this includes existing TLD registry operators. That said, there is no minimum number of registrations or uses necessary for an applicant to show. Each case must be decided on its own merits. Care was taken to adopt factors that have been used in other types of proceedings so that there is some level of precedence to which panels can look, but each case turns on the particular facts and circumstances, so additional specificity for certain fact patterns cannot be provided.

In terms of Panels and determinations, Article 13(b)(ii) of the New gTLD Dispute Resolution Procedure provides that "[t]here shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes in proceedings involving an Existing Legal Rights Objection. Furthermore, the intent of the procedure has always been that the parties do not waive any rights they have to proceed in any appropriate jurisdiction against a party for infringing conduct.

Community-Based Objections

Institution launching community-based objection

The definition of an institution capable of launching a community-based objection is much narrower than was the case in the previous TLD round; there seems to be no justification for this change. *Telnic—minority position in RySG (21 Nov. 2009)*.

Community objections: Factors

The list of factors in Section 3.1.2.4 should not be considered exhaustive and it should be left open to provide for the possibility for objectors to submit additional factors for the consideration of the panel. *IPC (22 Nov. 2009)*.

Community objections: "complete defense" (sec. 3.4.4)

The "complete defense" clause is still unjustified and dangerous. Rather than minimizing the number of objections, it would only displace them so that they would have to be dealt with in front of the ICANN board. This clause also causes opposition to the entire gTLD process. *W. Staub (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

The "complete defense" clause should be removed; it will effectively nullify the entire community objection process. *Microsoft (23 Nov. 2009)*.

Community objection standards and procedures

COA's outlined concerns with the community objection standards and procedures in its v2 comments did not result in any changes in DAG v3, and it refers to those comments for full details. ICANN has set up a system which restricts the community objection process as much as possible to channel potential objectors into filing their own new gTLD applications. *COA (22 Nov. 2009)*.

Community objection (sec. 3.3.1, 3.1.2)

It is incongruous that it is proposed that a single institution can endorse an application to raise it to the community level, but it requires substantial opposition from a significant portion of the community to

object. If this level is required to object, then it should be required in the first place. The terms “substantial” and “significant” are too open-ended and further definition of them is warranted. The level of community involvement to object should be clarified. Section 3.1.2 seems to suggest that a single “established institution” may object, while section 3.1.2.4 seems to change the criteria again. These sections should be reconciled, as well as Section 3.4.4, which raises a similar incongruity. *BITS (22 Nov. 2009)*.

ICANN should clarify the inconsistency on pages 3-4 regarding the factors determining if the objector has an ongoing relationship with a clearly delineated community (“factors that may be considered” v. “balancing of the factors listed above”). *Microsoft (23 Nov. 2009)*.

Community objection--detriment (sec. 3.4.4)

Add to the phrase “The objector must prove that there is a detriment to the rights or legitimate interests of its associated community” the phrase “or its constituents.” Requiring the High Verification program would solidly indicate that the applicant intends to operate a secure gTLD. *BITS (22 Nov. 2009)*.

Flaws in community objection process—detriment

COA has never called for eliminating the detriment requirement, only for shifting the burden of persuasion on detriment, and has not urged that every challenger should benefit from this burden shift simply by filing an objection, but only a challenger who has shown that it meets the criteria of community delineation, substantial opposition, and targeting. Giving certain objectors with standing veto power over applications is precisely what all the objection procedures spelled out in the DAG are about. Apparently only in the field of community objections is a valid representative of the community targeted by a proposed string to be told that its objection fails for lack of sufficient proof of “detriment” and that its only remedy—now longer available to it—would have been to apply for the string itself. *COA (22 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

It is unclear why an objector with standing must still prove detriment above and beyond allocation of the challenged string to the applicant. *Microsoft (23 Nov. 2009)*.

Analysis and Proposed Response

Comments received on the community-based objection process, largely track comments received and previously responded to. Others seek clarity. And still others seems to suggest that any party that would otherwise have standing to apply, should prevail in an objection against an otherwise valid community-based applicant.

Considerable thought has been given to the topics of complete defense and proof of detriment, and have been previously addressed in detail. Neither the complete defense provisions, nor the proof of detriment requirement on the objector, are intended to nullify the community objection process. As already stated, the New gTLD Program, with its dispute resolution and string contention procedures, is designed to safeguard a dispute panel from purporting to recognize the legitimacy of any specific organization as the representative of any group, religion, etc. There may well be multiple applicants that compete for the same string. The procedures are aimed at resolving the conflicts that arise from those applications. In short, the delegation of community-based gTLD to a particular community shall not constitute and should not be seen as recognition of any particular group or organization as the legitimate representative of that community.

If two institutions with proper standing apply for the same community-based gTLD, the string contention procedure (rather than the dispute resolution procedure) will determine which applicant might be delegated the gTLD. ICANN has agreed with suggestions from the community that the complete defense should only be available to those applicants who apply for a community-based TLD and has revised the standards to reflect that. An applicant for a TLD that does not first submit its application as Community-based should not be entitled to later claim a complete defense in the face of an objection by stating that the applicant meets the Community standing requirements.

There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant. Therefore, in response to certain comments, it is not incongruous that “a single institution can endorse an application to raise it to the community level, but it requires substantial opposition from a significant portion of the community to object.” Further, the experts who decide community objections will consider what “substantial” and “significant” mean in light of the facts and circumstances of individual cases

Finally, in terms of the comments seeking clarity, section 3.1.2.4 does not change the standing criteria stated in Section 3.1.2. A single “established institution” may indeed have standing to file a community objection, provided that it satisfies the other criteria for standing (the factors for determine the existence of an “established institution” set for in section 3.1.2.4 are not exhaustive). And, there does not appear to be any “incongruity” in Section 3.4.4, which describes the standards to be applied on the merits of a community objection, not the criteria for standing.

String Confusion Objection

String Confusion Objection (sec. 3.1.2.1)

Part of the section should be clarified: suggested language: “...where string confusion between the two applicants has not already been found during the Initial Evaluation. That is, an applicant does not have standing to object to another party’s application for string confusion with which it is already in a contention set as a result of the Initial Evaluation.” *IPC (22 Nov. 2009). Microsoft (23 Nov. 2009).*

The vague generalities in this section about “confusion” in no way address the realities. Only the language communities can speak to the specifics in each of their particular situations. Why has ICANN not devolved responsibility accordingly? *D. Allen (24 Nov. 2009).*

Strings subject to successful string confusion objection

In cases where an application is rejected because an existing TLD operator successfully asserted string confusion with an applicant, the rejected string should be added to a “rejected TLDs” list. Any of the strings that are included in the “rejected TLDs” list should not be delegated to any party (including the existing TLD operator) in the future indefinitely. *Y. Keren (Module 3, 23 Nov. 2009). S. Subbiah (Module 3, 23 Nov. 2009). A. Sozonov (Module 3, 23 Nov. 2009).*

It is assumed that if based on the confusion criteria if the string is found confusingly similar with the existing string and the objection is satisfied, then it may not be registered by anyone else later. *A. Mykhaylov (Module 3, 23 Nov. 2009).*

III. Analysis and Proposed Response

Two main topics have been raised relating to string confusion. First revolves around under what circumstances someone may object to an application on the grounds of string confusion. The comment suggests that it be clarified that one does not have standing to object to another for string confusion if, in Initial Evaluation, they two strings are already placed in a contention set. The Guidebook was intended to be clear that Initial Evaluation is the only stage in which, outside of the objection process, two strings would be deemed in contention for similarity. That said, ICANN will review to determine if more clarity in the next version of the applicant guidebook would be helpful.

The second suggestion was that where an application is rejected because an existing TLD operator successfully asserted string confusion with an applicant, the rejected string should be added to a “rejected TLDs” list, and those on the list should not be delegated to any party. Section 3.1.2.1 in the current draft addresses this scenario. If the case where an existing gTLD operator successfully asserts string confusion, the application will be rejected. It will not, however, be permanently removed from circulation since different circumstances could arise in the future.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)

I. Key Points

- The availability of the RRDRP will not replace ICANN’s contractual compliance oversight responsibilities. ICANN remains committed to enforcing contractual obligations and will do so from all new registry agreements
- The recommended remedies found in any Expert Determination shall be subject to review, approval and enforcement by ICANN.

II. Comment Summary

RRDRP - ICANN’s Contractual Compliance Enforcement Duties

INTA supports this proposed procedure to allow third parties with standing to seek enforcement of the term of a gTLD’s registry agreement. However, INTA believes that the RRDRP’s existence will not and should not limit or supplant ICANN’s contract compliance responsibilities. ICANN should be a party in RRDRP proceedings. *INTA (20 Nov. 2009)*.

If ICANN is not going to conduct contract compliance it should so state. *Microsoft (23 Nov. 2009)*.

RRDRP –Administrative Review of Complaint

A 5-day administrative review period (not 10 days) should be provided. There should be a 5-day period within which a complainant may cure any administrative deficiencies in the complaint. In its response, *INTA (20 Nov. 2009)*

RRDRP – Fees

The RRDRP fee should be less than \$1000 unless the complainant has previously filed a complaint and ICANN has concluded that the allegations are without merit. A minimum and maximum range should be

set regarding proceeding costs. If the provider appoints an expert, the provider must bear the cost of the expert's fees. A party requesting a hearing (videoconference or teleconference) should bear its cost, *INTA (20 Nov. 2009)*.

The Provider should bear parties' costs if the Expert wants to conduct discovery, take written statements or hold a hearing. *Microsoft (23 Nov. 2009)*.

RRDRP - Panels

The party paying the fee should have the sole choice of whether the panel consists of one member or three members. There should be a 15-day period for appointing the panel (not 30 days). ICANN should establish a deadline by which panel determinations must be rendered (e.g. 60 days after complaint is filed), *INTA (20 Nov. 2009)*.

There should be 14 days for appointing the panel. *Microsoft (23 Nov. 2009)*.

RRDRP - Standard

The standard should be "preponderance of the evidence" because "clear and convincing" is too burdensome. The evidentiary standard for finding a case "without merit" should be the same standard applied to the complainant. *INTA (20 Nov. 2009)*.

The burden of proof should be clear and convincing. *Microsoft (23 Nov. 2009)*.

RRDRP – Standing

ICANN should eliminate the standing requirement for RRDRP complaints or in the alternative allow the IO to initiate RRDRP proceedings. *INTA (20 Nov. 2009)*.

Standing requirements should be clarified so that individuals have standing, including the Independent Objector. *Microsoft (23 Nov. 2009)*.

RRDRP – Remedies

ICANN should outline maximum and minimums for penalties or sanctions; should clarify that monetary sanctions (with the possibility of attorneys fees) will be paid to the complainant; and should base them on the greater of the financial harm to the complainant or the financial benefit to the registry, with treble damages for egregious conduct. Violating registrations should be deleted and refunds, if any, to registrants of such violating registrations should be paid by the gTLD operator. First time offenders should be temporarily banned from registering new gTLDs, and repeat offenders should be permanently banned. Complainants should never be banned from filing complaints. The panel should have the express authority to order remedial measures and barring any justification to the contrary from ICANN remedies should take effect immediately. *INTA (20 Nov. 2009)*.

Remedies should include deletion of domain name registrations that were made in violation of the registry agreement restrictions. Notice of this potential remedy should be provided to registrants through the contracting process. *Microsoft (23 Nov. 2009)*.

RRDRP – Disclosures by Complainants

Complainants should be required to disclose if they participated in any way in the ICANN new gTLD program, either by providing comments, submitting an application, etc. They should also disclose their relation, if any, with any other registry operator currently operating or wishing to operate a new gTLD.

This would help to ensure that contentions at earlier stages are not forwarded later at a stage where the registry runs, and complaints come through the RRDRP. The complainant should also disclose its ties with the community for which it files a complaint and if it owns domain names in the registry for which the complaint is lodged, as well as if it tried to register domain names but was turned down and for which reasons. All complaints, at least after their resolution, should be published publicly somewhere, on the website of ICANN or the RRDRP, with all possible details. *P. Mevzek (Module 5, 22 Nov. 2009).*

RRDRP—Appeals (draft registry agreement cite in sec. 2.13)

Any process which could result in penalties or termination of the registry agreement must be appealable to the ICANN Board and subject to judicial review. To do otherwise would violate ICANN’s bylaws, the Board’s fiduciary duty and California law. *RySG (21 Nov. 2009).*

III. Analysis and Proposed Position

In general, comments have supported the concept of the RRDRP, but implementation questions or comments have arisen. In particular, comments revolve around ICANN’s contractual compliance role, standing, burden of proof, procedural timing and fee related issues, the binding nature of expert determinations, including remedies, and the publication of the expert determinations. Many of the comments made suggestions for revision while others simply sought clarity. ICANN appreciates the thoughtful comments and provides the following in response.

As stated at the outset, the availability of the RRDRP will not replace ICANN’s contractual compliance oversight responsibilities. ICANN remains committed to enforcing contractual obligations and will do so from all new registry agreements. If a registry were indeed engaging in the type of behavior that violates its registry agreement, ICANN will enforce that agreement and apply the remedies it deems appropriate.

There are competing comments on the burden of proof – one suggests preponderance of the evidence, as is contemplated by the initial proposal, and another suggesting clear and convincing evidence.

One comment suggests that standing requirements should be eliminated and others suggest that the Independent Objector should have standing to object. Given that imposition of community-based registration limitations is meant to ensure that registrations support the relevant community to which a gTLD is directed, it is appropriate to limit standing to members of the relevant community who claim to be harmed by certain registrations. The independent objector has a limited role in the new gTLD program and is meant only to protect the public interest in the pre-delegation stage, not post-delegation stage of the program.

In terms of timing, some suggest shortening the time limits for panel selection, administrative review, and deadlines for issuance of expert determinations. While balance is sought between providing an efficient and cost effective process and allowing the provider adequate time to review the evidence and make an educated determination as to the respective rights of the parties, many of the suggestions seem generally acceptable. The next revised version of the RRDRP, will reflect some revisions to procedural deadlines.

Various comments suggest specificity on fees structure of the proceedings. Although this procedure is still in development stages, it is important to note that the providers shall be responsible for setting fees for disputes. One way to reduce costs is to provide for only one expert, rather than allowing the complainant to choose if it would like three experts as one comment has suggested. As the presumption is that no hearings will take place, ICANN agrees that if the expert grants one party's request for a hearing over the other party's opposition, the expert should be encouraged to apportion those costs to the requesting party. This will be reflected in the revised version of the RRDRP. Finally, if an expert deems more information through discovery or independent experts it needed to make a full analysis and informed determination, it is appropriate for the non-prevailing party to pay those additional resulting costs, not the provider. Otherwise, if further information or expertise is needed to assist in the resolution of the case, the panel may not seek it if the dispute resolution provider must bear sole responsibility for costs, and the effect would be unfair to one or both of the parties.

Expert determination of remedies has also been the topic of some comments. Some have suggested that monetary sanctions be paid by complainant, yet that would not be appropriate if the complainant was not the prevailing party. As the proposal indicates, the prevailing party should not bear the costs of the proceedings. In terms of setting limitations on monetary sanctions, as has been suggested, the current proposal was created to allow the appointed expert latitude to make recommendations deemed appropriate under the specific facts and circumstances of each case. It would be impossible to envision each and every circumstance that might form the basis for a complaint and pre-set limitations. Thus, on balance, leaving the expert with latitude appears to be the preferred approach in light of the vast differences likely to appear in each of the cases. ICANN will clarify; however, that the recommended remedies found in any expert determination shall be subject to review, approval and enforcement by ICANN. Finally, as stated at the outset, the RRDRP is not intended as an exclusive procedure and does not preclude individuals from resorting to other mechanisms set forth in ICANN's Bylaws or courts of law.

One comment suggested certain disclosure requirements for complainants. While requiring a complainant to disclose the ties, if any, with the community against which it is filing the complaint may provide helpful information, the community against whom the complaint is filed is free to provide such information thus imposing a mandatory disclosure requirement would not seem necessary. Moreover, while some information might be gleaned from requiring a complainant to disclose participation in the gTLD program, such a requirement might chill additional public comment or discourage participation in the process, an effect ICANN hopes to avoid. As such, such mandatory disclosures of this nature would not be required.

With respect to publication, the initial staff proposal already stated that all Expert Determinations should be publicly available on the dispute resolution provider's website.

POST-DELEGATION DISPUTE RESOLUTION PROCEDURE (PPDRP)

I. Key Points

- ICANN remains committed to enforcing contractual obligations and will continue to do so with the new gTLD registry agreements. If a registry were engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN will enforce that agreement and apply the remedies it deems appropriate within the bounds of the agreement.

- In no way would the PDDRP expand the rights of trademark holders, nor would it limit those rights. Whether the PDDRP exists or it does not, the holder would be free to pursue conduct of the registries in the appropriate forum if that conduct was actionable.
- The remedies available and recommended by the expert panel must be approved and enforced by ICANN, thus contractual compliance still remains ICANN's responsibility.

II. Comment Summary

PDDRP Support

The concept of creating a Post-Delegation Dispute Resolution Process (PDDRP) to address improper activities of registries and registrars is long overdue. *NCTA (22 Nov. 2009)*.

The IOC gives qualified support to the PDDRP. *IOC (20 Nov. 2009)*.

Now that the foundation has been laid for a meaningful procedure to address possible trademark abuse by ICANN-approved TLD registries, balanced yet crucial adjustments are within reach. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP—effective design

An effective PDDRP would promote responsible registry conduct by incentivizing registries to adopt reasonable, meaningful RPMs and balanced policies and best practices. Such registries would benefit from safe harbors where they acted to address, at launch and later as required, known relevant abuses. The PDDRP must be predictable for all parties, including the identification of safe harbors. Neither trademark owners nor registries or registrants should have to guess about the consequences of the availability of a PDDRP. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP Opposition

The PDDRP is unnecessary. Any variation of the PDDRP would require a substantial overhaul with adequate safeguards to be put in place. *RySG (22 Nov. 2009)*.

Without explanation the staff PDDRP proposal radically departs from the IRT's proposal and strips out many of the core concepts that made the process fair and balanced. It is unacceptable. In addition, it is time for ICANN to accept responsibility for enforcing its agreements and not rely on others to perform its work and make the tough calls. Consistent with ICANN's Affirmation of Commitments, it is time to go back to square one with the PDDRP and produce a process that actually reflects the IRT recommendations and input from the community as a whole. *J. Neuman (Module 5, 7 Oct. 2009)*.

The PDDRP is deeply flawed. It should not apply to second level domains. *Minds + Machines (22 Nov. 2009)*.

PDDRP is unclear and seems unnecessary

This procedure is not at all clear. It seems to mix without enough details problems with the gTLD string possibly infringing some trademarks and problems with abusive registrations. For trademark issues, the trademark holder should have time before the registry starts operating to lodge complaints with ICANN through designated procedure (Module 3). Giving trademark holders a perpetual right to fight against some registry far after it started seems to be without merit and completely unbalanced. As for abusive registrations, it would be hard to identify such large scale bad behavior from the registry except if it is so blatant that it should have been caught at the application step well before the start of the registry. Such

cases should be “consequences” of UDRP –i.e. some further review of the registry operations should be attempted. Given these two points the PDDRP would not be needed. If it PDDRP does exist, the details suggested for the RRDRP should be adopted. Given the similarities between RRDRP and PDDRP, an attempt should be made to merge the two for cost and efficiency reasons. *P. Mevzek (Module 5, 22 Nov. 2009).*

PDDRP--Staff proposal departure from IRT report

The staff proposal is radically different in substance and effectiveness from the IRT report, raises much concern and dilutes the practical efficacy of the PDDRP. It puts trademark holders’ interests at risk; once delegation is made they would not have any recourse or rights to institute Post Delegation Disputes under this policy based on: breach of representations in the gTLD application; breach of Registry Agreements; or systemic breach of trademarks in the gTLD as a result of willful lacunas in registry operations leading to infringements. A registry operator who fails to perform the specific RPMs enumerated in its registry operator’s agreement should be subject to PDDRP claims as set forth in the final IRT report. *BC (23 Nov. 2009). Microsoft (23 Nov. 2009).*

PDDRP unduly limited as proposed

The PDDRP as proposed is unduly limited. The standards for infringement at the top and second level need clarification. Operators of truly generic TLDs will be immune from the PDDRP no matter how the TLD is being used in combination with second level domains. *INTA (20 Nov. 2009).*

ICANN contractual enforcement role

The PDDRP would not replace ICANN’s own contractual compliance oversight responsibilities. WIPO supports the IRT concept that a trademark owner would have the ability to initiate proceedings if the parties and ICANN could not timely and conclusively resolve the dispute under ICANN’s contractual framework. ICANN should align its own contractual compliance responsibilities with DNS realities. Declining the availability of a straightforward option to facilitate ICANN’s enforcement of its own contract terms in relation to trademark abuse appears inconsistent and may invite resource-consuming court litigation. *WIPO (Module 5, 20 Nov. 2009).*

ICANN role in PDDRP

The proposal deviates markedly from the IRT recommendations. ICANN should take a greater leadership role regarding the investigation and enforcement of complaints in connection with the trademark PDDRP. *BBC (19 Nov. 2009). MarkMonitor et al. (20 Nov. 2009). Lovells (22 Nov. 2009).*

ICANN role—investigating potential breaches of the registry agreement

The proposed removal of ICANN investigation as a pre-requisite to filing a PDDRP is unacceptable. Having ICANN not only involved but integral to the processes is vital because it provides a “check and balance” between (i) an IP owner that has been harmed by systemic bad faith actions of an irresponsible registry operator and (ii) the overzealous trademark owner that sought remedies against the registry operator, when the appropriate party to go after is actually the owner of the infringing domain name registrations. As stated by the IRT, if the registry were indeed engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN should enforce that agreement and apply the remedies it deemed appropriate within the bounds of the agreement. In addition, requiring an investigation by ICANN as a first step prior to initiation of a PDDRP serves as a deterrent against an overzealous trademark attorney seeking to go after the registry because it has deeper pockets or is easier to reach than the ultimate registrants causing the infringements. *RySG (22 Nov. 2009). Lovells (22 Nov. 2009).*

The PDDRP raises concern about taking contractual compliance outside the purview of ICANN and creating rights and remedies beyond those offered in law or as part of an ICANN-registry contract. *Demand Media (23 Nov. 2009). J. Neuman (Module 5, 7 Oct. 2009).*

ICANN needs to do a better job enforcing its contracts with registries and registrars. ICANN should take a larger role in the PDDRP rather than passing on the entire onus to trademark owners. *IOC (20 Nov. 2009).*

PDDRP--ICANN role in determining remedies

It is unacceptable to remove ICANN's involvement in determining the remedies in cases where a panel finds that a registry has breached its registry agreement by using its TLD to infringe rights of IP owners (at the top-level) or by engaging in a substantial pattern or practice of specific bad faith intent to profit from trademark infringing domain names. How would the immediate appeal to a court from a panel determination really be accomplished—who does the registry take to court, and what is the basis for either subject matter or personal jurisdiction? In contrast, if ICANN elected and enforced a remedy the registry could challenge ICANN on a breach of contract ground. *RySG (22 Nov. 2009). J. Neuman (Module 5, 7 Oct. 2009). NICMexico (23 Nov. 2009).*

As a matter of principle, any process which could result in penalties or termination of the registry agreement must be appealable to the ICANN Board and subject to judicial review. Adoption of the PDDRP would violate ICANN's bylaws (the Community Objection mechanism would also violate the bylaws), the Board's fiduciary duty and California law (Corporations code section 5210). *RySG (22 Nov. 2009).*

PDDRP--Escalating remedies

Escalating remedies to address abusive registrations should be available under the PDDRP, within limits. E.g., appropriate remedies should be available for second-level abuses where it is impractical for brand owners to file multitudes of UDRP or cyclical URS cases. On the other hand, monetary damages or direct third-party determinations that a registry operator contract must be terminated would not be appropriate in a PDDRP framework. *WIPO (Module 5, 20 Nov. 2009).*

Procedures should reflect the weight of the PDDRP mechanism

The proposed word limits and time periods do not reflect the intended weight of the procedure. Fees should be reasonable yet sufficient to prevent misuse (as with the Draft WIPO DRSP Fees for LRO procedures published as part of DAG v3). Consideration should be given to how to ensure that any possible follow-up legal action in other fora does not unreasonably restrict timely implementation of appropriately ordered PDDRP remedies. *WIPO (Module 5, 20 Nov. 2009).*

PPDRP Grounds for complaint

Regarding the grounds which a complainant could rely on to initiate and succeed in a PDDRP, those suggested by the IRT would tackle potential bad faith practices on the part of registries more efficiently. *Lovells (22 Nov. 2009).*

Without consultation, ICANN staff substituted its own judgment and revised the grounds for the dispute by eliminating any tie-in to the Registry Agreement with ICANN. This seems to be an attempt by ICANN to remove itself from the dispute process. *J. Neuman (Module 5, 7 Oct. 2009).*

PDDRP Content of complaint

The content bullet points seem duplicative. It is not clear whether the standing requirement is, or should be, separate from the requirement to identify the particular legal rights claim being asserted. Requiring a “detailed explanation of the validity of the Complaint” is duplicative of the preceding requirements. If intended to be an additional requirement, explanatory details should be provided. *INTA (20 Nov. 2009)*.

Administrative review of the PDDRP complaint

The administrative review period should be reduced to 5 days. *INTA (20 Nov. 2009)*.

Response to the PDDRP complaint

ICANN should raise the standard for set asides of defaults to “excusable neglect” or some higher standard to prevent gTLD registry operators from easily avoiding default judgments. The following statement is also not clearly worded: “If the registry operator believes the Complaint is without merit, it will affirmatively plead in its response the specific grounds for the claim.” *INTA (20 Nov. 2009)*.

PDDRP--Address top and second level conduct

The PDDRP standard of proscribing registry conduct causing or materially contributing to trademark abuse should apply to both the top and second levels. *WIPO (Module 5, 20 Nov. 2009)*.

PDDRP--Top level--“Affirmative conduct”

Regarding top-level disputes, there is no definition of what constitutes “affirmative conduct” by a registry or what it means to take unfair advantage of, unjustifiably impair or create an impermissible likelihood of confusion regarding the complainant’s mark. Absent clarification and exemption/safe harbor provisions the PDDRP could require registries to monitor and “sanitize” the names they register, requiring them to make determinations they are not competent or well-suited to make and requiring costly and time-consuming human analysis and intervention in what has been an automated process to date. *RySG (22 Nov. 2009)*.

The PDDRP is unnecessary at the top level—e.g., it is highly unlikely that a .APPLE fruit registry will lie to ICANN during the application process and risk all its investment by operating the registry in a manner that exploits the trademarks of Apple the electronics company. *Demand Media (23 Nov. 2009)*.

At the top level it should be sufficient that the registry knowingly permitted or recklessly disregarded that the use of the gTLD meets the conditions (a), (b) and (c) in the proposed standard so that scenarios in which a registry turns a blind eye to the abusive use of the gTLD would be covered. *INTA (20 Nov. 2009)*.

PDDRP--Second level disputes

At the second level there is no obligation for the registry to engage in affirmative conduct, but rather that there is a substantial ongoing pattern or practice of specific bad faith intent to profit from the sale of trademark infringing domain names. It is unclear what this means and the Registries Stakeholder Group reserves the right to make further comments about this unique standard. *RySG (22 Nov. 2009)*.

On the second level, if the goal is to stop “rogue” registries from harvesting names, engaging in serial cybersquatting, etc., then the language must be clear that the registry has to actively participate in such conduct and is not vicariously liable for the actions of independent third parties. *Demand Media (23 Nov. 2009)*.

PDDRP-standard

INTA agrees that the PDDRP should apply to the second level but disagrees with the proposed standard for second level infringement—it raises many questions and needs clarification. E.g.: the conditions set out in (i)-(iii) cover only certain infringement scenarios; they must cover other typical scenarios of cybersquatting. Another condition should be added under (b) to address domain names which have been registered and used in bad faith pursuant to the principles of the UDRP. The proposed standard also does not address the systematic “use” of domain names; it should be made clear that the standard addresses the systematic registration or use domain names which meet the requirements (b) (i)-(iii) or have been registered and used in bad faith. *INTA (20 Nov. 2009)*.

PDDRP—upset to balances in existing law

If the obligations set forth in the PDDRP are interpreted broadly by trademark owners, such obligations would give trademark owners rights above and beyond what they are given under the existing laws of a number of jurisdictions. Absent clarification and narrowing of its scope, the PDDRP could upset the balance struck in existing law. *RySG (22 Nov. 2009)*.

Abusive filings

ICANN must increase protections against abusive filings. ICANN has departed from the IRT approach and removed the fee barriers, which would serve as a deterrent to abusive filings by overzealous trademark owners. The changes ICANN made mean that fees will be relatively low and will enable any third party to file a complaint. *RySG (22 Nov. 2009)*.

The PDDRP must have appropriate mechanisms to counter and seek to prevent abusive filings by overzealous trademark owners. The IRT went to great lengths to ensure such mechanisms were in place. *Lovells (22 Nov. 2009)*.

Advance payment of fees

In a change from the IRT, ICANN has recommended that each party, not just the complainant, must pre-pay the full amount of the provider administrative fees and the panel fees at the outset of the proceedings. The threat that the registry must pre-pay these fees in order to defend itself will scare or coerce legitimate registry operators acting in good faith. This will also result in endless gaming by overzealous trademark owners to blackmail registries into settlement, whether or not a trademark owner’s claims are legitimate or in good faith, harming both registries and registrants. *RySG (22 Nov. 2009)*. *J. Neuman (Module 5, 7 Oct. 2009)*.

PDDRP--Registries--no review on default

Unlike the UDRP or URS, where a review of the facts of the complaint against a registrant is required, if the PDDRP complainant meets the procedural requirements in filing the complaint (mostly that it has paid its refundable fee to the provider) and the registry does not respond, there is no further review but rather automatic remedies. *RySG (22 Nov. 2009)*. *J. Neuman (Module 5, 7 Oct. 2009)*.

To avoid the risk of increased registry abuse in the new gTLD program, panel review should be denied when the respondent defaults and costs should be refunded to prevailing parties. *IOC (20 Nov. 2009)*.

PDDRP--Hearing option

A hearing should be the default not the exception. Before an order for the potential termination of an entire registry in which the operator has invested thousands if not millions of dollars, a registry should have the option of a hearing. *RySG (22 Nov. 2009)*.

PDDRP--Panel appointment and panel determinations

The period for appointing the panel should be reduced to 15 days. The period for the panel to provide a decision should be reduced to 30 days. *INTA (20 Nov. 2009)*.

PDDRP--Discovery--experts

If the Provider appoints an expert on its own initiative, the provider must bear the cost of the expert's fees. *INTA (20 Nov. 2009)*.

PDDRP--One-member panel is insufficient

At a minimum, the PDDRP should employ the same standard as the Independent Review Process under the ICANN Bylaws—i.e. either party may elect a three-member panel and in the absence of any such election the issue will be considered by a one-member panel. The panelist should be more akin to the type used under the current Independent Review Process—i.e., an international arbitration provider. Panelists used for UDRP decisions do not necessarily have the right skills, training and qualifications or expertise to serve as panelists in a PDDRP. *RySG (22 Nov. 2009)*. Three-member panels are obligatory given the importance of panel decisions and the potential impact on the business of the registry operator. *Lovells (22 Nov. 2009)*.

PDDRP--Burden of proof

The standard should be “preponderance of the evidence.” If there is concern that the process may be abused, safeguards can be included on the back-end (i.e. the appeals process). *INTA (20 Nov. 2009)*.

PDDRP--Remedies

The section addressing monetary sanctions should be clarified to specify that monetary sanctions (with the possibility of attorneys' fees, as are available to registry operators in cases filed “without merit”) will be paid to the complainant. The panel should have express authority to order remedial measures. The evidentiary standard for finding a case “without merit” should be the same standard applied to the complainant. *INTA (20 Nov. 2009)*.

PDDRP is deficient, unworkable and unacceptable (Specification 7)

There should be either: (a) a reversion to the PDDRP proposed by the IRT with changes proposed by many commentators on the IRT version; or (b) elimination of the PDDRP from the DAG. The current version of the PDDRP differs from what the IRT proposed and what commenters supported. Its deficiencies include that ICANN takes itself out of the process; it changes the grounds for dispute; and it eliminates all protections for abusive filings. *R. Tindal (23 Nov. 2009)*.

III. Analysis and Proposed Response

ICANN thanks the community for its thoughtful set of comments relating to a Post Delegation Dispute Resolution Process or PDDRP. In reviewing all of the comments, one thing is clear, there are many views about the PDDRP, many of which contradict each other. The general issue areas have been combined and are discussed below.

First is the PDDRP Concept in general

Some think that the concept of creating a PDDRP to address improper activities of registries is long overdue, yet others think it is unnecessary and could provide trademark holders a perpetual claim

against a registry and additional rights in their trademarks. Still others claims that the PDDRP could put trademark holders at risk because after delegation they would have no recourse against registries for violating its registry agreements. ICANN has tried to revise the PDDRP proposal while balancing the contradictory interests set out in the comments.

In no way would the PDDRP expand the rights of trademark holders, nor would it limit those rights. Whether the PDDRP exists or it does not, the holder would be free to pursue conduct of the registries in the appropriate forum if that conduct was actionable. The PDDRP does, however, consistent with the GNSO recommendation, provide a cost-effective RPM for trademark holders.

A second area of discussion in the comment forum has been the application of the PDDRP at both the top and the second level. Some have commented that the PDDRP standard of proscribing registry conduct causing or materially contributing to trademark abuse should apply to both the top and second levels. Others have suggested that the PDDRP is unnecessary at the top level while others have suggested that it should not be applied to the second level. It is clear that the current proposal, like the IRT proposal for such a process, is meant to apply at both the top and second level. The proposal made part of the DAGv3, contains language intended to strike a balance between avoiding the imposition of strict liability on the part of the registry for acts at the second level, while at the same time attempting to proscribe active involvement by a registry in trademark infringement.

A third area of discussion related to the application at the top and second level issue revolves around the standards set for each level. Some believe that a reckless disregard standard at the top level is sufficient, others indicate that affirmative conduct by the registry should be required at both the top and the second level and others simply seek more clarity. Some have commented that the second level standard does not reach all of the typical scenarios of cybersquatting and that another condition should be added to address domain names that have been registered and used in bad faith pursuant to the principles of the UDRP. Others have requested clarity and examples of affirmative conduct, and/or a recitation of safe harbors so registries do not feel compelled to sanitize the names they allow in the registry.

The one thing that must be remembered is that nothing in the PDDRP prohibits the use of the UDRP or other mechanisms to challenge actual cybersquatting or infringement claims. The PDDRP is meant to provide a non-judicial avenue to address systematic bad conduct by registries. In an attempt to balance all comments, the DAGv3 proposal is being revised to try to achieve further clarity and to make it clear that, under the PDDRP ignorance of infringing names within a registry is not sufficient to hold a registry responsible for that infringement. Recall, the UDRP (and other RPMs) are still available against the registrant of an infringing name.

A fourth and major topic of discussion is why, according to commenters, the PDDRP in the DAGv3 appears to limit ICANN's role in the process. At the outset, it is important to note that the PDDRP would not replace ICANN's contractual compliance oversight responsibilities. Rather, the PDDRP proposal allows a trademark owner to initiate proceedings if it believes that a registry is liable in some way for infringing its rights. ICANN remains committed to enforcing contractual obligations and will continue to do so with all new gTLD registry agreements. If a registry were engaging in the type of behavior addressed by the PDDRP and such conduct violated the registry agreement, then ICANN will enforce the agreement and apply the remedies it deems appropriate within the bounds of the agreement. However, requiring ICANN to be involved before a trademark holder can pursue a claim under the PDDRP would defeat the purpose of the RPM. Finally, as will be reflected in the revised PDDRP, the

remedies available and recommended by the panel must be approved and enforced by ICANN, thus contractual compliance still remains ICANN's responsibility.

Another area of discussion suggests that there should be increased protections against abusive filings. In response to a Complaint, a respondent may allege that the complaint is without merit, which, if proven, would entitle the respondent to relief. Still under consideration is the manner in which a panel would be able to determine if a complaint was filed without merit and the attendant burden of proof associated with such a claim. If the panel made that determination, it would have the discretion to recommend the appropriate sanctions. While it is believed that these sanctions would offer sufficient deterrence against abuse, if others should be considered, further comment is welcome.

The issue of sanctions leads to the broader discussion of remedies. Some suggest escalating remedies to address abusive registrations in the appropriate circumstances. Others suggest that appropriate remedies should be available for second-level abuses only where it is impractical for brand owners to use the UDRP or in cyclical URS cases. Moreover, some have suggested that monetary damages or direct third-party determinations that a registry operator contract must be terminated are not appropriate in a PDDRP framework. The current proposal allows the panel latitude to make recommendations that it deems appropriate under the specific facts and circumstances of each case with ICANN review of the recommended remedy. It would be impossible to envision each and every circumstance that might form the basis for a complaint. On balance, this appears to be the preferred approach in light of the vast differences likely to appear in each of the cases. It should be pointed out, however, that commenters were right when they noted that ICANN, and not the panel, should have to approve and enforce the recommended remedies, and that will be reflected in the revised PDDRP.

The registries also argue that requiring the registries to pay the full amount of each matter up front will scare legitimate registry operators. ICANN is considering how to revise that and balance the need for full payment up front with the understanding that the registries will be under contract with ICANN and be required to comply with the finally approved remedies. The revised PDDRP may reflect some change in this regard.

Several comments address specific procedural points of the PDDRP. For example, a few of the procedural deadlines have been questioned – some as too long and some as too short. ICANN will continue to adjust those in the proposal as deemed appropriate and some will be revised. However, a balance must be sought between providing an efficient and cost effective RPM and allowing the provider adequate time to review the evidence and make an educated determination as to the respective rights of the parties.

One commenter has suggested that a hearing should be the default as opposed to the exception. It is important to remember that one of the goals of the PDDRP as an RPM is to provide efficiency. In keeping with that aim, the PDDRP proposal is that there should not be a hearing unless one was requested. In this manner the cases that are appropriate for a hearing will still get one, and those that do not need one will not consume resources.

A couple of comments revolve around the expert panels. It has been suggested that if the panel request appointment of an expert, then the panel or provider should cover that expense. At first blush, such a recommendation has appeal. However, the reason to appoint the expert is to assist the panel in reaching a fair and informed determination. As such, it appears that the parties should bear the cost of any expert the panel reasonably retains. Also related to panels, some have suggested that either party

may elect a three-member panel and in the absence of any such election a one-member panel will preside. ICANN will review this and possibly suggest a revision to the PDDRP, but is also cognizant of the need for efficiency.

Finally, questions have arisen as to what review would be undertaken for default. The current proposal envisions circumstances in which default could be set aside for such things as excusable neglect, but the question remains, if default, does the complainant automatically prevail? While some suggest the answer is yes, others disagree. In many RPM scenarios that have recently been discussed, including the URS proposal, the panel is required to do an analysis on the merits of the complaint, even if no answer or response is filed. ICANN accepts this suggestion and the PDDRP will be revised.

Registry Operator Covenants

I. Key Points

- The covenants in the new gTLD agreement are designed to ensure that new registry operators will be bound by certain obligations necessary for the security and stability of the DNS and the Internet, while being flexible enough to allow for a diverse array of registry operators with differing business plans.
- ICANN will continue to explore ways to reconcile registry operator covenants with laws and regulations applicable to geographically diverse registry operators.
- Technical comments on the specifications to the new gTLD agreement are welcome and are being considered by ICANN technical personnel.

II. Comment Summary

Contract obligations—overreaching or inapplicable in some situations

The level of requirements should match the type of TLD and applicants. Some of the provisions of the agreement are overreaching (e.g., the continued operation instrument in 2.1 is U.S.-centric and would not have any practical value in some other parts of the world; section 2.2 is contrary to French law regarding protection of personal data; and section 2.3's requirements would only make sense for certain types of TLDs). For a community TLD, ICANN-defined performance requirements should be limited to the TLD name service and public Whois service. *City of Paris (22 Nov. 2009)*.

With regard to registrant's personal data publication per section 2.2, it is inapplicable to the French legal framework. ICANN should update the DAG to provide that provisions such as those approved for the .tel registry agreement may be acceptable. *AFNIC (22 Nov. 2009)*.

Approved services; additional services (sec. 2.1)

The phrase "at http: ...as such policy may be amended from time to time" should be deleted. Instead, there should be a reference to the RSEP that is self-contained within the registry agreement as an exhibit. The last sentence should also be deleted for contract certainty. The need for amendments is adequately addressed by the existing process. *RySG (21 Nov. 2009)*.

Data Escrow Requirements (Specification 2)

All terms must be properly defined; a number of specific, technical language suggestions and refinements are required (provided in RySG comments). *RySG (21 Nov. 2009)* Data collection

methodology (registrar data forms) should be streamlined and possibly centralized. *M. Neylon (22 Nov. 2009).*

Escrow Agent Requirements

ICANN should provide specifications before the new gTLD launch regarding the requirements for an escrow agent and consider differences between western country standards and non-western country standards (e.g., it could be illegal for an IDN gTLD applicant from a non-western country to escrow the data with a US/western agent. *Y. Keren (Module 5, 22 Nov. 2009).* *S. Subbiah (Module 5, 23 Nov. 2009).* *UNINET (22 Nov. 2009).*

Format and Content for Registry Operator Monthly Reporting (Specification 3)

Fields 36, 37, and 38 are provided at ICANN's request per the Add Grace Period (AGP) Limits Policy implementation notes, not in accordance with the AGP Limits Policy. *RySG (21 Nov. 2009)*

Schedule of Reserved Names at the Second Level in gTLD Registries (Specification 5)

For country and territory names, it would be helpful for ICANN to maintain the authoritative list or provide authoritative links to the official documents. Specific clarifications also are requested by RySG regarding provisions. RySG recognizes that for certain TLDs the ability to use geographic names at the second level would be beneficial and non-objectionable. ICANN should establish a process pursuant to which a TLD could register geographic names at the second level. *RySG (21 Nov. 2009)*

Audits should be expanded

For the third time COA asks ICANN to revise the registry agreement to give ICANN authority to audit new gTLDs registries regarding material misrepresentations made in the application and contract negotiation process, as well as material statements that are no longer true. Section 2.11 is deficient because it only authorizes audits for compliance with covenants contained in Article 2, while the warranty of truthfulness of these statements is in Article 1. *COA (22 Nov. 2009).*

ICANN is also prevented from making any unannounced audits of registries; this is unjustified and should be removed. *IPC (22 Nov. 2009).* *SIIA (23 Nov. 2009).*

INTA reiterates that ICANN itself should conduct audits vis-à-vis technical check questions 3, 7, 8 and 9 in section 5.2.1 or in the alternative a third party should conduct the audit. All audit terms should be set forth before the application round opens. The pre-delegation testing procedure in DAG v.3 is an important and encouraging development, but ICANN should establish all testing criteria and procedures before the new gTLD application round opens. The persons/entities conducting the testing should be identified so that criteria, procedures and persons/entities can be fully vetted. *INTA (20 Nov. 2009).*

Audits should be limited

In the first sentence "quarter" should be deleted and replaced with "year." One audit per quarter is excessive. There should not be more than one audit per year covering the same ground (i.e., should not do multiple operations audits in the same calendar year). Site visits should require more than 5 calendar days' notice—10 business days is more reasonable. *RySG (21 Nov. 2009).*

Continued Operations Instrument not always appropriate

The continued operations instrument laid out in Specification 8 is not always appropriate or necessary (e.g. a gTLD operated by a public authority). This requirement should be replaced with a form of

commitment by a third party to ensure continued operations of the registry for three years, at its own expense, in case of failure of the registry operator. *AFNIC (22 Nov. 2009)*.

Ongoing registry eligibility and objection process (sec. 5.4.1)

The mission/purpose as described in standard applications should be used to determine ongoing registry eligibility. If the purpose is changed when implemented (e.g. a standard TLD described to be publicly available is actually kept for internal use) there is no recourse under the existing Terms and Conditions unless intellectual property rights are infringed. For meaningful objections to be raised to applications, objectors must understand how the TLD is to be used, and that the self-prescribed use will not change over time. *MarkMonitor (Module 5, 20 Nov. 2009)*.

III. Analysis and Proposed Position

The purpose of the new gTLD agreement is to provide a basic agreement among different types of registry operators (applying for varying types of gTLDs) and ICANN with respect to the operation of new gTLDs. Some modifications to the form may be appropriate (for example in the case of gTLDs that might be operated by governments or inter-governmental organizations), but the goal has been to create an agreement that is appropriately flexible for all types of potential new gTLDs. The relatively low annual fee will not provide the resources to enter into unique registry agreements with operators of possibly hundreds of potential new gTLDs. To the extent that a potential registry operator believes that the new gTLD agreement conflicts with specific laws, ICANN expects that such registry operator will provide a complete analysis with respect to such conflicts during the application process.

The RSEP process has been established as an ICANN consensus policy, and is subject to change based on evolving technologies and standards. It would be inappropriate to limit the reference to the RSEP to the current process for purposes of a long-term agreement.

ICANN is willing to work with the technical community to refine the language in the data escrow requirements set out in Specification 2 and the report fields set out in Specification 3.

The requirements set forth in Specification 2 will apply to all escrow agents but there is no requirement that registry operators engage an escrow agent from any particular region. The requirements are in place to ensure that there is no loss of registry data and are not meant to discriminate against potential escrow agents in non-western countries.

The Governmental Advisory Committee has indicated a strong preference that geographic names be restricted at the second-level as set forth in the draft agreement. Working with the GAC, ICANN published in version 3 of the Guidebook protections for country and territory names at the second level. The names protected appear on certain lists. No translations of the names are protected unless the translation appears on those lists (i.e., the lists themselves are complete and dispositive). The lists are maintained by independent agencies, the ISO and the UNEGEN. As requested by the Registry Constituency, links to those lists can be provided in the agreement.

All registry operators will be required to re-certify as to matters stated in their TLD application prior to entering into the new gTLD agreement. All registry operators will also provide a warranty that such statements are true. Audits are limited to operational matters and ICANN believes that the audit mechanics set out in Section 2.11 will provide ICANN with the rights it needs to ensure compliance with

registry agreement provisions while being minimally invasive to the business operations of registry operators.

The “Continued Operations Instrument” is intended to ensure the continuity of all new TLDs in order to protect registrants. ICANN believes such an instrument is appropriate for all registry operators. Public authorities are subject to bankruptcy and other failure and should not necessarily be exempt from this requirement in all cases. The mechanics of the Continued Operations Instrument are still under review and subject to community input. While such instruments will be required, some registries may be exempted from a requirement to transfer data and operations to a successor registry. An example might be a TLD such as .post if the registrants solely consist of member states. It will be difficult to write bright line rules for such an exemption.

While, ICANN expects that each applicant will initially maintain a new TLD for the purposes it states in its application, there is no requirement in the new gTLD agreement that the applicant always maintain the currently intended use of the TLD. (The one exception being the continuing obligation to enforce registration restrictions in the case of community-based gTLDs.) ICANN recognizes that business plans may change over time and registry operators should be given requisite flexibility in operating new TLDs after delegation.

Protection of Third Party Rights

I. Key Points

- The appropriate rights protection mechanism requirements are the subject of ongoing debate and study.
- New registry operators will be required to implement some baseline protections.

II. Comment Summary

Protection of legal rights of third parties (sec. 2.8)

It is unclear why ICANN would have an approval right for any changes or modifications, when it does not appear to have such a right initially when Registry Operator specifies the process and procedures it will use. The words “at a minimum” should be deleted because they suggest that registries must adopt additional protections above and beyond those stated in Specification 7. The provision should be replaced with the following: “Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth at [see specification 7].” Also, RySG remains concerned that the v3 Registry Agreement must not create rights that are inconsistent with existing law. RySG strongly objects to the scheme requiring registries to protect the legal rights of third parties. If registries voluntarily choose to do so, they should be required to live up to their promises to do so. It is entirely unreasonable to require registries to implement and adhere to any RPMs that may be mandated from time to time by ICANN. This is akin to unilaterally amending the terms and conditions of the contract, would damage certainty and deter investment. The same is true regarding the proposed PDDRP, which may be revised from time to time. As the entire scheme is still under development, RySG reserves the right to comment further. *RySG (21 Nov. 2009).*

III. Analysis and Proposed Position

Debate regarding appropriate requirements for rights protection mechanisms continues as one of the "overarching issues"; see <<https://st.icann.org/new-gtld-overarching-issues/>> for additional details. The GNSO has undertaken a review the findings and recommendations of the IRT and staff proposals and a consideration of additional appropriate requirements.

The requirements set forth in Specification 7 are meant to establish a baseline of rights protection mechanisms and each registry operator is not obligated to implement procedures or safeguards beyond that baseline, except as required by future policies or amendments to such baseline protections. Additional safeguards may be implemented by the registry operator as it sees fit for the operation of its business.

The general business community continues to express concern over rights protection matters and registry operators will be expected to implement reasonable third party rights protection mechanisms to address these concerns.

Term, Termination and Continuity

I. Key Points

- The new gTLD agreement's termination/renewal provisions attempt to strike a balance between registry operators that need certainty with respect to the continued viability of the TLD and those in the community concerned about the need for proper enforcement of registry operator obligations following delegation.
- Termination/non-renewal is reserved for the most serious breaches of the agreement, which breaches must occur on several occasions.
- In the case of termination/non-renewal of the agreement, ICANN will consider whether re-delegation is appropriate and will consult with the former registry operator prior to any re-delegation.

II. Comment Summary

Non-renewal by ICANN too easy

Three cured breaches over ten years should not necessarily result in non-renewal. It is unclear what purpose an automatic three strikes rule serves. RySG is concerned about the expanded number of offenses that could result in non-renewal, even offenses that seem mundane. Regarding sec. 4.3, Termination by ICANN, there should not be different terminology used for "breach" or "default." These commonly mean the same thing and care should be taken to ensure that there are no differing notice and cure provisions or other obligations owing to the different terminology used. Regarding sec. 4.3(b), there must be an objective standard for "testing and procedures necessary for delegation of the TLD into the root zone" and there should be a standard cure period allowed. Sec. 4.3(c) should require a "material" breach and be subject to the protections of sec. 4.3(a), including final determinations by a court or arbiter. *RySG (21 Nov. 2009)*.

Non-renewal by ICANN too hard

The DAG v3 changes have made the ability to disallow renewal of the registry agreement even weaker. While it is important to give registry operators the ability to cure defaults, ICANN should retain power

not to renew a registry operator's agreement based on breaches of any portion of the registry agreement. *INTA (20 Nov. 2009)*.

Renewal should be subject to re-bid

There should be no presumptive renewal for registries; registry operations should be regularly tendered through open competition like any other procurement contract. G. Kirikos (22 Nov. 2009). M. Berkens (23 Nov. 2009). S. Roberts (23 Nov. 2009)

Termination by registry operator

What does it mean to terminate a contract with ICANN for ICANN's breach? Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? Termination is not a sufficient remedy in the event of a breach by ICANN, as the Registry Operator would not be provided an ability to recover any losses. ICANN should have service level agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions not subject to the limitations of liability may be the only potential meaningful penalties, as opposed to termination by the Registry Operator. Section 4.4(b) will not be necessary once ICANN eliminates its unilateral right to amend the Registry Agreement. *RySG (21 Nov. 2009)*.

Branded TLD Continuity

Provision should be made for how the closure of a branded TLD will be handled. Where the branded TLD owner makes satisfactory provision for the transfer or closure of any second-level domains, it should be permitted to discontinue the TLD without it being re-allocated to an unconnected third party. ICANN must foreclose the possibility that a branded TLD might be re-allocated or managed by a follow-on registry if the brand owner becomes insolvent or chooses to discontinue operation of the registry—in such cases, authority to operate the registry must be perpetually associated with the trademark owner. *INTA (20 Nov. 2009)*. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*. *Microsoft (23 Nov. 2009)*.

Continuity plan (sec. 4.5)

In the first sentence, after "this Agreement" insert "as provided in Section 4.3". This edit is needed to ensure that the transition assistance is provided upon proper termination. In the second sentence before "consultation" insert "proper termination and" and delete "as the same may be provided from time to time." There should not be an ability to unilaterally amend the continuity plan (which is presently not yet finalized). RySG is unclear as to how the continuity plan applies in this context. It is primarily geared towards ICANN's responsibilities. *RySG (21 Nov. 2009)*.

Termination of registry agreement by ICANN

Can ICANN terminate the registry agreement once the delegation process has been successfully concluded including all set up tests? What safeguard and accountability mechanisms exist once a gTLD is up and running to ensure the domain management fulfill their obligations, and if not to revoke their registration license, transfer it or have their gTLD shut down altogether? M. McAdam (21 Oct. 2009).

Timeframes, including six month maximum timeframe for entering registry agreement contract with ICANN (sec. 5.1)

If, after evaluation and if necessary, after dispute resolution and string contention processes, the agreement is not signed by that point then the proposal should be rejected. If there was a contention or auction, the second winner should then have the possibility of signing the final contract if it still complies with all requirements. This would ensure that the community and/or end users would not be frustrated to see that some TLDs do not go forward. The same idea should apply to testing procedures (they

should not last more that “x” months). A specific page on the ICANN website should deal with the final life of all proposals listing each TLD/registry operator being in phase of “signing the contract,” “doing the final technical tests”, “IANA delegation”, etc. with dates when each event happened. *P. Mevzek (Module 5, 22 Nov. 2009)*.

III. Analysis and Proposed Position

As stated in response to comments on v.2 of the Draft Applicant Guidebook, after considering community input, ICANN determined to propose a longer initial contract term in the proposed new gTLD agreement as a measure to facilitate business planning by prospective new registry operators and encourage investment in new TLDs. Given the length of each agreement’s term, ICANN requires the ability to terminate or not renew the agreement if a registry operator fails to live up to its obligations under the agreement. ICANN believes the changes made to the termination and renewal sections of the new gTLD agreement strike the right balance between those in the community that feel that registry operators must have significant certainty with respect to the renewal/termination of the agreement and those that are concerned that ICANN will not have the ability to terminate agreements with bad actor registry operators.

In response to community comment, ICANN revised the new gTLD agreement to allow the registry operator to terminate the agreement under certain circumstances. If the registry operator terminated the agreement, the registry operator would not be allowed to continue operating the registry and the registry would either be transitioned to a new registry operator or wound down in accordance with the agreement.

In response to community concerns over the re-delegation of “branded TLDs”, ICANN revised the new gTLD agreement to require consultation with the registry operator prior to any transition. ICANN must retain the ultimate authority over transitioning TLDs of failed registry operators in order to fulfill its mandate to maintain the stability of the DNS.

The ICANN continuity plan is a work in progress and adherence to the final policy, as it may be amended in the future, is critical to the stability of the DNS.

The termination/delegation provisions in the new gTLD agreement allow ICANN to terminate/not renew the agreement if the registry operator fundamentally and materially breaches certain covenants in the agreement. These provisions are meant as safeguard and accountability mechanisms to be enforced after the new TLD is delegated and operating.

If, after evaluation and any string contention or dispute process is concluded, a prospective registry operator fails to enter into the registry agreement within 90 days, ICANN may offer the runner-up the option to proceed with its application. In keeping with ICANN’s mandate of transparency, the progress of gTLD applications will be tracked and publicly available.

Registry-Registrar Separation

I. Key Points

- Community interest in the registry-registrar separation model remains very high.

- ICANN intends to propose a new model in the next draft of the new gTLD agreement that will incorporate discussions, debates and studies conducted to date.

II. Comment Summary

Registry/registrar separation

ICANN became a supporter of removing separation of registry and registrar functions after it became clear that ICANN could become the monopoly holder of the root zone. Having that enforced separation would require ICANN to choose to become the registrar for the root zone or to own the root zone editorial process which it has claimed since its inception. ICANN apparently does not want to make that choice—it wants both. *B. Manning (8 Oct. 2009)*.

Registry/registrar separation—questions

Regarding consideration of this topic at the Seoul meeting: (1) How did ICANN choose only the four options for community discussion and consideration with respect to this issue that are set forth in the DAG v.3? (2) What (and where) is the economic data to support these options and not others? (3) If the community wishes to add options for consideration how should this be done before November 22, 2009 when DAG v. 3 comments are due? (4) What is the process for deciding on the final menu of options that will be considered? (5) What is the process and timeline that ICANN will use to make final decisions on the registry/registrar separation issue? (6) How will ICANN apply the construct that is finally decided upon to existing TLDs as opposed to new TLDs? *VeriSign (22 Oct. 2009)*.

Registry/registrar separation—policymaking process

What is the final process ICANN will use to make final decisions on the registry/registrar separation issue? When in the process will comprehensive economic data supporting the four options set forth in DAG v.3 be presented? Must the new gTLD program await resolution of this issue? *VeriSign (27 Oct. 2009)*. *GoDaddy (22 Nov. 2009)*.

The following should be added as an option for consideration and discussion regarding vertical integration: If the status quo is changed, ICANN should require either (1) complete restriction of registry/registrar cross-ownership or (2) complete lifting of any such restrictions. *VeriSign (27 Oct. 2009)*.

Any changes in the existing registry/registrar separation policies need to be developed using the policy development process. This should be a parallel track but not an overarching issue that needs to be solved before new gTLDs are introduced. *SIDN (23 Nov. 2009)*.

Registry/Registrar Separation—support for “vertical integration” (sec. 2.9)

The first option of “vertical integration” is the best approach (i.e., (a) No cross ownership restrictions except where there is market power and/or registry price caps (regulation needs, if any, left to regulating authorities)). It benefits consumers through better price, innovation and service; is supported by ICANN precedent in numerous TLDs; is the norm in almost every other industry; and safeguards will remain in place. Without it, many new registries will be hindered if registrars do not offer their TLDs. Registrars, the main beneficiaries of vertical separation rules in .com, support this option for new TLDs. *R. Tindal (23 Nov. 2009)*.

Registry/registrar separation—ICANN consideration of RySG views (sec. 2.9)

RySG is concerned that there is no apparent community support for the inclusion of the vertical integration options in v3 of the Registry Agreement. There was no inclusion of the RySG supermajority position or minority position as set forth in the v2 comments. ICANN must consider those RySG comments in addition to the ones it chose to consider in v3. *RySG (21 Nov. 2009)*.

Vertical integration is not harmful

Domain names should be registered only by ICANN-accredited registrars. ICANN should maintain the current structural separation requirements between registry and registrar functions, and the requirement that registries not discriminate amongst registrars. Vertical integration of registries and registrars would be beneficial; risks of malicious behavior would not be prevented by prohibiting such vertical integration. There is a history of registrars selling the TLDs of affiliated registries in gTLDs and ccTLDs with no allegations of wrongdoing. ICANN should not prohibit affiliates of ICANN-accredited registrars from applying to be a new TLD registry operator or from providing any types of services to registry operators. ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator. *RSG (22 Nov. 2009)*.

Allow cross ownership

Opposing arguments to prohibit cross ownership are driven by the desire of incumbent registries to maintain their protected market positions and not by consumer welfare and business efficiencies. We agree with ICANN's economists that absent extraordinary circumstances of market power there is not a good basis to prevent a registry from owning a registrar that is accredited in the registry's TLD. The following things should not change: legal (structural) separation of registries and registrars, guaranteed access to a registry by any registrar who wishes to offer its names; and non-discriminatory treatment of all such participating registrars. *Demand Media (22 Nov. 2009)*.

NeuStar believes that registrars should be permitted to become registry operators, but the longstanding, successful policy of structural separation should remain in place. *NeuStar (23 Nov. 2009)*.

Don't allow cross ownership

There should be complete separation of registry and registrar activities, and registries should not be permitted to register domains in their own TLD, with the possible narrow exception of single-owner, branded TLDs. Without such separation, the door will open to "insider trading", abusive domain registration practices and higher prices for some registrants. *INTA (20 Nov. 2009)*.

Relax cross ownership restrictions for single brand holder registries

ICANN should consider eliminating the registry/registrar separation requirements in cases of single brand holder registries. *MarkMonitor et al. (20 Nov. 2009)*.

III. Analysis and Proposed Position

ICANN recognizes that there are still significant community concerns and a variance of views regarding the appropriate registry-registrar separation model. ICANN is continuing to seek additional opinions on these issues and foster further discussion in order to refine the model and its parameters.

Additional detail regarding the current state of registry-registrar separation policy is set forth in the letter from ICANN Chairman Peter Dengate Thrush to GAC Chairman Janis Karklins dated 22 September 2009 located at <http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf>.

Based on debates on the subject held at the ICANN meetings in Seoul, discussion during the consultation with certain community representatives held on 7 January 2010 in Washington D.C., and ongoing study, ICANN will propose for community comment a new registry-registrar separation model for inclusion in the next draft of the gTLD agreement.

Pricing Controls

I. Key Points

- Price caps are not necessary or desirable. Registrars and Registrants will be protected against predatory pricing by certain other provisions (i.e. notice periods and non-discrimination requirements) and market forces.
- Existing pricing controls will remain in place.

II. Comment Summary

Additional pricing protections are needed

INTA welcomes the changes made to the draft registry agreement attempting to address concerns about the absence of price caps, but the potential for abusive pricing remains. Under DAG v3 a registry operator can, at its sole discretion, increase prices over time. The vast majority of domain name registrants do not register domain names for a long term, so proposed long term solutions are not adequate. Additional measures to prevent, discourage and control abusive pricing are needed. At a minimum, registry operators should be required to provide a rationale for requested price increases that are in excess of some incremental uniform increase indexed to a set standard, such as the cost of living index. *INTA (20 Nov. 2009)*.

This revised provision is still not enough; it still allows unrestricted prices because it has a loophole. Registries will simply have everyone agree that they can change the price at any time in their agreements that most people do not read. Alternatively they could provide hidden discounts for people while raising prices for all others. Hard caps are needed—i.e., no more than twice the .com price. Registrants should make a clear statement on the need to protect their registrant clients from predatory pricing by registries with the safety mechanism of hard price caps in sec. 2.10. *G. Kirikos (22 Nov. 2009)*. *M. Berkens (23 Nov. 2009)*. *S. Roberts (23 Nov. 2009)*.

ICA commends the new language in the Registry Agreement that makes progress on preventing differential pricing of domain renewals that could permit a registry to tax the success of domain developers. It should be clarified that the pricing rule that accompanies a particular domain at its inception should carry over to any subsequent acquirer regardless of how they obtained it. *ICA (23 Nov. 2009)*.

Pricing – impact of registrars

The new language about renewal pricing needs clarification. The current version does not differentiate between varying second level names and does not fully recognize registrars' role in domain pricing. Suggested modified language: “[Registry Operator shall offer a domain registration renewal at the same price as the initial registration price for that name, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such

renewal price by Registry Operator and clear advice by the relevant registrar that renewal price may be higher than initial registration price.”] *R. Tindal (23 Nov. 2009)*.

Pricing impact—existing gTLDs

A clear statement is needed that existing TLD registries will not be allowed to deviate from the well-established general pricing structure that has defined the market in existing gTLDs .com, .net., etc. The absence of ICANN’s position on this point leaves global stakeholders feeling that ICANN is disconnected or unconcerned about potential abuses of registrant consumers who are the financial backbone of the Internet itself. *M. Menius (22 Nov. 2009)*. *E. Muller (23 Nov. 2009)*.

Clarification needed in pricing provision

Clarification is requested on what “net of refunds, rebates, discounts” means, as well as the bracketed sentence about offering of all renewals at the same price, what “same price” means, and whether that pertains only to a Registry Operator who is selling directly to a registrant. The proposed language seems to restrict a registry’s ability to offer a discount on renewals to registrants who commit to a longer renewal term, e.g. five years. Further, a registry could disclose renewal pricing--e.g., by posting a pricing policy on its website. However, the registry has no direct relationship with the registrant and should have no responsibility to disclose pricing to a registrant. Registry pricing and the fee a registrar charges are not the same. In the final sentence, what does “public query-based DNS lookup service” mean—that alternative models are not allowed, such as free registration with fees for resolution? RySG reserves the right to provide additional comments on this section, depending on the answers to these questions. *RySG (21 Nov. 2009)*.

Market forces should govern pricing

Section 2.10 of the proposed registry operator agreement should be removed with the understanding that the consumer protection it seeks to address will be addressed through market forces as it has been with all of the non-price regulated existing registries. *D. Schindler (Module 5, 24 Nov. 2009)*.

Other considerations beyond competition must be considered

Price competition does not necessarily mean lower prices for domains. It is also a question of the added value a new domain offers. *dotBERLIN (15 Nov. 2009)*. *dotbayern (16 Nov. 2009)*. *D. Krischenowski (17 Nov. 2009)*. *M. Maller (18 Nov. 2009)*. *M. Tofote (18 Nov. 2009)*. *G. Werner (18 Nov. 2009)*. *S. Lubek (19 Nov. 2009)*. *H. Krueger (20 Nov. 2009)*. *dotKoeln GmbH (21 Nov. 2009)*. *dothamburg (22 Nov. 2009)*. *HOTEL (22 Nov. 2009)*.

III. Analysis and Proposed Position

After significant community comment and an expanded and comprehensive review of pricing controls, imposition of pricing caps on new registry operators does not appear to be necessary or desirable. However, public comment has led to the inclusion of steps to discourage and provide notice for large price increases for renewal of registrations. The protections against predatory pricing in the current draft of the new gTLD agreement will provide registrars with enhanced notice periods prior to pricing increases and will require registry operators to not discriminate among registrars with regard to pricing.

Nothing in the proposed agreement for new gTLDs will directly modify the obligations of existing registry operators with regard to price caps; absent any amendments to existing registry agreements those provisions will continue in effect. Any requests from existing registry operators to modify their existing

agreements would be subject to community review and comment and ICANN approval. ICANN has promised in its agreement with existing operators that ICANN will "not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

The Registry constituency questions the meaning of "public query-based DNS lookup service.' We agree with the point made there. Section 2.10 will be clarified in the next version of the new gTLD agreement with respect to the language cited by the RySG. The proposed agreement would require that free public query-based DNS lookup service will be required to be implemented by the operators of all new gTLDs.

ICANN agrees with the comments that the value of new gTLDs is not limited to just competition for lower prices for domains but that other forms of service and value are important.

ICANN Fees

I. Key Points

- ICANN fees are meant as cost recovery mechanisms and, as such, must increase as the DNS expands and costs increase.
- The costs of the RSTEP process should be shared by the registry operator that stands to benefit from that process and the introduction of innovative services.
- The ability of ICANN to collect registrar fees directly from the registry operators in the event that it is unable to collect directly from registrars is crucial to the funding needs of ICANN and such fees can be recovered by registry operators via each registry-registrar agreement.

III. Comment Summary

Registry-level Fees (sec. 6.1)

RySG reiterates its v2 comments—the proposed mechanism seems to abandon cost-recovery obligations and amounts to a revenue share. *RySG (21 Nov. 2009)*.

The logic behind some of the fees is bizarre. E.g., registrar accreditation should be covered by the accreditation application fee. The amount for the registry operator fee (minimum \$25K) should be revised considering that one current registry operator pays less than \$1K per year. *M. Neylon (22 Nov. 2009)*.

RSTEP Cost Recovery (sec. 6.2)

RySG reiterates its v1 and v2 comments—this provision should be reconsidered given the negative impact it will have on innovation in the TLD space. *RySG (21 Nov. 2009)*.

Variable registry-level fee (sec. 6.3)

RySG does not see the cap on the per-registrar component that was supposedly added. RySG objects to registry operators being forced to act as guarantors for registrars. At this time, registries have no ability to select the registrars they do business with. If ICANN accredits registrars that cannot or will not pay, this should not become an obligation of registries. Language on this point suggested by RySG in v2 should be added. Finally, as more of the burden of payments to ICANN falls on registries, the registries believe they should have a similar approval right to the ICANN budget as currently enjoyed by the registrars. *RySG (21 Nov. 2009)*.

Adjustments to fees (sec. 6.4)

If such fees are subject to increase based on the CPI, they should also decrease if the CPI goes down. *RySG (21 Nov. 2009).*

ICANN revenue increase

ICANN's revenue is expected to substantially increase after new gTLDs launch. Does ICANN have an exact plan about how to handle this money and remain a non-profit corporation? *A. Sozonov (Module 5, 23 Nov. 2009).*

ICANN's main job appears to be monitoring the wired monies from a few hundred contracts and arranging 3 ICANN meetings a year. *S. Subbiah (Module 5, 23 Nov. 2009).*

ICANN should publish what it will do with all the money that it will collect from the new gTLD and ccTLD applications. *UNINET (22 Nov. 2009). D. Allen (23 Nov. 2009).*

III. Analysis and Proposed Position

ICANN considers the fees set forth in Section 6 of the new gTLD agreement to be fair and in keeping with the goal of cost recovery given what could be a rapidly expanding DNS.

The costs and fees for the RSTEP have been borne to date by ICANN. The costs and fees are expected to increase substantially in the future due to increased sophistication in new registry services and such increases are not part of the ICANN budget. If the number of registries increases significantly and ICANN is still required to cover these costs, the fees charged to all registries could be increased to cover the additional cost. Those new services that are subjected to the RSTEP process will need to be funded by the registry operator's seeking to profit from such services.

The variable registry-level fee (pass through of the registrar fee) is necessary in the event ICANN is unable to collect fees at the registrar level. This fee is intended to be recoverable by the registry operator pursuant to a provision included in the registry-registrar agreement. This pass-through is intended to be consistent with the one found in present registry agreements. The per-registrar fee will be capped at the amount determined by the ICANN board each fiscal year.

Because decreases in the CPI are extraordinarily rare on an annual basis, ICANN does not believe fees need to be subject to a board-approved reduction based on CPI decreases.

ICANN intends to utilize increased revenues from the new gTLD program to support the new gTLD program and continue to fulfill its mandate to maintain the security, stability and interoperability of the DNS and the Internet.

Technical Specifications and Requirements

I. Key Points

- Because of their importance to the security and stability of the DNS, DNNSEC and IPv6 will be required to be implemented by all new gTLD registry operators.
- ICANN will continue to consult with the technical community regarding the appropriate service level requirements for inclusion in Specification 6.

- ICANN will continue to review and supplement the ICANN gTLD Registry Continuity Plan based on community comment and policy discussions.

II. Comment Summary

DNSSEC

The guidebook needs to be clear on whether DNSSEC will be a requirement to run a new registry, and ICANN must appreciate that some applicants may be caught between an ICANN requirement for DNSSEC and a local government that objects to it. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*.

DNSSEC is made mandatory for all applicants in Module 5. ICANN should explain why it has not given the applicant a choice as to whether to require DNSSEC. *CONAC (Module 5, 23 Nov. 2009)*. *CONAC (23 Nov. 2009)*.

DNSSEC should be an optional feature, not mandatory. *S. Legner (19 Nov. 2009)*. *UNINET (22 Nov. 2009)*.

Universal deployment of DNSSEC is a critical step to close a known security issue that leads to “pharming” attacks (DNS cache poisoning) and the requirement for it is applauded. With the root most likely to be signed prior to the launch of any new gTLDs, it makes no sense to allow new gTLDs to publish without signing themselves. *Internet Identity (Module 5, 23 Nov. 2009)*.

We assume that DNSSEC services will not trigger additional reviews or fees. *RySG (21 Nov. 2009)*.

IPv6

IPv6 implementation is still rare around the world and especially outside the U.S. It will be very hard in the near future to find an IPv6 ISP and co-location hosting center outside of the U.S. and will create an obstacle mainly for IDN applicants. This requirement should be removed to ensure the diversity of applicants and new gTLD registries. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*. *D. Allen (23 Nov. 2009)*.

IPv6 should be optional. *A. Liu (23 Nov. 2009)*.

ICANN should only ask for the software ability to handle IPv6. *UNINET (22 Nov. 2009)*.

Technical feasibility of string (sec. 1.2)

This point should be rewritten to say: “...certain top-level domain strings may encounter difficulty in acceptance by various existing or future Internet services.” There is no need here to concentrate on webhosters or web applications. *P. Mevzek (Module 5, 22 Nov. 2009)*.

EPP (specification 6)

The registry operator should be mandated to follow all RFCs related to the EPP, and in the event it needs some extensions, it should be required to publicly release all documentation related to its EPP extensions. It should follow IETF guidelines in writing drafts and participate in IETF efforts related to EPP and other protocols associated with its operations (DNS, DNSSEC, IDNs, IRIS, etc.). *P. Mevzek (Module 5, 22 Nov. 2009)*.

CORE understands the need for a stable and robust infrastructure and encourages the chosen metrics for the DNS itself. But it is doubtful whether the same values should apply to the SRS (EPP). It does not harm registrants if the SRS is down for maintenance longer than 43 minutes per month and registrars could not interact with the SRS in this downtime. It is also questionable why the new values are higher compared to current registry operators contracts (e.g. COM/NET from VeriSign). *CORE (Module 5, 22 Nov. 2009)*.

Availability of RDPS and EPP service

The tightened requirements of 99.9% availability for RDPS and EPP services including all planned outages seem to go far beyond the practical requirements of some potential new gTLDs. The requirements should be reduced to the 99% value as stated in version 2 of the draft new gTLD agreement, which will leave responsibility with the TLD owner and foster competition amongst the TLDs and registry service providers. *S. Legner (19 Nov. 2009)*.

ICANN should reconsider the SLA levels for the EPP interface, giving well-established medium-sized registry operators at least a chance to compete with industry leaders, particularly for smaller, community-based new TLDs. *NIC.at (25 Nov. 2009)*.

SLA performance

For the sake of efficiency, ICANN should operate the probes specified in Specification 6, and the total number of probes should be lowered. Also the changes made to DAG v3 regarding SLAs put a large burden on small community-driven applicants. ICANN should revert to version 2 and focus on DNS availability (100%) and RPDS availability (99%). Also the proposed 99.9% availability for every single IP address listed for a TLD has drawbacks and carries risk of reducing the overall service availability in case of systematic architectural problems. ICANN should remove or reconsider these new SLA standards and consider alternatives (specific amendment suggestions provided in AFNIC comments). ICANN should also remove the 15 minute update time for the DNS SLA or at least to set the minimum frequency at several hours. *AFNIC (22 Nov. 2009)*. *NIC.at (25 Nov. 2009)*.

Performance Specifications

A uniform approach to performance specifications is not appropriate. CORE would like to see three categories and is willing to contribute concrete specifications to ICANN on request. The draft is unspecific about who determines the probes and testpoints. More specific language and a rationale should be provided regarding the changes to version 2 and how registrants benefit from the chosen approach. Also, it should be in the registry's discretion which model is chosen regarding DNS update times. It is now set to 15 minutes, but there are scenarios when longer times are wanted (e.g. to prevent name drop catching). *CORE (Module 5, 22 Nov. 2009)*.

Registry Interoperability, Continuity, and Performance

Regarding standards compliance, good operational security may require that some details of a registry's access and usage for its keys and registrants trust anchor material not be published. If is ICANN's goal to let registrants know that registries maintain good practices in this area, then that goal should be more explicit. RySG requests clarification on what is meant by designation of a registry services continuity provider. RySG would object if this meant that a registry has an obligation to select a second registry to take over in the event of a registry failure. The sentence including designation of continuity provider should be replaced with: "Registry Operator shall have a business continuity plan." Other specific technical language clarifications are requested and suggested in the RySG comments. Performance specification 6 eliminates many of the protections for registries as to allowances for things beyond their

control, allowances for planned outages and upgrades, and cure periods for failure. Further community discussion is needed on what is an appropriate standard for reliability and appropriate penalty for failure to perform, as well as the issue of whether every TLD should be subject to the same standards. *RySG (21 Nov. 2009)*

III. Analysis and Proposed Position

The implementation of DNSSEC is a requirement for all new gTLDs. Comments are not uniform on whether DNSSEC should be optional or mandatory, but due to the history and danger of attacks on DNS, and due to the coming signing of the root and implementation of DNSSEC in many existing gTLDs and ccTLDs, all new gTLDs will be required to implement DNSSEC. Additional support for requiring DNSSEC arises out of the consultation and study to address the overarching issue of malicious conduct; see <http://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>. There is work in progress in the IETF to address the concerns of some governments and others relating to the use of some particular cryptographic algorithms in DNSSEC; for more information please see <http://www.ietf.org/dyn/wg/charter/dnsex-charter.html>. As long as a proposed implementation of DNSSEC conforms to industry best practices it should not trigger any additional reviews or fees.

It was recently announced by the Number Resource Organization that less than 10% of IPv4 addresses remain unallocated <http://www.nro.net/media/less-than-10-percent-ipv4-addresses-remain-unallocated.html>. The NRO stated "IPv6 includes a modern numbering system that provides a much larger address pool than IPv4. With so few IPv4 addresses remaining, the NRO is urging all Internet stakeholders to take immediate action by planning for the necessary investments required to deploy IPv6 ... organizations and end users, should request that all services they receive from their ISPs and vendors are IPv6-ready, to build demand and ensure competitive availability of IPv6 services in coming years."

The wording in the new gTLD agreement regarding the technical feasibility of the string will be revised in the next draft of the gTLD agreement.

Specification 6 does require "provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 3735, 3915, 5730, 5731, 5732, 5733 and 5734." Additional applicable RFCs will be added if appropriate.

Given that gTLDs face "requirements for coordination, interoperability, and broad distribution," (see RFC 3735 <http://www.ietf.org/rfc/rfc3735.txt>), the language of the specification will be amended to require that any EPP extensions used by new gTLD registries must be documented.

ICANN will review the proposed service level requirements, particularly the EPP uptime requirements, and will consult further with the technical community and the broader ICANN community concerning appropriate service level requirements for new gTLD registry operations.

The draft specification calls for registries to publish a "DNSSEC Policy Statement", which is in accordance with current work of the IETF DNSOP working group. Registries would not be required to publish any confidential information.

The concept of a registry services continuity provider comes from the work ICANN has done over the past several years in consultation with the community on the "gTLD Registry Continuity" project <<http://www.icann.org/en/registries/continuity/>>. ICANN will review the requirement in light of the comments and in line with the current version of the ICANN gTLD Registry Continuity Plan <<http://www.icann.org/en/registries/continuity/gTld-registry-continuity-plan-25apr09-en.pdf>>.

Amendment Process

I. Key Points

- The special amendment process continues to be highly controversial with certain segments of the community.
- ICANN will consider changes to the process that may give registry operators more comfort regarding the possibility of arbitrary and detrimental amendments being effected without registry operator consent.

II. Comment Summary

Unilateral contract amendment rights should be eliminated

Unilateral language in the contract by ICANN will only create unilateral counter action in the conduct, policy formation, cooperative response to adverse events and in undetectable operational practice. We should not build a new contractual culture of surprise and distrust as the “scaling solution” to having more than 21 contracts. *E. Brunner-Williams (Module 5, 23 Nov. 2009)*. The draft registry agreement must excise any provisions (e.g. secs. 7.1, 8.6, 8.8) that unilaterally allow for amendment of contract terms by ICANN and return instead to the paradigm of requiring mutual consent as is customary for amendments. Moreover, the proposed process for changes is unnecessary—and section 7.2 should be deleted. *RySG (21 Nov. 2009)*. *Minds + Machines (22 Nov. 2009)*. *RSG (22 Nov. 2009)*. *GoDaddy (22 Nov. 2009)*. *Demand Media (22 Nov. 2009)*.

Unilateral contract amendment rights should be expanded

IPC is concerned that ICANN has no authority even to propose amendments regarding the scope of registry services, compliance with consensus policies, or the definition of consensus policies (section 7.1). The definition of “security and stability” should be examined to make sure it is not unduly restrictive. *IPC (22 Nov. 2009)*.

Amendment (sec. 7.1) and process for changes (sec. 7.2)

The provision allowing registry fee amendment needs to have a much higher standard—e.g. a compelling financial need based on unforeseen circumstances beyond ICANN’s control. There also needs to be an annual limit on any fee increase (e.g. no more than 10% increase per year). As now written, the provision broadens ICANN’s powers by allowing it to make unilateral changes to registry fees for any reason ICANN deems necessary; it is not linked to Stability or Security, is loose and dangerous, and is in addition to sec. 6.4 which allows ICANN to make annual increases in registry fees based on inflation. *R. Tindal (23 Nov. 2009)*.

III. Analysis and Proposed Position

The proposed process for effecting amendments to the agreement during the life of the contract continues to be the focus of concern by certain sectors of the community. The new gTLD agreement has

introduced a number of additional safeguards for registries against arbitrary amendments, including ultimately allowing registry operators to terminate the agreement if they oppose an amendment that is adopted over their objection.

ICANN is considering reducing the lengthy terms of each registry agreement or expanding ICANN's rights not to renew agreements as an alternative to the proposed amendment process. ICANN is also considering whether the relevant provisions and mechanisms to modify or replace the registrar accreditation agreement should be utilized for the new gTLD agreement. Finally, certain changes to the current provision are under consideration that would limit ICANN's ability to amend the agreement through the special amendment process to a small subset of matters and only under specified conditions. This issue was discussed in detail during ICANN's public consultation on the proposed registry agreement held on 7 January 2010.

Whois Requirements

I. Key Points

- ICANN will consider suggestions for technical changes to the protocols contained in Specification 4.
- The concept of a centralized zone file access is under consideration by ICANN and subject to further community comment.

11. Comment Summary

Specification 4

The Whois Service language requires significant alteration. ICANN should not carve out a contractual right to impose unknown and possibly arbitrary technical requirements on registries. Movement to alternative formats and protocols is subject to consensus policy-making. GNSO efforts to examine Whois are already underway and should continue. The centralized zone file access concept raises legal, security and procedural concerns and it is not known if it is a good solution to a real problem. Further discussion is needed regarding what security and abuse risks may be involved. RySG has significant concerns about ICANN taking on this responsibility, which is currently carried out by registry operators. RySG outlines in its comments specific considerations that should be addressed regarding centralized zone file access.

III. Analysis and Proposed Position

ICANN considers the requirement to provide thick Whois to be widely supported and settled in the new gTLD agreement.

The Whois language contained in Specification 4 is standard thick Whois format and protocol. GNSO work on Whois will continue. Any changes to the Whois-related requirements for new gTLDs would be developed with broad public consultation whether as a result of new policy development or through amendments to the agreement. ICANN will consider changes submitted by the community to clarify the

language. The potential for ICANN to create centralized zone file access is under consideration and is subject to community input. Such centralized zone file access could result in decreased cost for registry operators and better access to zone files for legitimate users.

Other Provisions

I. Key Points

- Applicants for new gTLDs will be thoroughly vetted and reviewed prior to entry into the new gTLD agreement and delegation of new gTLDs.
- The limitation of liability, indemnification and change in control provisions contained in the new gTLD agreement contain safeguards and compromises based on comments to prior gTLD agreement drafts and ICANN will consider additional suggestions.

II. Comment Summary

Pre-contract review

ICANN should mandate a pre-contract review which should not be limited to whether an entity is merely a going concern in good legal standing. Applicants must reveal which individuals and corporations are affiliated with the entity and what their past legal standing was, etc. Material negative changes in an applicant's status or financial qualifications should be sufficient to allow ICANN to refuse to enter into a Registry Agreement with that applicant. *INTA (20 Nov. 2009)*. INTA reiterates the importance of requiring applicants to re-certify and provide accurate and updated information. *INTA (20 Nov. 2009)*. ICANN still has not identified who would be responsible for conducting the pre-contract review and the pre-delegation technical check. *INTA (20 Nov. 2009)*."

Final registry agreement available for review (sec. 5.1)

The reference in section 5.1 is to a "draft" registry agreement. The exact registry agreement needs to be published and guaranteed to be the one that will be signed in the event of delegation prior to the beginning of the application period or payment of application fees. The agreement should guarantee in writing and at the outset that if the applicant jumps all the hurdles and is eligible for delegation according to the pre-published rules, Board approval and Department of Commerce introduction of the TLD into the root is certain. *Y. Keren (Module 5, 22 Nov. 2009)*. *A. Sozonov (Module 5, 23 Nov. 2009)*. *S. Subbiah (Module 5, 23 Nov. 2009)*. *UNINET (22 Nov. 2009)*.

Definitions usage

Care should be taken to ensure that the terms "Security and Stability" and "Registry Services" are used in their precise, capitalized, defined meanings, rather than lower-case. *RySG (21 Nov. 2009)*.

Representations and warranties (sec. 1.3)

It is unclear what "and the other parties thereto" refers to. The provision should read – "Registry Operator has duly executed and delivered to ICANN..." *RySG (21 Nov. 2009)*.

Root zone information publication (sec. 3.4)

ICANN must make promises to gTLD registries that are the same as the commitment it made to the IDN ccTLDs. RySG (21 Nov. 2009).

Arbitration (sec. 5.2)

RySG objects to the continuing insistence on only a single arbitrator. The right to grant punitive damages should be reserved for truly important matters (e.g., not for things like failure to file monthly reports). The phrase “Article 2, Article 6 and Section 5.4” should be deleted, and replaced by “Section 2.1, 2.2, and 6.1” to reflect that punitive damages would be available with regard to temporary policies, consensus policies, registry services and fees. *RySG (21 Nov. 2009)*.

Limitation of liability (sec. 5.3)

RySG reiterates its v2 comments on this issue (cap on indemnification under the limitation of liability). RySG also believes it proposed previously a reasonable disclaimer of warranties, as these warranties may otherwise be implied by law, and they are routinely disclaimed. RySG’s specific language should be inserted into Section 5.3. *RySG (21 Nov. 2009)*.

Indemnification of ICANN (sec. 8.1)

A more reasonable approach is to make the indemnification provision mutual and to limit it to material breach of representations and warranties, and to gross negligence and willful misconduct. RySG suggests language changes to this effect. Also, per its comments to sec. 5.3, RySG offered language that would clarify that the indemnity obligation is under the Limitation of Liability. A cap is especially necessary given the breadth of the indemnity required in the v3 Registry Agreement. Also, the word “reasonable” should be inserted before “legal fees”. In section 8.1(b) the sentence beginning “For the purposes of reducing Registry Operator’s liability...” should be deleted; there is no way the Registry Operator would know that information or have access to it to make such a demonstration. *RySG (21 Nov. 2009)*.

Defined terms (sec. 8.3)

The effect on security language is too broad and should be changed to read: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.”

Regarding effect on stability, the phrase “authoritative and published by a well-established, recognized, and authoritative standards body” is unacceptable. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which is IETF. Application of additional standards should be considered via the consensus policy process. The contract language also must be revised to adhere to proper terminology regarding IETF practices and definitions. *RySG (21 Nov. 2009)*.

Change in control, assignment and subcontracting (sec. 8.5)

In the second sentence after “organized” insert “in the same legal jurisdiction in which ICANN is currently organized and”. This is in keeping with the plan that ICANN retain its headquarters in the U.S. to ensure certainty about ICANN’s registry agreements. RySG is concerned that ICANN’s unwillingness to

make the change it requested in its v2 Registry Agreement comments suggests a desire to evade cited commitments by a reorganization. RySG remains concerned about the impact of section 8.5 on securities laws as possibly requiring notification prior to public disclosure. RySG recommends saving language be added and suggests: “Under no circumstances shall Registry Operator be required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws.” *RySG (21 Nov. 2009)*.

ICANN should review Sec. 8.5 to ensure it will be an effective protection and if it adequately insulates ICANN itself for liability from injuries suffered by registrants and Internet users after a registry passes to the control of a “bad actor”. *IPC (22 Nov. 2009)*. *SIIA (23 Nov. 2009)*.

III. Analysis and Proposed Position

Each applicant will be required to provide significant financial and other information in its application for a new TLD. This information will be verified by ICANN and certified by the applicant prior to the entry into a new gTLD agreement. The process and parties responsible for reviewing applicant information will be identified prior to the acceptance of new gTLD applications.

The final new gTLD agreement will be published prior to opening the new gTLD round. The current draft new gTLD agreement sets out (and the final version will continue to set out) the requirements that each new registry operator will be obligated to fulfill prior to delegation.

ICANN will review the language of the new gTLD agreement to ensure that the proper capitalized terms are reflected.

It is anticipated that each Continued Operations Instrument will involve a third party financial institution or other guarantor. That is the purpose of the reference to “the other parties thereto” contained in Section 1.3.

The commitments made to registry operators under the new gTLD program are similar to the commitments made to the operators of IDN ccTLDs and ICANN’s commitment “to coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner” is part of its core mandate.

A single arbitrator appointed pursuant to the rules of the International Chamber of Commerce is capable of resolving disputes arising under the new gTLD agreement at considerably less cost and in a more efficient manner than a panel of three arbitrators. This reduced cost will benefit both ICANN and the registry operator. Punitive damages are only available for “fundamental and material” breaches, which presumably would not include minor breaches such as the occasional failure to file a monthly report.

It is not appropriate for indemnification to be capped by the general limitation of liability provisions. Damages arising from the acts of the registry operator should be covered in full by the offending registry operator, subject to the limitations that were introduced in the indemnification section. ICANN will review and consider adding back the warranty disclaimers contained in existing registry agreements.

If the registry operator wishes to reduce its indemnification obligation based on the bad acts of other registry operators, it is appropriate that the registry operator should have the burden to prove such other bad acts.

ICANN will review the “Security” and “Stability” language but notes that these definitions are derived from existing consensus policies.

Given the length of the term of each registry agreement, ICANN requires flexibility in the language regarding its potential reorganization. ICANN will consider the proposed changes with respect to the notice required to be given by registry operators that are publicly traded.

ICANN believes that it is sufficiently protected from liability in the event that a change in control of a registry operator results in the registry being controlled by a “bad actor”, and that the new gTLD agreement provides sufficient safeguards to remedy such a situation.

RESPONDENTS

Hugh Addington (H. Addington)
Adobe Systems Incorporated (Adobe Systems)
AFNIC
David Allen (D. Allen)
American Bankers Association (ABA)
American Intellectual Property Law Association (AIPLA)
AT&T
Matthew Barnes (M. Barnes)
BBC
Allyson Bell (A. Bell)
Michael Berkens (M. Berkens)
Anders Rosenkrans Birkedal (A. Rosenkrans Birkedal)
Ron Andruff (R. Andruff)
Asociacion PuntoGal
Association for Progressive Communications (APC)
Association UNINET (UNINET)
BITS
Big Room Inc. (Big Room)
Mary Boese (M. Boese)
Eric Brunner-Williams (E. Brunner-Williams)
Business and Commercial Users’ Constituency (BC)
Nicole Carosella (N. Carosella)
ccNSO
China Organizational Name Administration Center (CONAC)
City of Paris
Coalition Against Domain Name Abuse (CADNA)
Coalition for Online Accountability (COA)
David Cohen (D. Cohen)
CORE Internet Council of Registrars (CORE)
Council of European Municipalities and Regions (CEMR)
Matthew Crow (M. Crow)
Courtney Daly (C. Daly)
Bradley Couture (B. Couture)
Danish Internet Forum (DIFO)
Demand Media

Avri Doria (A. Doria)
dotbayern
dotBERLIN
dotECO LLC (dotECO)
dotEUS
dothamburg
dotKoeln GmbH
DotSport Registry (DotSport)
dotZON
Markus Erbach (M. Erbach)
EuroDNS
European Communities Trademark Association and MARQUES (ECTA/MARQUES)
Megan Ferraro (M. Ferraro)
Heather A. Forrest (H. Forrest)
Robert Gerstemeier (R. Gerstemeier)
Jean Guillon (J. Guillon)
Frank Hagale (F. Hagale)
Geoff Hale (G. Hale)
Hearst Communications, Inc. (Hearst Communications)
HOTEL Top Level Domain GmbH (HOTEL)
Greg Houston (G. Houston)
IBM Corporation (IBM)
INDOM
Intellectual Property Constituency (IPC)
International Hotel & Restaurant Association (IH&RA)
International Olympic Committee (IOC)
International Trademark Association (INTA)
Internet Commerce Association (ICA)
Internet Identity
Patrick Jacxsens (P. Jacxsens)
Kerstin Jager (K. Jager)
Ivan Kalitka (I. Kalitka)
Yoav Keren (Y. Keren)
George Kirikos (G. Kirikos)
Dirk Krischenowski (D. Krischenowski)
Helga Krueger (H. Krueger)
Yan Kwok (Y. Kwok)
Beauregard LaCoste (B. LaCoste)
James Lake (J. Lake)
Stefan Legner (S. Legner)
Elizabeth Letchworth (E. Letchworth)
Amanda Liu (A. Liu)
Carter Livingston (C. Livingston)
Martha Lopez (M. Lopez)
Lovells LLP (Lovells)
Sven Lubek (S. Lubek)
Bill Manning (B. Manning)
MarkMonitor

MarkMonitor et al.
Malcolm McAdam (M. McAdam)
Amy M. McKinlay (A. McKinlay)
Rebecca McKinnon (R. McKinnon)
Andrew McNeill (A. McNeill)
Max Menius (M. Menius)
Patrick Mevzek (P. Mevzek)
Microsoft Corporation (Microsoft)
Minds + Machines
Martina Maller (M. Maller)
Joceline Masri-Nahigian (J. Masri-Nahigian)
Doug Motley (D. Motley)
Ed Muller (E. Muller)
Alexey Mykhaylov (A. Mykhaylov)
Keith Nahigian (K. Nahigian)
National Cable & Telecommunications Association (NCTA)
Jeffrey J. Neuman (J. Neuman)
NeuStar Inc. (NeuStar)
Michele Neylon (M. Neylon)
NICMexico
Nokia
Norwegian Post and Telecommunications Authority (NPTA)
Online Trust Alliance (OTA)
Courtney Perrone (C. Perrone)
Andrea Peters (A. Peters)
John H. Poelman (J. Poelman)
Elaine Pruis (E. Pruis)
Dieter Rau (D. Rau)
Registrar Stakeholder Group (RSG)
Registries Stakeholder Group (RySG)
Scott Roberts (S. Roberts)
Royal Regency International Hotels (RRIH)
Francisco Salamero (F. Salamero)
Dan Schindler (D. Schindler)
Robert B. Seidel (R. Seidel)
Anja Seugling (A. Seugling)
SIDN
Ritva Siren (R. Siren)
Alexei Sozonov (A. Sozonov)
Werner Staub (W. Staub)
Uwe Stache (U. Stache)
Sean Storan (S. Storan)
S. Subbiah
The AmericaSpeakOn.org Team (AmericaSpeakOn.org)
The Coca-Cola Company (Coca-Cola)
Thomsen Trampedach GmbH (Thomsen Trampedach)
Time Warner Inc. (Time Warner)
Richard Tindal

Bastian Tippkemper (B. Tippkemper)
Markus Tofote (M. Tofote)
Adam Toronto (A. Toronto)
Lutz Treutler (L. Treutler)
UNINETT Norid AS (UNINETT Norid)
VeriSign
Caspar von Veltheim (C. von Veltheim)
Visa Inc. (Visa)
Gabriele Werner (G. Werner)
WIPO Arbitration and Mediation Center (WIPO)
Yahoo!

Reference Material 18.

NEW gTLD DRAFT APPLICANT GUIDEBOOK VERSION 4 PUBLIC COMMENT SUMMARY AND ANALYSIS

Sources

Public Comment Postings (31 May to 21 July 2010). The full text of the comments may be found at: <http://icann.org/en/topics/new-gtlds/comments-4-en.htm>.

GENERAL COMMENTS

Key points

- There should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants.
- By working with SO and AC working groups, ICANN has sought to ameliorate concerns that, in considering and responding to public comments, staff is making policy.
- By publishing these comment summaries and making significant amendments to the Guidebook, ICANN has sought to ameliorate concerns that it is not responsive to comment.
- ICANN has created staffing and resource plans to be in a position to adequately monitor contractual compliance.
- The New gTLD Program has introduced new rights protection mechanisms and malicious conduct mitigation measure to help provide for the safety of Internet users.
- Success of the New gTLD Program will be measured by the benefits to Internet users and not by the number of gTLD applicants.
- The ICANN community is striving to avoid delays in launching the new gTLD process that would undermine the credibility of ICANN's multi-stakeholder, bottom-up policy development process.

Summary of Comments

Public Interest TLDs. The sale of TLDs needs to be balanced with sound public policy. E.g., the potential use of a .health to signify health providers could make it increasingly difficult for consumers to differentiate between legitimate health providers and general commercial organizations. Also, TLDs such as .physio could be misused and potentially breach national laws (e.g. in Australia, use of physio.au by anyone other than a registered physiotherapist would breach registration laws). The fees for new TLDs are prohibitive for small not-for-profit groups that might appropriately manage public interest-oriented TLDs (e.g. a national physiotherapy association managing a .physio). ICANN should therefore reserve some TLDs where the public interest does or should outweigh commercial interests. *D. Mitsch (16 June 2010)*.

No privileged treatment and a level playing field.

In response to many requests for privileged treatment by various potential applicants, ICANN has wisely resisted these pleas. We support a single application window, a single set of rules, and no special priority to any type of application beyond those already contemplated in the DAG. *Minds + Machines 21 July 2010*).

Proposals for advantaged applicants should not be adopted. There will be an official communications and marketing period to give everyone the possibility (not just “insiders”) to get their community, geographical or standard TLD. Giving advantage to some applicants would compromise the ability of communities or governments to find the best TLD solution. *Bayern Connect (21 July 2010)*.

Glossary.

Definitions are often circular (e.g., the community-based TLD definition uses the term “community” and does not explain what comprises a “community”) and do not adequately describe the technical terms for those new to ICANN processes. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

CORE appreciates additions made to the DAG to address the specific needs of intergovernmental organizations or governmental entities. CORE requests a further clarification that “governmental entities” means any level of public authorities, according to their respective legal systems, be that national, federal, state, regional, local, municipal or other. In many languages there is a clear distinction between “governments” and “public authorities” where the former is sometimes reserved to the highest political body representing the sovereign state, and may go further down to federal or regional level, but rarely encompasses all levels of public authorities with a political and administrative mandate to manage a territory. *A. Abril i Abril (Module 5, 21 July 2010)*.

New gTLD-related enforcement resources--not-for-profits. ICANN should consider including in the Applicant Guidebook mechanisms that allow not-for-profit organizations to conduct enforcement activities in a more efficient and cost effective manner. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Compliance. The new gTLD program raises concerns over abuse in the secondary market for new TLDs which ICANN is not in a position to adequately monitor from a contract compliance standpoint due to the unlimited nature of the proposed gTLDs, and also raises concerns over abuse of solicitations for defensive registrations. *A. Aikman-Scalese (21 July 2010)*.

Compliance Officer. The entity awarded a new gTLD should be required to designate by name a Compliance Officer responsible for contract compliance and should be required to notify ICANN immediately of any changes in that designation. They should also be required to provide prominent public notice on their home page of the name and contact information for the designated Compliance Officer. *A. Aikman-Scalese (21 July 2010)*.

Whois concerns. Concerns about inaccurate Whois information should be addressed prior to implementation of the new gTLD program. *A. Aikman-Scalese (21 July 2010)*.

Costs. The effect of each new version of the guidebook is to raise operational costs for all kinds of TLD registries, when most of them don’t need the highest possible standards. One size does not fit all. *A. Abril i Abril (21 July 2010)*.

Overall approach.

ICANN must discard the mantra that more is better. Per the advice of the Economic Framework paper, it should analyze the likely costs and benefits of new gTLDs and move forward to authorize only those that can demonstrate a net public benefit. *MPAA (21 July 2010)*. *BITS (22 July 2010)*.

The Business and Commercial Users' Constituency (BC) wants to see new gTLDs rolled out in a systematic manner. All new names should meet five key principles—differentiation, certainty, good faith, competition and diversity. *BC (26 July 2010)*.

The four overarching issues are not integrated into the DAGv4 and ICANN's development of the implementation plan for new gTLDs. ICANN should develop a holistic implementation plan that includes a comprehensive set of safeguards for addressing these issues. *AT&T (21 July 2010)*.

ICANN's multistakeholder, bottom up process loses all credibility if delays continue. It is time to concede that the gTLD process has been overloaded. It must be redesigned in a way to constrain (a) the range of issues to be dealt with in the application documents; and (b) the range of gTLD applications accepted in the coming round. Both constraints can be applied by specifying a simple set of guiding principles rather than scoring systems or lists of names and codes. Examples of possible principles:

(1) ICANN must maintain an environment conducive to the beneficial development of the Internet
(2) ICANN may deny the delegation of gTLDs or kinds of gTLDs whose likely negative externalities (external costs) outweigh their benefits for the development of the Internet in the public interest. *W. Staub (21 July 2010)*.

Flaws in policymaking process. Where public comments suggest a policy that does not yet have consensus through the bottom-up process, that proposed policy should not be introduced at the discretion of the ICANN staff. In such cases the proposed policy should go to the appropriate policy making body (e.g., the GNSO). The three issues of vertical integration/separation, single registrant single user (SRSU), and HSTLD do not have consensus and the ICANN staff exceeded its role by including them in some versions of the DAG in the implementation process despite that these issues are not explicitly discussed in the final report for new gTLDs. The staff's role is to make an implementation plan for what is figured out in policy discussions, not to introduce a new policy. Public comments of value to the staff are comments that: (1) suggest that a policy issue which became consensus is not implemented; (2) suggest that the implementation plan contradicts the policy consensus or ICANN bylaws, etc.; (3) suggest that there is a flaw in the plan so that there is difficulty in actual implementation; and (4) suggest an improvement for implementation of a policy issue which became consensus. *JPNIC (2 Sept. 2010)*.

Criterion for measuring success of new gTLD program. Belief in meeting consumer demand and eagerness for new gTLD business are deeply connected. But beyond the issues of competition and consumer choice is the additional issue of stability. Threats to stability caused by eagerness for new gTLD business have not completely disappeared. A high number of applications received and processed is not the measure of success for ICANN. In reality only a few applicants will succeed; others will fail because they do not represent real consumer demand. After this stage we will be able to enter into a new era in which people can calmly predict consumer demand and the stability threat will be reduced. Reaching that point will be an achievement for ICANN. It is of concern that by recommending single registrant single user (SRSU) TLDs, ICANN staff may be intending to increase the number of applications. This should not be true. *JPNIC (2 Sept. 2010)*.

Support for New gTLD Program

Complete the guidebook and do not delay the program. Further delay of the launch will erode the credibility of the new gTLD program. The Guidebook is in very good shape and reflects hard-won

compromises. *Minds + Machines (21 July 2010)*. *Bayern Connect (21 July 2010)*. *R. Tindal (21 July 2010)*. *D. Schindler (22 July 2010)*. *J. Frakes (22 July 2010)*.

It is almost time to move to the gTLD implementation stage. Demand Media strongly believes that introducing new gTLDs will provide more choices for consumers, genuine uniqueness and specificity in TLDs and greater competition among registries. Many issues have been addressed by ICANN in the various version of the DAG with community's input. The Applicant Guidebook may need to be amended to deal with future issues and that is to be expected. The DAGv4 represents sound judgment and consensus in most respects. *Demand Media (22 July 2010)*. *J. Frakes (22 July 2010)*.

Opposition to New gTLD Program

Opposition.

The International Olympic Committee (IOC) opposes introduction of new gTLDs. IOC's recommendations should not be taken as a waiver of IOC's right to proceed against ICANN for damages resulting to the IOC or the Olympic movement from implementation of the proposed new gTLD system. *IOC (21 July 2010)*.

Introduction of new gTLDs is premature and launch should not proceed without further review and revision. It is imperative that any plan put in place will guarantee the safety of Internet users and protect the rights of all parties. *CADNA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *IACC (21 July 2010)*.

ICANN has not adequately addressed the overarching issues. Unresolved malicious conduct concerns alone require that the gTLD program not go forward because it is far from ready. At minimum ICANN should assume at least another 18-24 months will be needed before it could launch new gTLDs given all the unresolved matters. As evidenced by the economic work produced by ICANN this summer, it is far from clear whether the public interest will be served; there has been no demonstration of demand for new gTLDs, or that a flood of new gTLDs will result in constructive, new competition. *SIIA (21 July 2010)*.

The case has not been made for and no sensible advantages would be gained by introduction of new gTLDs. The new program will create more confusion and worsen cybersquatting and trademark infringement problems. Instead of introducing an unlimited number of additional TLDs, ICANN should concentrate on improving the current DNS by finding effective solutions to cybersquatting and trademark infringement problems. *H. Lundbeck (8 July 2010)*. *VKR Holding (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*.

ICANN should cease its headlong rush to authorize an unlimited number of new gTLDs and instead follow a more considered approach based on an assessment of the need for new gTLDs and how they can be judiciously authorized so as to protect the interest of commercial users and the general public. *MPAA (21 July 2010)*.

Microsoft continues to object to ICANN's planned simultaneous introduction of an unlimited number of new ASCII gTLDs. If ICANN nonetheless proceeds despite the widespread opposition to the program and the economic downturn, then it should take the time necessary to consider and address the issues and questions raised by the community about the intended implementation of the plan. It is essential that ICANN "get it right" and as written the DAGv4 effectively ensures that it will not. *Microsoft (21 July 2010)*.

ICANN is not promoting competition. ICANN is not promoting competition with the new gTLD program but is acting in favor of registrars and registries and against the interests of the public. If competition is working, this will be seen through registration prices lower than .com. ICANN refuses to take steps to eliminate VeriSign's abusive .com monopoly by implementing a regular tender process so that each TLD is managed by a registry that will give consumers the lowest price for a set level of service. *G. Kirikos (1 June 2010).*

ICANN does not value public input. We will passively resist by not participating in a process that only leads to predetermined outcomes. We request that ICANN notify the community when it is ready and willing to demonstrate that it properly values public comments. *G. Kirikos (17 July 2010).*

Analysis of Comments

Policy development process and public comment

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market, "The new corporation ultimately should ... oversee policy for determining the circumstances under which new TLDs are added to the root system." The secure introduction of new gTLDs, as specified in the White Paper, remains an essential element in fostering competition and choice for Internet users in the provision of domain registration services.

The introduction of new gTLDs continued to be identified as a core objective for ICANN in several key agreements, for example "Define and implement a predictable strategy for selecting new TLDs" in the 2003 Memorandum of Understanding. The study and planning stages, extending back several years, include two trial rounds of top-level domain applications held in 2000 and 2003. Experiences from those rounds have been used to shape the current process.

The New gTLD Program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the GNSO, formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholders, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community were engaged in discussions for more than 18 months on such questions as demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The ICANN Board subsequently approved these recommendations in June 2008, and directed staff to develop an implementation plan.

The development of the Applicant Guidebook, and the resolution of the overarching issues identified during the process, has been a challenging task. Recommendations adopted from the trademark and malicious conduct working groups have been, where possible, incorporated into the Applicant Guidebook, while issues of root zone scaling and the overall demand for new gTLDs are being addressed in separate reports.

Since creation of the consensus policy to introduce new gTLDs, ICANN has commissioned several economic studies to describe the costs, benefits and conditions necessary to maximize net social benefit of the program. The studies have also explored anticipated benefits of gTLD expansion.

The program implementation contains several elements in mitigation of certain concerns, including:

- Developing dispute resolution procedures for:
 - Similar TLD applications causing user confusion
 - Misuse of community labels
 - Infringement of rights
- Introduction of additional rights protection mechanisms
- Measures to mitigate and reduce malicious conduct
- Root zone scaling and DNS stability measures

The multi-stakeholder model means that ICANN is responsible to a diverse range of stakeholders, and the ICANN community has done an outstanding job of considering, in many cases, diverse views on issues and finding workable solutions. While there are claims that the failure to launch new gTLDs could be interpreted as a failing of the multi-stakeholder model, the process is, on the contrary, an example of its success. The implementation of this program has been a truly collaborative, community effort, involving a number of individuals who have worked very hard to resolve many contentious and important issues in large part through dedicated working groups such as:

- The Implementation Recommendations Team - proposed solutions on trademark protection;
- The Special Trademark Issues group - made recommendations for a Uniform Rapid Suspense System and a Trademark Clearinghouse;
- The Zone File Access group - recommended a standard zone file access model to aid those addressing potential DNS abuse;
- The Temporary Drafting Group - worked with ICANN to draft selected proposed elements of the registry agreement;
- The IDN Working Group – completed work on definitions and solutions for variant TLD management.

Some may question the value of the public comment process, if all comments are not going to be acted upon. However, the analysis of public comments received on the new gTLD process has set a new benchmark for ICANN. It is acknowledged that the content of the Applicant Guidebook will not please everyone, but there has been a genuine commitment to consider and respond thoughtfully to the public comments that people have taken the time to make, and in many cases these comments have been directly acted upon. This is evidenced by the considerable number of changes that have been made to the various iterations of the Guidebook and the consideration of the overarching issues that arose during the process.

While listening carefully to the public feedback, one of the challenges has been to be careful not to reopen for debate issues that had been discussed and resolved during the policy development process while also ensuring that the consideration of public comment did not lead to new policy discussions. The Applicant Guidebook was developed around the principles, recommendations and implementation guidelines provided by the GNSO policy development process. These guiding principles in developing the Applicant Guidebook have been to: preserve DNS stability and security; provide a clear, predictable and smooth-running process; and address and mitigate risks and costs to ICANN and the global Internet community.

Registry-registrar cross-ownership was discussed in the context of promoting choice and competition. The GNSO considered the issue and was not able to come to consensus, which ultimately led to the Board making a decision supporting cross-ownership, with some protections built in.

The High Security Top Level Domain discussion was part of the overall concern about potential for increased malicious conduct and the principle that the introduction of new gTLDs should not cause security or stability issues. The community undertook a great deal of work on malicious conduct, which included a working group on a possible HSTLD designation. As a result of discussion on strategies for mitigating malicious conduct in the namespace, nine measures were recommended to increase the benefits to overall security and stability for registrants and trust by all users of new gTLD zones.

A well-defined process was undertaken which recommended the introduction of new gTLDs and was supported by the ICANN Board. We believe that many of the reasons for not supporting the introduction of new gTLDs that have been identified through public comment and public workshops and fora have been heard and addressed during the development of the Applicant Guidebook.

Compliance

In addition to the development of the Applicant Guidebook and the operational readiness of the New gTLD Program itself, ICANN has allocated considerable time and effort to ensure the overall organization, including its Compliance group, will be able to manage the potentially increased volume from new Registries.

Glossary and definitions

In addition to the glossary provided at the back of the Applicant Guidebook, Module 1 provides more detailed explanations of the meaning of terms such as “community” in the context of the new gTLD process.

We acknowledge that there are varying levels of governments, and differing terminology and levels among governments. Additions have been made to the next version of the Applicant Guidebook to respond to comments for clearer definitions. The geographic names section has attempted to identify the expected level of government support, non-objection, required for the different categories.

Success of the new gTLD program

There are many ways to measure the success of the new gTLD program. From an operational standpoint, for example, we will look at the efficiency with which applications are processed, the performance of the TLD Application System (TAS), and the overall process flow and timelines.

There are other ways success could be measured. The Affirmation of Commitments calls for a review of Competition, Consumer Trust and Consumer Choice one year after new gTLDs go into operation. This analysis will likely answer critical questions that are asked today, for instance: has there been an increase in choice for consumers? Has the stability and interoperability of the DNS been impacted by the increased number of gTLDs in the root? Has the program allowed for more geographic diversity in the gTLD namespace?

TIMELINE / MODELS

Key Points

- The Board has directed staff to adopt as a working plan the Launch Scenario with launch date of Q2 2011.

Summary of Comments

Finalize the new gTLD process.

ICANN should finalize the gTLD process and start accepting new applications. Actions to facilitate this are highly welcome, such as the proposed “ICANN Summit” in September. *dotBERLIN (3 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*. *dotZON (21 July 2010)*.

It is important for the credibility of ICANN and the vast number of already existing applicants to continue with the process so that a final guidebook can be published as soon as possible. *Bayern Connect (21 July 2010)*. *Domain Dimensions (22 July 2010)*.

A reliable timeframe for the next application round should be set. *dotZON (21 July 2010)*. *eco (21 July 2010)*. *HOTEL (21 July 2010)*. *NIC Mexico (21 July 2010)*. *EuroDNS (22 July 2010)*. *dotKoeln (22 July 2010)*.

Now is the time for the new gTLD program to move forward. The guidebook should be in final form no later than the end of 2010 and the application window and communication/outreach completed by summer 2011. A schedule for the next 18-24 months should be provided which clearly delineates what will happen and when as it relates to the new gTLD program. *J. Frakes (22 July 2010)*.

ICANN should move forward with the program in a timely fashion. ICANN needs to recognize that it cannot focus the community’s time and energy on the “unknown”. It would be unreasonable to expect any group of people to draft policies today that would remain unaltered for eternity. It would be beneficial for all parties if these limitations were recognized. If and when issues arise let us all address them then. *Blacknight Solutions (21 July 2010)*.

Changes in the latest version of the DAG allow for the launching of the application round in the near future. *AFNIC (23 Aug. 2010)*.

With a few tweaks we believe the new gTLD program will be ready to launch later this year or early 2011. *Neustar (21 July 2010)*.

Official timeline and benefits of an incremental approach.

ICANN now needs to focus on publishing an official timeline as much as it needs to work on the final adjustment of the new gTLD program. Accumulated delays are detrimental to new gTLD applicants with projects having “net social benefit” and undermine ICANN’s credibility and legitimacy. The incremental approach previously suggested by AFNIC is still valid. If an incremental approach were not deemed appropriate for the application process (reserved windows for applications with defined characteristics), it could still be highly beneficial in the subsequent processing of applications, i.e., either for the actual processing of the application and/or later on upon negotiation of the Registry Agreements. Once ICANN

accepts applications, it would seem fairly reasonable that groups of like-featured applications could naturally appear (objectives, governance, policies and/or targeted audiences, etc.) Efficiency, simplicity and justice principles would then argue for specialization of the processing of such applications. Specialization could intelligently combine with the incremental approach. Batches of applications would form on the basis of rationality rather than mere chance. ICANN would gain time to deal with the most difficult problems posed by projects of uncertain “net social benefit” while it would realize and prove the value of its new gTLD program by unleashing initiatives that are of evident “net social benefit.” *AFNIC (23 Aug. 2010).*

Indifference toward public comments.

ICANN has admitted that it is ultimately indifferent to comments submitted by stakeholders in this process. Time Warner is deeply concerned that ICANN appears poised to move forward with the launch of new gTLDs despite the fact that none of the “overarching issues” identified by ICANN in early 2009 have been adequately addressed in the DAGv4. If ICANN plans to launch a successful gTLD program, it has more work to do before claiming “mission accomplished” and accepting applications. *Time Warner (21 July 2010).*

ICANN should revisit issues with open mind.

ICANN should revisit issues with an open mind and propose needed changes before the Board meets in September to consider all of the outstanding issues relating to implementation of the new gTLD program. *COA (21 July 2010).*

Take more time before introducing new gTLDs because issues remain unresolved.

Three substantive issues remain unresolved in the DAGv4: (1) the economic study; (2) proposed rights protection mechanisms; and (3) root scaling. *MarkMonitor (19 July 2010). Carlson (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Comerica (3 Aug. 2010). Sunkist (21 July 2010). LifeScan (22 July 2010). Solvay (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

As advised in the Economic Framework report, ICANN should move slowly in rolling out new gTLDs and study the implementation, demand, and potentially negative consequences arising from a new gTLD rollout. There has not been significant progress on the four overarching issues. *Verizon (20 July 2010). HSBC (21 July 2010). A. Aikman-Scalese (21 July 2010). Adobe Systems (21 July 2010). Rosetta Stone (21 July 2010).*

Clarity on next steps.

USCIB members would appreciate some clarity on how ongoing community discussions, the release of the Economic Framework study and expected second phase of that study, as well as the expected root scaling study, will affect the DAGv4 and possible launch of new gTLDs. For example, the Economic Framework study stated that it may be wise to continue ICANN’s practice of introducing new gTLDs in discrete, limited rounds. *USCIB (21 July 2010).*

ICANN should prioritize IDNs and introduce new gTLDs in discrete, limited rounds, consistent with the Economic Framework paper’s recommendations. *AT&T (21 July 2010). Coca-Cola (21 July 2010).*

Launch the less contentious cultural and linguistic TLDs.

Many of them will help developing countries and are less likely to be problematic with rights holders. *Blacknight Solutions (21 July 2010).*

Analysis of Comments

Finalizing the new gTLD process

ICANN continues to approach the implementation of the program with due diligence and plans to conduct a launch as soon as practicable along with the resolution of these issues.

Timeline and benefits of an incremental approach.

A Special Meeting of the ICANN Board of Directors was held via teleconference on 28 October 2010 in which the Board discussed proposed timelines for publishing a final version of the Applicant Guidebook and the extent of public comment to be received on the Applicant Guidebook. After agreement on a proposed workplan to guide the remainder of staff's work, the Board directed staff to adopt as a working plan the scenario including a launch date in Q2 2011.

Staff continues to make progress towards the program development while, at the same time, working with the global Internet community towards a level of consensus on the Program's outstanding issues.

COMMUNICATIONS

Key Points

- The communications campaign is designed to address concerns about whether communications letting all parties know of the opportunity to operate a new gTLD are appropriately detailed, began soon enough, and contain enough detail to help entities that are new to ICANN's processes.

Summary of Comments

Start communications period. The communications period should start sooner rather than later; 'outsiders' should get enough time to become familiar with the new gTLD opportunities. dotZON (21 July 2010).

Evaluation procedures—technical requirements training, education outreach. ICANN should provide greater detail and instruction regarding how to prepare for the technical requirements associated with the new gTLD application and process, and should provide education and training outreach for organizations such as not-for-profits that are new to ICANN activities. This outreach should begin immediately but be increased once the final Applicant Guidebook is released so that parties will have access to the final policy information. It should cover the application process as well as areas of interest to third parties, such as the objection procedures and rights protection mechanisms. Outreach should be done in all five ICANN regions, and ICANN should provide live in-person seminars open to the public rather than only posting information on its website or hosting webinars. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

Analysis of Comments

The Applicant Guidebook, exceeding 300 pages in length, is already quite detailed about the application process. It covers topics that the commenters requested, such as objection procedures and rights

protection mechanisms. Regarding the request to provide greater technical instruction, the questions contained in the application are intended to inform and guide the applicant in aspects of registry start-up and operation. Inexperienced applicants should find them a natural part of planning. Supplemental documentation or more detailed guidance on particular areas of technical operations are referenced in the guidebook where available, and a number of resources are available elsewhere in the community.

Regarding the communications plan for new gTLDs, ICANN has already undertaken significant effort to achieve the objective of the four-month requirement recommended by the Generic Names Supporting Organization. ICANN's staff remains deeply committed to the primary goal of ensuring that all those who wish to participate in, and benefit from, the new gTLD Program have opportunity to do so.

A communications plan has already been posted, received public comment, and is being revised. The current plan includes live outreach presentations in all five ICANN regions, in addition to written and recorded educational materials. In order to give due consideration to all publicly expressed views, the plan will be finalized after ICANN's international meeting in Cartagena, December 5 – 10 2011.

APPLICATION PROCESS

Key Points

- An Applicant Support Working Group has been established to evaluate options to provide support for defined groups of applicants. This has resulted in various types of outreach and education that ICANN expects to offer to applicants. This group will continue to work to find sources of funds and criteria for awarding them.
- A reduction in the application fee for efficiencies gained from certain types of applicants (i.e. multi-string, single entity applicant) has already been considered in determining the \$185,000 fee. ICANN staff will review processes after Round One to determine where additional efficiencies may be gained for subsequent rounds and additional efficiencies gained will be passed on to applicants in future rounds.

Summary of Comments

Fee standards—developing and undeveloped countries. Huge fees (\$185K evaluation fee, US\$70K-\$122K and US\$32K-\$56K for the M&PO and community objections respectively) would stifle the initiative of developing and undeveloped countries and dampen globally balanced development of the Internet. ICANN should be able to set a fee standard based on the costs and adopt a favorable fee policy for the developing and undeveloped countries. ISC (21 July 2010).

Discounted fees--IDNs and Exact String Translations.

ICANN should significantly decrease application fees for exact translation equivalents of the same TLD to reflect the effort the evaluating team would require to process the applicant. If all TLDs fall under the same applicant, community, business plan, string, backend registry, etc., then ICANN does not need to spend additional time repeating the same evaluation step needlessly since economies of scale/scope are reasonably justified. .MUSIC (20 July 2010). dotKoeln (22 July 2010).

Each community-based applicant should be allowed to increase their utility within their specific community by having the option to apply for their respective IDN-equivalent TLDs for a nominal additional fee (per IDN or translated equivalent). It would not be justified to ask a community based applicant to pay an additional \$185K for each translation to the approved string. BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. CNNIC (21 July 2010).

Reduced fees for small cities, small cultural and linguistic community TLDs. Special consideration, including reduction of the \$185K application fee and \$25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. JIDNC (21 July 2010).

Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

Reduced fee for bundled variants. ICANN should provide for a lower fee in the case where the TLD names are not chosen but are pre-existing (e.g. geographical names, many of which have more than one common name including IDN variants). Charging \$185K for each variant seems punitive and unfair. Minds + Machines (21 July 2010). Bayern Connect (21 July 2010).

Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a “deposit” on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).

Support for African new gTLD applications. The African ICANN Community urges that support be given for new gTLD applications from Africa and be prioritized. Civil society, NGOs and non for profit organizations in Africa are most in need of such support, and support is of utmost importance for geographic, cultural and linguistic and community based applications.

- Support should include but not be limited to: financial (reduced fees); linguistic (translation in the six UN languages); legal; and technical.
- Cost reduction is the key element in fulfilling the goals of Board Resolution 20, and the following should be entertained to achieve cost reduction: waiving the program development cost (\$26K); waiving the risk/contingency cost (\$60K); lowering the application cost (\$100K); waiving the registry fixed fees (\$25K per year); and charge only the registry-level transaction fee (\$.25 per

domain name registration or renewal). The reduced cost should be paid incrementally to give African applicants more time to raise money and since investors will be more encouraged to fund an application that has passed initial evaluation.

African ICANN Community (28 June 2010).

Developing countries applicant support working group—support for initiative. We welcome the recent ICANN initiative regarding possible support for applications from developing countries. The results of the working group should be taken into consideration in the final Applicant Guidebook. *Arab Team (21 July 2010).*

Developing country non-profit applicant financial support efforts by ICANN, where the applied for TLDs are for the public good, are welcome, and should include reduced fees for application, evaluation and the annual contract. For proposed gTLDs financially sponsored by certain governments, ICANN should consider the government's financial support commitment in place of the irrevocable standby letter of credit or deposit into an irrevocable cash escrow account, since some governments are reliable enough to guarantee sustainable operation of the registry(s). DNSSEC cost burdens should also be reduced and the application process should be made more accessible to global stakeholders. ICANN should provide document translations and conference simultaneous interpretations in six UN languages which may also help reduce costs for non-English speaking applicants. As for technical support, DNSSEC support is a necessity. *CONAC (22 July 2010).*

The consensus in the At-Large Community is that whatever the finalized processes and procedures, ICANN must embrace the prospect of providing affirmative support for participation of hitherto marginalized communities, especially those entrusted to act on behalf of disadvantaged groups or those with agendas widely recognized as active in the general public interest in the new gTLD economy. The ALAC strongly endorses continuation of these efforts. *ALAC (September 2010)*

Reduced application fee--brand and charitable organizations. The application fee is too high and could be discriminatory against certain types of applicants such as .brands restricted to employees of a company or charitable organizations. Such applicants should be eligible for a lower fee. *Hogan Lovells (21 July 2010).*

Application fee level is generally appropriate. The \$185K fee is likely to be a realistic average estimate of ICANN's costs to manage the program. Substantial changes to the new TLD process as described in DAGv4 could result in an increase in the fee. I support practical ways to reduce costs for the discrete group of applicants in need, especially those from developing countries. *R. Tindal (21 July 2010).*

Terms of payment—exchange rate. The following is suggested as addition in DAGv4 after section 1.5.4: "Section 1.5.5—Terms of payment: Payment to ICANN may be effected in USD or in the legal currency of the applicant's country. If the applicant decides to use his local currency for processing payments, the exchange rate used shall be the one which applies on the day the applicant registers with TAS (refer to paragraph 1.5.1)." This section is justified because the risk of exchange rates should not be borne by applicants alone, but shared with ICANN. It may be fair for ICANN to acquire financial products to hedge this currency risk, rather than each and every applicant having to provide this insurance on its own. *E. Blocher (Module 1, 5 June 2010).*

Refund of evaluation fee (1.5.1). The proposed 20% refund of the evaluation fee to unsuccessful applicants after having completed dispute resolution seems unreasonable. While it may be reasonable

to make such a refund if the applicant decides to withdraw at the outset of objection proceedings, there will be less incentive to take such an approach if the applicant knows that they will recover this sum whatever the outcome of the dispute resolution. BBC (21 July 2010)

Analysis of Comments

Fee Issues

Comments regarding fees have generally been consistent with previous versions of the Draft Applicant Guidebook. One comment is generally in support of the application fee to cover costs, while a number of comments have suggested a reduction in the application fee either based on where the applying organization is located (e.g., a developing country), its organization type (not-for profit, charities, small cities, a brand holder) or based on a presumed level of effort required to review an application (IDN variants, or multiple strings from the same organization).

Comments suggest a reduction of the \$185,000 application fee based on the type of TLD being applied for (linguistic, small community), the organization applying (not-for-profit) or where there may be multiple TLD strings applied for (e.g., IDN variants, translations of a string) by a single applicant. The processing steps and associated costs to perform each application evaluation are based on an average number of steps to complete each application and do not change based on the TLD type or organization applying. In addition, applications for translated versions of the same string would undergo the complete evaluation process as each application is expected to stand alone. Consequently, the current application fee is not expected to change for the initial application round. However, as stated previously, it is anticipated that subsequent application rounds will enable adjustments to the fee structure based on historical costs from previous rounds, the effectiveness and efficiency of the application evaluation process, and other data as it becomes available.

Currently, a working group, comprised of representatives from various Internet constituencies, is evaluating options to provide support for a defined set of applicants. The working group's preliminary recommendations were presented to the Board in September and a resolution was agreed on regarding the support to be provided by ICANN (<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.2>).

Progress is being made by the Applicant Support Working Group, tasked with, among other things, locating sources of funds to provide financial support for certain deserving applicants and determining criteria for releasing those funds in a way that avoids abuse and is fair.

There was a suggestion that payment of the application fee should be allowed in US dollars or in the legal currency of applicant's country to share exchange rate fluctuation risks. The payment of the application fee follows standard ICANN practices with respect to fees collected globally. For this process, ICANN receives funds in US currency only. It is the applicant's responsibility to arrange for funding in their own currency to equate to the evaluation fee at the time of the each wire transfer. ICANN does allow for normal fluctuations as the funds are applied to their respective application.

A comment questioned the relative incentives for applicants to participate in a dispute resolution proceeding or withdraw prior to the dispute resolution process. This was considered previously. The dispute resolution process is in place to allow a weighing of the objection in regard to the application. In

the event of an objection, an applicant may choose to withdraw at an earlier stage for a larger refund. The process is not designed to discourage applicants from completing a dispute resolution process just to afford some recovery to applicants who do not go through the entire evaluation.

APPLICATION CATEGORIES

Key Points

- Newly formed entities must be formally established prior to application submission. These entities will be evaluated similarly to established entities. Information required by newly formed entities is discussed in the Criteria section of the Application questionnaire.
- The standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application.
- New TLD categories beyond what has already been described (community, geographic, and standard) will not be introduced, as ICANN believes that over time, the market and community interests are better suited to sorting TLD types. In addition, the introduction of categories may mean an unintended increase in compliance-related costs in areas without benefit to DNS security.

Summary of Comments

Proposal for two categories under community-based TLDs—commercial and noncommercial. ICANN’s one-size-fits all approach does not accommodate all stakeholders. There should be two categories of community-based gTLDs—a commercial use and noncommercial use. Differentiated policies and evaluation procedures should be established for noncommercial TLDs—their evaluation should be simpler, as they may not be involved in trademark protection issues. ICANN should provide more support to noncommercial applicants—financially, technically and linguistically—and give some exceptions to them regarding vertical integration and Whois policies. This will simplify new gTLD management and accelerate the pace of evaluation to some extent. Moreover, GNSO has the commercial and noncommercial stakeholder groups, which perfectly matches the proposal. *CONAC (22 July 2010).*

Community-based application definition (1.2.3). The fourth factor (“Have its application endorsed in writing by one or more established institutions...”) seems too narrow in specifying “one or more” and is imbalanced when compared with the Section 3.3.1 grounds for a community objection. If it takes substantial opposition from a significant portion of the community to object, how is it possible that only one institution can represent a community in the application process? BITS suggests also that during the Initial Review process, reviewers should be required to change the designation from a “standard” to a “community-based” application if it is clear that the applicant intends the gTLD string to be targeted explicitly or implicitly at a specific community. It is also not clear why ICANN in Section 1.2.3.2 makes the assumption that community-based applications are intended to be a “narrow category.” *BITS (22 July 2010).*

Financial TLDs. Any domain name associated with financial services should be restricted to financial services companies, with substantial restrictions, guidelines and proof of eligibility. There should be a

formal Financial Services Panel for assessing financial service-oriented gTLD applications. Specific higher levels of security and stability should be mandated. The DAGv4 does not adequately address these recommendations. *ABA (22 July 2010)*.

Applicant Evaluation: yet-to-be formed entity. Clarification by ICANN is requested as to whether it is possible under the current DAG to submit an application in name and on behalf of a yet-to-be-formed entity, where checks and evaluations are performed on the submitting entity(s) while the future registry has to be defined in all terms, but not yet prove legal existence. ICANN is asked to clarify the required documentation for the future designated registry on behalf of which the application is submitted. Examples of such a situation would be community-based, non-profit entities wishing to form a Foundation to manage a given TLD, or a city that might establish an agency to manage a city TLD. *A. Abril i Abril (Module 2, 21 July 2010)*.

Brand category of applications. A third category of applications for brand owners would be beneficial. It is still unclear if brand owners could qualify to file a community-based application and whether a corporation could be considered to represent a community consisting of a restricted population such as its customers or employees. *Hogan Lovells (21 July 2010)*.

Closed gTLDs—lack of provisions.

The DAGv4 lacks provisions for operation of closed gTLDs. Would this mean that trademark owners owning a gTLD would need to open the registration procedure to second-level domain names applied for to third unrelated parties? In this case, what is the incentive of actually registering and operating such a gTLD? *PMI (21 July 2010)*.

Unique procedures are needed for single registrant TLDs. Such single registrant TLDs need different requirements in the utilization of ICANN authorized registrars. The DAGv4 does not address the unique procedures that are required for these unique registries, which are being used to increase online visibility of the TLD holder and not offering open registrations of second level names. *AT&T (21 July 2010)*.

Single registrant, brand, corporate TLDs—beyond scope of new gTLD program. Based on the GNSO report to the Board (11 Sept. 2007), single registrant, brand and corporate TLDs are beyond the scope of the current new gTLD process. We strongly urge ICANN to state this fact explicitly in the forthcoming final version of the new gTLD RFP for the next round. ICANN should also clearly state that “community-based TLDs” will not open the door for proprietary TLDs. *JPNIC (21 July 2010)*.

Opposition to single registrant, single user (SRSU) TLD category. ICANN staff should not propose single registrant single user (SRSU) TLDs because this proposal does not have consensus within the ICANN community. If the ICANN staff proposes it in its discretion, that would be a violation of process. In addition, such a proposal could increase the risk of lawsuits against ICANN by the SRSU applicants since many of the required elements of the new gTLD process do not properly fit for SRSU TLDs (e.g., mandatory use of ICANN registrars, data escrow and vertical integration). Therefore the third paragraph in the Background section addressing brand holders and organizations seeking to manage their own name should be deleted. The issue of SRSU TLDs is an important policy issue which should be discussed in the GNSO. It is not a consensus policy included in the 2007 GNSO final report for new gTLDs and it should be treated by a dedicated PDP. In case the dedicated PDP does not end in a timely manner, the next round of new gTLDs should exclude SRSU TLDs. This argument has the same logical structure as the

underlying logic of Board Resolutions 2010.03.12.17 and 2010.03.12.18 for Vertical Integration/Separation. *JPNIC (2 Sept. 2010)*.

Analysis of Comments

A comment requests clarity on “yet-to-be formed entities” applying for a gTLD. Applications from or on behalf of yet to be formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered. All requirements of an existing entity continue to apply: proof of planned technical/operational and financial capabilities (see Criteria for Question 45 for financial information required by newly formed entities) will be required, background screening of the organizations forming the new entity as well as the new entity’s key officers and shareholders will be conducted, all required documentation for geographic names and/or community based applications must be presented, and all other requirements, as outlined in the draft Applicant Guidebook must be met to submit a complete application.

A comment notes a potential imbalance between the requirement for at least one endorsement of a community-based application, and the requirement that there be substantial opposition in the event of a community objection. It is intended that the application should have substantial support as well; however, this is difficult to establish based on a certain number threshold. It may well be that an applicant supported by one institution or group means substantial support for that case (e.g., a highly structured community with only one relevant institution or endorsement from the pre-eminent institution in that area). Conversely, the standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application. Opposition from a single entity might also be determined substantial in a given case.

Comments provided suggestions for possible approaches to application categorization. Depending on the category, various accommodations are suggested: for example, no requirements for an ICANN contract, or to use accredited registrars, or to follow consensus policy, or policy provisions outlined in the GAC’s ccTLD principles. Some might be restricted to not-for-profit status, be eligible for reduced fees, require registration restrictions, and have names reserved in anticipation of registration by certain parties. There will be considerable debate and discussion in the community as to whether certain accommodations should be made. Should certain gTLDs not be required to have an agreement with ICANN or not be required to follow consensus policy? Should certain TLDs be required to maintain not-for-profit status? These discussions and debates will take considerable time and resources and may ultimately not result in consensus. The structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees.

Significant consideration has been given to the issue of introducing category-based TLDs in the new gTLD process. ICANN remains a strong proponent of innovative uses of new TLDs. This is especially so in cases where TLDs can be delegated to address the needs of specific communities such as intergovernmental organizations, socio-cultural groups and registered brands. Rather than having ICANN limit this type of innovation and identification with certain TLD models, more creativity might be spawned by allowing different groups to self-identify the type of TLD they purport to be and promote that model among their community.

If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant. Socio-economic groups, brand holders and other groups all can be accommodated under the existing structure and self-identify as a particular type of TLD. Over time, the market and community interests will sort TLD types – a model preferable to having ICANN make that determination a priori.

It may well be that as definitive categories of applicants emerge in practice, and as ICANN and the respective communities gain further experience of possible benefits of additional gTLD categorization over time, organizational structures might be developed with ICANN to reflect these categories. That will be a consequence of bottom-up policy developments by affected participants, according to the ICANN model. Nothing in the current implementation procedures forecloses those future developments.

Comments suggest that single registrant TLDs not be allowed as these may not have support from within the ICANN community nor is there policy to support such a category. Categorization of TLDs beyond what has been proposed (community, geographic, and standard) is not being introduced. In addition, an applicant is not required to have a minimum number of registrants to qualify for a TLD.

PROCEDURES

Key Points

- ICANN staff will conduct a Completeness Check of applications after the close of the 90-day Application Submission Period. Depending on the severity of missing information, incomplete applications may either be rejected or may be provided with an opportunity to provide missing information. Only after all applications have been designated as complete or have been rejected during the Completeness Check period will ICANN post the applied for strings and applicant data.
- The objection filing period begins with the posting of applied for strings and applicant data and ends 2 weeks after the close of Initial Evaluation. Applicant data necessary to file an objection will be made available via ICANN's website.
- It is important to note the distinction that reviews in Initial Evaluation offer no chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for String Similarity, DNS Stability and Background Screening as needed.

Summary of Comments

Timing for amendment of incomplete applications.

The provisions in paragraph 1.1.2.8 (string contention) can be expected to be used in competing applications (contention sets) to take speculative advantage of intentionally caused delays by incomplete applications. Therefore applications should be given a limited time of a maximum 4 weeks to mend incomplete application parts. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*. *HOTEL (21 July 2010)*. *dotKoeln (22 July 2010)*.

Paragraph 1.1.2.8 should be amended so that applicants should be required to provide all information they can provide within a reasonable deadline set by ICANN. The string contention procedures will not

begin until all applicants in the contention set have completed all aspects of the evaluation. The deadline should help prevent applicants of speculative registrations from delaying the dispute resolution process. *eco (21 July 2010)*.

Supplements to applications. ICANN should allow supplements to applications after submission. This would help not for profit organizations that may have a learning curve to understand the process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Notice of changes (1.2.7). Part of the application should contractually or otherwise obligate applicants to notify ICANN of changes. *BITS (22 July 2010)*.

Clarify objection filing timeframe (1.1.2.4). ICANN needs to clarify the objection filing timeframe. One part of this area suggests that the objection period is based on the Administrative Completeness Check, but another section suggests it is based on the Initial Evaluation Period with a two week window of time between posting of the Initial Evaluation results and the close of the objection filing window. *BITS (21 July 2010)*.

Reconsideration. In every case, an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision. The current process has three places where an applicant or application can fail without opportunity for appeal or extended review: background check, string similarity, and DNS stability tests. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

Proof of good standing. ICANN should require proof of good standing in the application process. The DAGv4's elimination of this step at the early stage of the process raises concern about its impact on the entire process—it could potentially lead to a greater number of illicit applicants ending up in the applicant pool. Even if ill-intentioned applicants end up getting eliminated at a later point, it may still result in a waste of time of resources for ICANN and others which could have been prevented earlier in the process. *CADNA (21 July 2010)*.

ICANN permission to use Applicant logos (Module 6, section 9). There is no basis to give ICANN unfettered permission to use an Applicant's logos as section 9 provides. It is basic trademark law that the value and distinctiveness of a trademark such as a logo can be destroyed through unregulated use by parties other than the trademark owner. If ICANN requires the right to use an Applicant's logo, it should enter into a proper trademark license with the trademark owner. *IBM (21 July 2010)*.

Confidentiality (section 11.b). The confidentiality standard in this provision is insufficient. Rather than state that ICANN use "reasonable efforts" IBM proposes that the section should state that ICANN will have "sufficient agreements in place" to ensure confidentiality is maintained. *IBM (21 July 2010)*.

TLD Application System Access. Sections 1.1.2.1, 1.4.1 and 1.4.1.1 speak to applicants, but it is not clear what process ICANN will use for other users who wish to review open applications for possible objection. It is also unclear how 1.1.2.2. and ICANN not posting certain information on the TAS (e.g. related to finances, architecture and security) will affect potential objectors' ability to assess an application and its applicants. *BITS (22 July 2010)*.

Timing of subsequent application rounds (1.1.6). Given the timeframes of other sections, is it realistic for ICANN to assume the launch of a next round of applications “within one year of the close of the application submission period for this round”? *BITS (22 July 2010).*

Required financial documents (1.2.2). BITS recommends that ICANN ask for 3 years of audited financial statements instead of just one. Multiple years of statements would serve to validate the applicant’s ongoing fiscal strength. *BITS (22 July 2010).*

Application form (1.4.1.2)—encryption of data. ICANN should encrypt the application data in transit across the Internet (i.e. use HTTPS) and while it is at rest in storage at ICANN—at least for selected information such as financials. *BITS (22 July 2010).*

Evaluation fee (1.5.1)—proof of concept round. Can ICANN provide a table of the 200 Proof-of-Concept round applications, and are these eligible for re-application? *BITS (22 July 2010).*

Analysis of Comments

Comments have requested clarity on the timing of providing complete applications to ensure string contention procedures begin appropriately. Although timelines are not yet final, it is expected that all Applicants will submit completed applications, including the receipt by ICANN of the full application fee, throughout and up to the final day of the Application Submission period. A 4-week completeness check period will ensue, allowing ICANN staff to validate that all applications question are complete and all necessary supplemental documents are attached. This review will not look at the adequacy of answers; rather it will focus on ensuring that each question has an answer. If an application is deemed incomplete, the applicant will have one opportunity to provide any missing data during this period. If the application remains incomplete at the end of this 4-week period, then it will be ineligible for further review and application fees (less any expenses incurred) will be refunded. Only after the completeness check is complete for all applications will ICANN post the applied for strings and other relevant information. The posting will also mark the beginning of Initial Evaluation. String Similarity analysis will begin immediately thereafter and string contention sets will be posted once this analysis is complete. Contention sets will be posted prior to the end of Initial Evaluation.

Another comment seeks clarity on the objection filing period as well the availability of applicant information necessary to file. The objection filing period will begin at the end of the completeness check period and will close two weeks after the Initial Evaluation results are posted. Based on current estimates, the objection filing period is expected to last approximately 5 1/2 months. In relation to the availability of applicant information, the objection process allows for interested parties to file objections against the organization applying for the string and/or the string on any of four grounds: [Limited Public Interest], Community, String Confusion, and Existing Legal Rights. This process does not allow for objections to be made on the applicant’s ability to meet financial, technical or operational criteria. Accordingly, relevant and necessary applicant data to file an objection will be made available via ICANN’s website.

A comment asked about the viability of committing to a subsequent application round “within one year of the close of the application submission period for this round.” The GNSO’s New gTLD Policy Development Final Report suggests that “Applications must initially be assessed in rounds until the scale of demand is clear” and that “...the first round will include scheduling information for the subsequent

rounds to occur within one year.” ICANN expects to meet this recommendation; however, the timing of the second round may be affected by necessary changes and improvements to the new gTLD program. Any potential delays in beginning the subsequent round will be communicated as soon as practical.

Comments have requested clarity, or made suggestions regarding several areas of the guidebook. One suggests that applicants should be contractually bound to inform ICANN if any material changes arise in regards to their submitted application. The current wording in the guidebook requires notice of changes to information, and makes it clear that if an applicant is found to have failed to notify ICANN of a material change, their application may be rendered invalid.

Another comment mentioned the three areas of Initial Evaluation (IE) that do not allow for appeal or extended evaluation; background check, string similarity, and DNS stability. It is important to note the distinction that no area of IE offers a chance for appeal – the opportunity exists for clarifications only. Limited clarifications may be sought for the three areas mentioned above in IE, as needed. For DNS Stability and String Similarity, as the submitted string cannot be modified, the need for clarifications is expected to be minimal.

A comment concerns the usage of the applicant’s name and logo in section 9 of the Terms and Conditions (Module 6). While the language does constrain the areas of usage, it will be further narrowed in the next version of the guidebook to reflect only the use of the applicant name. The other comment on Application Terms and Conditions relates to maintaining the confidentiality of applicant information in seeking consultation to evaluate an application. The Terms and Conditions state that ICANN will use reasonable efforts to ensure that panelists maintain confidentiality of information in the application. This would include having agreements in place with panelists and other experts that may be consulted, as suggested in the comment.

One comment suggests that three years of audited financial data should be requested as opposed to the one required in the current version of the guidebook. Requiring only one year of audited financials is intended to provide sufficient data on the applicant’s financial capability and broaden the range of applicants by avoiding overly burdensome requirements.

One comment reiterated that confidential data collected in TAS must be protected. We agree and ICANN is taking reasonable and necessary steps, including hiring an independent security consultant, to ensure that Applicant data is secured throughout the process.

One comment asked for a list of the year 2000 proof of concept participants. That information can be found here: <http://www.icann.org/en/tlds/app-index.htm>

EVALUATION

Key Points

- Applicants are expected to provide all necessary and relevant information at the time their application is submitted including disclosing any known concerns as described in Section 1.2.1 Eligibility (Questions 11d – f of the Application questionnaire).

- ICANN is moving forward with developing additional Eligibility (Section 1.2.1) guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications.
- Protocols are being developed to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarifications requests.
- A clear process describing the Board’s role in evaluation and delegation has been developed and communicated.
- Initial Evaluations cannot be completed until all relevant public comments have been considered and addressed. A summary of how public comments were addressed per application will be provided after the end of Initial Evaluation.

Summary of Comments

Question 18 and additional questions. The BC urges ICANN to add two more questions to sharpen the criteria for new gTLDs that add value and differentiation: (1) which users/registrants/organization/group/community do you intend to serve? (2) How does your TLD differentiate itself from others in the DNS? ICANN should initiate the new gTLD rollout with safeguards for an orderly approach to market differentiation and if or when necessary make adjustments in future applicant guidebooks. *BC (26 July 2010). R. Andruff (Module 1, 21 July 2010).*

Guidelines are needed regarding how Section 1.2.1 of the DAG will be applied. This section enables ICANN to deny a new gTLD application if any applicant, partner, officer, director or manager or any person owning more than 15% of the applicant “is the subject of a pattern of decisions indicating liability for, or repeated practice of bad faith in regard to domain name registrations.” Applicant evaluators need to be provided with additional guidance on this eligibility factor. For example, a statute of limitations of 5 years should apply in regard to past infringing activities, given that trademark infringement can be unintentional and the UDRP process is unpredictable. Also, a few adverse UDRP findings over many years in the context of a large domain portfolio should not be presumed to indicate that an entity or individual is a “bad actor” who should be barred from any significant involvement in a new gTLD. *ICA (21 July 2010).*

Definitions—security (2.2.3.1). The “security” section of this area is very minimalist. BITS recommends either direct inclusion of other security related requirements or at least reference to other areas of the applicant guidebook containing those requirements (e.g. 5.4.1). *BITS (22 July 2010).*

Evaluation team—communications (attachment to Module 2, scoring, p. A-3). How will applicants be notified that there is a communication to them from the evaluation team available at the “online interface” (e.g. will there be email notification to check the interface)? *BITS (22 July 2010).*

“Average, reasonable Internet user”. This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

Public interest prioritization. Rather than randomizing applications for batch processing, ICANN should consider prioritizing applications based on public interest need. *Red Cross (21 July 2010).*

World Health Organization (WHO) concerns not addressed. Concerns of the WHO regarding public health and safety issues involved with International Nonproprietary Names for pharmaceutical products (from WHO letter to ICANN dated 9 December 2009) have not been addressed. *A. Aikman-Scalese (21 July 2010).*

Financial evaluation—not-for-profits. Evaluation should take into account the different financial picture and sources of funding for not-for-profit organizations when reviewing whether an organization has adequate funding for three years of registry operations. *Red Cross (21 July 2010).*

Reserved names—regional ccTLD organizations (2.2.1.2). The four regional organizations of ccTLDs (AfTLD, APTLD, CENTR and LACTLD) should be added into paragraph 2.2.1.2 like reserved names. Like ARIN, LACNIC, AFRNIC, RIPE and APNIC, for IP numbers the regional organizations of ccTLDs are involved directly in the process of ccTLDs and ICANN. The four regional organizations have liaisons in the ccNSO Council and participate in different working groups and are recognized by the community. *E.I Ahon (Module 2, 17 June 2010).*

Section 2.2.2.3—Evaluation—clarifying questions. With respect to language changes made in this section, note that the evaluators are under no obligation to ask clarifying questions. RySG repeats its recommendation from its DAGv3 comments that evaluators should be obligated to ask clarifying questions where needed. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Section 2.2.3.1—Definitions—Security and Stability.

No changes were made to the definitions of security and stability. They need to be revised. They conflict with and exceed the draft gTLD agreement, and are based on a misunderstanding of IETF practices and definitions. The contract language must be revised to adhere to proper terminology (e.g., contracted parties should not be required to adhere to IETF best practices; by definition best practices are not mandatory.) *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Some language in the “security” definition is too broad and opens it up to expansive interpretation. It potentially takes in a wide variety of small and large security incidents on the Internet. The mere fact that services are operating on a domain name does not imply or require registry involvement. The current language in the guidebook seems to come from the RSEP definition of an “effect on security” but it is missing the context of that definition. After the DAGv3 RySG suggested that the “security” language be changed to read: “Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.” *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

The “stability” definition’s phrase “authoritative and published by a well-established, recognized, and authoritative standards body” is unacceptable. ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the consensus process. *RySG (10 Aug. 2010).*

Question 11(f)—allegations of intellectual property infringement. The question as written is ambiguous. The more relevant question is whether the applicant has been charged with activities that infringe intellectual property rights in which a domain name has been used. The question should be rephrased to

refer to “allegations of intellectual property infringement relating to registration or use of a domain name.” The Notes column should make clear that ICANN can reject an application in which the applicant cannot provide a satisfactory explanation. *COA (21 July 2010)*.

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010)*.

WHOIS requirements should be uniform. Whois enforcement must be stronger. The rules should be as specific as possible and ensure that accurate data is maintained. Applicants should be held to a uniform set of requirements in order to avoid any discrepancies. *CADNA (21 July 2010)*.

High Security Zone TLD Program—application-based incentives.

A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010)*.

We are concerned that an applicant’s decision to not pursue High Security Zone verification does not reflect negatively on the applicant or affect its scores in the evaluation process. There should be a right to object against any financial services gTLD applicant that seeks to avoid high security verification and such avoidance should be grounds for denial of the application. *ABA (22 July 2010)*. *BITS (22 July 2010)*.

ICANN Board role in evaluation and delegation.

The Board’s role in any part of the evaluation and delegation process is not sufficiently articulated or constrained. The Board’s role needs to be extremely clearly defined so that all parties know when and under what conditions the Board may step in. The Board, like the evaluators, needs to be bound by probity requirements to ensure there is no background lobbying (e.g. from national governments or others). The Board’s role in delegation must be clearly articulated (e.g., a Board bottleneck due to workload would be very unfair to an applicant who had successfully completed the application process). A full refund of costs of the evaluation would need to apply in cases of an applicant that passes evaluation but for which the Board denies delegation. *L. Williams (23 June 2010)*.

ICANN should assure that the Board’s role is to ensure that once submitted to ICANN that applications meet the criteria in the Final Applicant Guidebook as approved by the Board. ICANN should provide clarifying language in the Final Applicant Guidebook that if an application is deemed to have met the criteria, it is not the Board’s role to make further deliberations about the application’s validity or eligibility. *AusRegistry (20 July 2010)*.

Technical evaluation of new backend registry operators. Given the established registry backend operators—i.e., VeriSign, Afiliias, Neustar, AusRegistry and CORE, ICANN should evaluate them once and “pass” all applicants who have them as their backend registry providers. This would save ICANN money

and simplify the application process. The only backend registry technical evaluation that would make sense is if the backend registry is new and has no prior history in the business. *MUSIC (20 July 2010)*.

Delegation decision—certainty of process. The Final Applicant Guidebook should provide clarifying information about certainty of process so that each successful gTLD applicant has a clear indication of when their delegation will occur. It is not clear how ICANN decides the order of delegation and how and when successful applicants are informed. *AusRegistry (20 July 2010)*.

Registry Failure—continuity of operations and financial instrument requirement.

The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010*). *NIC Mexico (21 July 2010)*.

Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. *Neustar (21 July 2010)*.

Clarifications of language—public comments.

In 1.1.2.5, who will handle public comments and in which way (e.g. ICANN staff, independent evaluators) and how will they be reflected in the evaluation process? *DOTZON (21 July 2010)*.

There should be guidelines for evaluators to use when assessing public comments. How will they be determined? How will comment periods be managed? Comments may be used in dispute resolution (1.1.2.7); DRPs should be given guidelines regarding how to assess comments. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

RSEP fees. The cost estimate for fees for use of the RSEP process seems extremely high (\$50K for a three person RSEP panel). What are the individual cost factors that make up this estimate? There are now actual RSEP cases that have been processed, so that the cost model should now be re-evaluated and made more cost effective. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

Analysis of Comments

Some comments suggested that “market differentiation” should be reflected as a criterion in the evaluation process. This point can be interpreted in a number of ways. Implementing market-differentiating criteria could be construed as limiting competition for existing registries and potentially stifling innovation. As with any industry, two or more organizations focused on the same consumer provide that consumer with choice. It is this choice that drives competition which can lead to innovation, product/service differentiation, and price reduction. Additionally, evaluating (i.e., scoring) the beneficial effect of innovation is difficult or impossible and presents contract enforceability issues.

The proposed question “Which users/registrants/organization/group/community do you intend to serve?” is already explicitly part of the application for those designating their applications as community-based. It is also implicitly part of the existing question required of all applicants to state their mission and purpose (question 18). This is an open-ended question to give the applicant the opportunity to describe the overall scope of its proposal, and to enable informed comment on the application. There is no expectation that this question should be used to eliminate any overlapping user groups, nor is there an assumption that the same group cannot be served by more than one TLD.

The second proposed question, “How does your TLD differentiate itself from others in the DNS?” might provide an interesting perspective, but it is unclear how responses to this question could be scored, used as a threshold item, or enforced without a significant expansion of the scope of ICANN’s responsibilities.

ICANN’s Core Values include “...depending on market mechanisms to promote and sustain a competitive environment.” How applicants will differentiate themselves within a given market or industry should be a decision left to the applicants and the relevant markets. ICANN should not judge the effectiveness of an applicant’s business model. Rather, ICANN is focused on DNS stability, preventing user confusion, determining whether an applicant has demonstrated basic competencies to run a registry, and protecting registrants and users.

A comment suggests that additional guidelines are needed for the Eligibility requirements as covered in section 1.2.1 of the Draft Applicant Guidebook. ICANN agrees and is moving forward with developing additional guidelines that will be communicated to both potential applicants as well as Applicant evaluators prior to receiving applications. Applicants will still be required to disclose any known issues and can provide clarification of these issues upon submitting the application. Should other issues be found, not previously disclosed by the Applicant, ICANN will seek additional clarification from the Applicant. This clarification request will be conducted during Initial Evaluation.

A comment suggests rephrasing question 11(f), regarding relevant infringing activity in the applicant’s background, for greater clarity, to refer to “allegations of intellectual property infringement relating to registration or use of a domain name.” This is a useful suggestion and this change will be made in the revision.

Comments have been raised seeking clarity on communication with Evaluation Panelists. One comment asks how Applicants will be notified of communications from Evaluation Panelists while another seeks to ensure that Evaluation Panelists be obligated to seek clarifying questions where needed. Protocols are being developed and will be published to ensure that all Applicants are aware of communications on a timely basis and are provided with same time period to respond to any clarification requests.

In addition, Applicants are expected to provide all necessary and relevant information at the time their application is submitted. This includes complete and accurate information to support relevant criteria in the Applicant Guidebook. Evaluation Panelists are experts in their respective fields and are expected to conduct a thorough analysis based on the information provided by each applicant. If a thorough analysis cannot be completed, then clarification questions may be asked. However, as the Applicant can provide no new information - only clarifying information for the answer or information previously provided - a clarification request may not be needed. Accordingly, clarifications will be at the discretion of the Evaluation Panelist.

Note that the evaluation process is designed to afford several opportunities for clarification and amplification when needed. Applicants are expected to provide complete and accurate applications and supplemental data upon the first submission. A Customer Service function will be available to handle questions from applicants during the Application Submission Period. The Customer Service function will endeavor to provide and publish answers to all relevant questions from all applicants, to the extent practicable, in the applicant's language of choice. The guidebook encourages applicants to take advantage of this Question/Answer mechanism to address any particular areas of uncertainty before the application is submitted, to reduce the need for additional clarification and review steps. Once the Initial Evaluation has commenced, the evaluation panels and applicants will conduct a coordinated exchange of information, if needed, which should address any remaining oversights or misunderstandings. Finally, applications not passing Initial Evaluation will have the option of requesting Extended Evaluation procedures in which they may provide further data supporting their applications (there is no extra cost to the applicant for electing this option). The availability of these opportunities before, during, and after application submission should allow the applicant to provide all necessary information to the evaluators.

A comment suggests there should be some prioritization of batch processing applications versus random selection. Note that batching will only occur if the volume of applications is so high that the process as already built cannot accommodate it. In such a case, the same concerns highlighted in the discussion of application categorization also apply to establishing categories of applications and prioritization thereof for batch processing. Providing benefit to one set of applicants over another does not promote a fair and impartial process.

A comment suggests that the evaluation should account for differing funding sources when reviewing an application from a not-for-profit entity as opposed to a for-profit entity. It should be noted that the estimated level of funds required for three years of operation is determined by the applicant, not the evaluators. The financial review panel considers the information provided and assesses whether the proposed funding level will be adequate to maintain a secure and stable TLD. This is the case regardless of what type of entity the applicant is.

In relation to Whois requirements, comments suggest that additional steps should be undertaken in regard to Whois accuracy measures as part of the evaluation process. This was discussed and considered previously. Changes in Whois policy require a consensus based, bottom-up decision. ICANN is working on several fronts to improve Whois accuracy: policymaking support, technical, compliance, and performance reviews. In the meantime, there are improvements in the Guidebook including the requirement to maintain a thick Whois database and an option to implement searchable Whois.

In relation to increased security, one comment suggests providing an incentive to encourage applicants to implement more rigorous protections as highlighted in the proposed High Security Zone TLD Program

and another suggests that such rigorous protections be required of certain applicants. Continual improvement in security will always be part of the new gTLD program. Adoption of an HSTLD type certification will be urged for registries whose model connotes “security, such as a TLD providing financial services.” There are a number of reasons for making this a requirement of a specific type of application.

Comments seek clarity of Board’s role in the evaluation and delegation processes. We agree that further clarification is needed, and consultations with the Board have resulted in the detail provided in the new Guidebook.

A comment suggests that established back-end registry providers be evaluated once as opposed to on a per-application basis. It is agreed that certain efficiencies can be gained in the approach to reviewing applications with the same back-end registry provider, and this will be tested in the evaluation process. However, there is no assumption that all such applications will be identical or should be subject to a less thorough standard of review.

A comment seeks clarification about the order of delegation and how and when successful applicants are informed. This process has been clarified in the Guidebook. The order of delegation depends strictly on how quickly the applicant can complete each step in the process after Initial Evaluation. Note, all applications will complete Initial Evaluation at the same time. If an application passes Initial Evaluation and is not part of a string contention set or does not have any objections pending, then it moves straight to contract execution. Once the contract is signed, the applicant will move straight to pre-delegation check. As this check is passed then it will move directly to IANA for delegation. ICANN expects to have resources available to execute each step as the application progresses. Note, however, that this part of the process is dependent on many factors – including applicant level of readiness – and not solely controlled by ICANN.

In terms of communication, clear posting dates will be communicated to the public and the pool of applicants throughout the evaluation process. As the Applicant progresses through each step, updates will be communicated to the public and to the Applicant directly.

One comment suggests the addition of the names of regional ccTLD organizations to the list of names that are reserved at the top level. This was considered; however, the top-level reserved names list is intended to be as narrow as possible, and cover only those names which have an impact on the DNS infrastructure or are part of the organizational structure of ICANN. The bodies mentioned are certainly contributors to ICANN, but fall more into the category of constituencies, which are more loosely formed and self-governed, and it would expand the list considerably to include all of these as reserved names.

Several comments seek clarification of the public comment process. As discussed in the Applicant Guidebook, the public comment period will open with the public posting of applicant data at the end of the completeness check and prior to commencing Initial Evaluation. To ensure that Evaluation Panels and Dispute Resolution Providers are able to effectively and timely consider public comments, the public comment window will remain open for 45 days. A general comment forum will remain available, but if comments are to inform Initial Evaluation, they must be submitted within the 45-day period. All panelist and dispute resolution providers will have access to the comments. The availability and use of public comments will be discussed with the Evaluation Panels and Dispute Resolution Service Providers as part of their training. In the case of a dispute resolution proceeding, the panel must provide the reasoning

upon which the expert determination is based, which might include consideration of relevant public comments.

Comments regarding the financial instrument requirement suggest that ICANN should provide alternatives, or that the requirement would be irrelevant in the case where part or all of the registry operations are outsourced to a third-party service provider. The two options currently included in the guidebook ([a] letter of credit or [b] cash escrow deposit) are in place because they provide the most efficient and reliable means for transfer of funds in the event of a registry failure scenario. Other options (such as those contained in earlier drafts of the guidebook) have been considered in detail for implementation, but could not offer the same speed or reliability without being cost-prohibitive for applicants. Note that the funds are only released if a threshold is met for failure of one of the critical functions. It should be considered that even if the existing service provider continues to execute the critical functions in the short term, it is not clear that such a provider would be willing to continue such operations indefinitely, especially in the absence of financial provision for it by the registry operator. The financial instrument is considered a cornerstone of registrant protection and thus is a requirement across all new gTLDs for a particular time period.

With regard to the registry services portion of the evaluation process, a set of comments suggested changes to the definitions of ‘security’ and ‘stability’ that are employed. The current definitions are found in existing registry agreements and can also be found in the Registry Services Evaluation Policy (“RSEP”) -- see <http://www.icann.org/en/registries/rsep/rsep.html>, which was adopted as an ICANN consensus policy. The definitions are intentionally broad -- anything a registry might do that could harm other systems on the Internet would be considered a security/stability issue and could cause ICANN to withhold approval of a particular service. These definitions are critically important terms and part of a process that has a significant impact on the DNS. A change to the currently accepted and workable process should be subject to a broader stakeholder discussion.

With regard to estimated RSEP fees, comments suggested that the model could be more cost-effective. The current expected fee of \$50,000 was estimated based on a significant decrease from historical costs. Efficiencies were introduced so that the fee is less than 50% of the current cost per RSTEP evaluation. In the three years that the Registry Services Evaluation Policy has been in place, a small fraction of registry services proposed by existing gTLD registries have resulted in an RSTEP review. Each inquiry involving the RSTEP involves a 5-person panel and costs \$100,000-\$125,000. In the new gTLD process it is anticipated that most cases will be addressed using a 3-person panel.

TRADEMARK PROTECTION

Key Points

- Comments from every section of the ICANN community and broader Internet community have been thoroughly considered in the development of the current trademark protection mechanisms called for in the Applicant Guidebook.
- These trademark protections reflect carefully crafted compromises that received broad support within the GNSO and At-Large communities.
- Although some debate adequacy, the new trademark protections are unprecedented and aim to create a balance between all interested parties with a main focus of protecting rights holders and consumers, including both registrants and Internet users.

Summary of Comments

Registry option to exceed baseline rights protection. Most of the comments to date from the IP community are of a “baseline” nature, while registries themselves can choose to go over and above these requirements. Big Room invites feedback from IP and trademark experts as to what a “best in class” sunrise and ongoing rights protection mechanism(s) would entail. *Big Room (21 July 2010)*. What is expected of a registry operator section (5.4.1). This is an important section which includes key requirements such as DNSSEC deployment requirement, Whois service, maintenance of an abuse point of contact, and continuity. BITS suggests that ICANN require both the Trademark Rights Service and the Sunrise period at startup. *BITS (22 July 2010)*.

Support for level of IP protection

The DAG is sufficient and is a significant concession to trademark owners even though the IRT’s recommendations were not accepted in their entirety. Every interest group within the ICANN community has found that they need to live with something that is, from their point of view, less than perfect. The IP community should be no exception especially in light of the considerable concessions already made to them. *Minds + Machines 21 July 2010*.

We work in the interest of the global hotel industry and we support the proposed instruments for rights protection, which are the result of intense discussions within the ICANN community. *HOTEL (21 July 2010)*.

Subject to minor drafting matters the trademark overarching issue should be considered complete. The protections developed through stakeholder discussion and compromise will provide trademark holders with significantly more protection than exists in current gTLDs. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*. *D. Schindler (22 July 2010)*.

Trademark protection not adequate.

IOC appreciates ICANN’s recognition of IOC’s comments regarding special statutory trademark protection as a proposed standard for inclusion in the trademark clearinghouse. However, IOC finds troubling the statements from ICANN leadership confirming that trademark protection in new gTLDs is believed to be a settled issue. *IOC (21 July 2010)*.

Current RPMs do not adequately address trademark concerns. *WIPO Center (16 June 2010)*. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *JONAS (11 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *MarkMonitor (19 July 2010)*. *BBC (21 July 2010)*. *C. Speed (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *Comerica (3 Aug. 2010)*. *Carlson (21 July 2010)*. *Sunkist (21 July 2010)*. *Solvay (22 July 2010)*. *ETS (22 July 2010)*. *LifeScan (22 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Adobe Systems (21 July 2010)*. *SIIA (21 July 2010)*. *Microsoft (21 July 2010)*. *ABA (22 July 2010)*. *Liberty Mutual (22 July 2010)*. *AIM (Module 5, 14 July 2010)*. *Nestle (21 July 2010)*.

Nilfisk is against introduction of new TLDs as long as the current system does not secure effective solutions to cybersquatting and trademark infringement. *Nilfisk (13 July 2010)*.

ICANN has not adequately addressed the overarching issue of trademark protection in the new gTLDs. *INTA Internet Committee (21 July 2010). Adobe Systems (21 July 2010)*

Introduction of new gTLDs will create vast opportunities for bad faith registrations and harm intellectual property owners and consumers. Consumers will lose trust in trademarks as guides in the global market. *JONAS (11 July 2010). INTA Internet Committee (21 July 2010).*

It is inevitable that conflicts will arise between competing brand owners in different jurisdictions. It is naïve to suggest (as ICANN does) that applicants identified as in contention can be encouraged to reach a settlement or agreement to resolve that contention, at least where trademark rights are concerned. It is highly unlikely that a brand owner would be prepared to share or relinquish control over its brand to a competing brand owner either in the same industry in a different country or a different industry in the same or a different country. We do not consider it possible to reconcile the conflict between territorial trademark rights and the global nature of the Internet. It is for this reason among others that BBC has opposed and maintains its opposition to ICANN's proposals. ICANN needs to adopt a solution which genuinely lessens the need for defensive registrations and the administrative and financial burden on trademark owners. *BBC (21 July 2010).*

It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010).* Notwithstanding a succession of processes, there has been little truly substantive dialog on trademark considerations. Exchanges are subject to palpable registration-driven pressures, and have not lived up to a proper standard of open and informed dialog, which is key to a long-term, stable DNS framework. This is illustrated by the heavily compromised state of the envisaged protection mechanisms: the PDDRP ignoring willful blindness; the URS becoming overburdened; and the TMC not providing a level playing field. These circumstances support the Economic Framework paper's recommendations that ICANN proceed in a controlled manner, i.e., in discrete limited rounds. WIPO staff will continue to monitor developments and remains available to contribute to rights protection systems that work for durable DNS expansion. *WIPO Center (21 June 2010).*

The trademark protections in the current guidebook are weak and inadequate. If ICANN does not review the current guidebook and adapt it to respond positively to our concerns, our members will appeal to national governments and other bodies. *MARQUES/ECTA (21 July 2010).*

Significant issues of concern remain regarding intellectual property protection. The online community will benefit from a smartly designed TMC and URS and IHG looks forward to seeing them through. *IHG (20 July 2010).*

The cost of acquiring a gTLD is too high for most companies, as well as the cost of enforcement of their trademark rights. At the very least, ICANN should allow for a period of time for existing companies with established, registered trademarks to register those trademarks with ICANN (or ICANN should be required to do a trademark search) to avoid this problem. *Piper Aircraft (14 July 2010).*

AAFA requests that ICANN reevaluate and revise the current rights protection mechanisms proposed for both the application process and post-delegation to ensure that brand owners' (i.e., the apparel and footwear industry that is so dependent on the strength of their reputation and brand names) legitimate concerns and rights are properly protected and assured in the new gTLD space. Without requisite mechanisms in place to protect brand owners in the application process and post-delegation, AAFA is concerned that the new gTLD program could provide a vehicle for rampant abuses and exploitation of its apparel and footwear members' valuable marks and brands to increase exponentially. The apparel and footwear industry is concerned that the proposed high costs of registering a new gTLD will not deter the often well-funded and highly organized counterfeiting operations that are prevalent online. As cost alone is unlikely an impediment to these bad actors, stronger brand protection mechanisms are critical. The RPMs need to be stronger, less costly and more efficient than the RPMs currently proposed in the DAGv4 for protecting trademarks. The overwhelming burden still falls substantially on brand owners to stop infringement, and the proposed processes to do so remain overly cumbersome, expensive and time intensive for brand owners. *AAFA (21 July 2010).*

ICANN should address trademark owners' concerns about the current inadequate protection measures in DAGv4 by providing for rules that:

- Avoid discriminatory treatment of trademark registrations;
- Provide for equitable and efficient resolution of situations of split trademark ownership (e.g. geographic split or product category split);
- Include clear procedures for the trademark repository and recognition of trademark registrations;
- Include IP rights other than trademarks alone;
- Provide for an equitable and efficient dispute resolution system (a shifting burden of proof after demonstration of a prior IP right, including the "loser pays" principle);
- Streamlining the appellate procedure;
- Providing unambiguous provisions for transfer or cancellation of domain names; and
- Including clarification on closed gTLDs.

PMI (21 July 2010).

Dilution of IRT work.

ICANN has allowed the mechanisms proposed by the IRT to be worn away, as ICANN evidently hopes that stakeholders will be worn down until they can be ignored entirely. The relevant provisions in AGBv4 have changed little from the STI Review Team recommendations. There is not consensus on the RPMs in DAGv4 which, if taken together, fall well short of an effective response to the problem of trademark-related external costs in the new gTLD process. ICANN's refusal to strengthen these mechanisms, even so far as to bring them back to the level originally recommended by the IRT, is tantamount to concluding that trademark holders and the public at large should bear these costs, which is contrary to the public interest that ICANN has pledged to serve. *Time Warner (21 July 2010). Com Laude (21 July 2010). Hogan Lovells (21 July 2010). HSBC (21 July 2010). MPAA (21 July 2010). INTA Internet Committee (21 July 2010).*

ICANN should proceed generally with all of the mechanisms set forth in the IRT report. *USCIB (21 July 2010). Microsoft (21 July 2010).*

The overarching trademark issues have not been resolved. It would not be a backwards step to re-form the IRT; changes are needed and the IRT is well placed to advise in this area. *C. Speed (21 July 2010).*

ICANN should either turn to qualified IP experts to craft a package of effective protection measures or return to the original recommendations of the IRT report. WIPO could have a key role in this process and could use the IRT's original proposals as the starting point. ICANN should start out with strong measures that could be liberalized later if necessary. To satisfy the broader community, a review of such measures could be instigated after they are operational (e.g. after two years). *MARQUES/ECTA (21 July 2010)*.

The AGBv4 is a step backwards—ICANN has inexplicably chosen to dilute the long-term solutions presented by the IRT. Without adequate remedies, the issue of trademark protection remains unresolved. The current proposals are too burdensome, expensive and unwieldy compared with existing remedies such as the UDRP or civil remedies available under the ACPA. We do not expect the business or trademark community to endorse or make wide use of the current trademark protection proposals in the future. At a minimum, all trademark protection remedies must be: (1) effective as a remedy; (2) reasonably expedited; (3) stringent enough to avoid gaming; (4) based on actual costs (which avoids further monetization and extraction of unnecessary fees from trademark holders); (5) provide for increased certainty; and (6) result in making the trademark holder whole. *Verizon (20 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *Rosetta Stone (21 July 2010)*.

Process.

It is clear from comments of senior ICANN staff at the Brussels meeting that no further major changes to the AGBv4 on rights protection mechanisms will be seriously entertained. The cross-community efforts to date are not a triumph of the bottom-up policy development process. Rather, the almost complete lack of support for the final outcome (the insufficient mechanisms now included in AGBv4) among members of the community with the most at risk demonstrates that the process has been a failure. The real losers will be the consuming public on whose interests in avoiding marketplace confusion and fraud the entire trademark system is based. *COA (21 July 2010)*. *BBC (21 July 2010)*. *Adobe Systems (21 July 2010)*.

It is ironic that ICANN prepares to announce “mission accomplished” on RPMs just when its Economic Framework paper calls for an objective study of the full costs to trademark owners of new TLDs (e.g., enforcement, monitoring, defensive registrations). This should have been step one in devising a sound and efficient system of RPMs, not an epilogue to a tale on which ICANN is about to close the book. *COA (21 July 2010)*. *BBC (21 July 2010)*.

Relationship to UDRP. The current new gTLD program's RPMs should meaningfully complement, not destabilize, the proven, globally recognized UDRP. *WIPO Center (16 June 2010)*.

Expansion. There is a substantial gap in coverage among the currently proposed trademark protection proposals. Currently there is no DRP or other mechanism that allows a brand owner directly to confront registrar misconduct. *INTA Internet Committee (21 July 2010)*.

Globally protected marks list (GPML).

The lack of a GPML in AGBv4 is very disappointing as it could have provided some relief for trademark owners of such marks. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *Nilfisk (13 July 2010)*. *Vestas (16 July 2010)*. *MARQUES/ECTA (21 July 2010)*. *HSBC (21 July 2010)*. *IPC (21 July 2010)*. *DuPont (21 July 2010)*. *IPOA (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Adobe Systems (21 July 2010)*. *SIIA (21 July 2010)*. *Nestle (21 July 2010)*.

Without the GPML there is no proactive trademark protection provided with the launch of new gTLDs. *AT&T (21 July 2010). AIPLA (21 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010).*

Analysis of Comments

Many have commented on the general nature of trademark protections that have been put in place for the New gTLD Program. Some think they are sufficient, some think they are not sufficient and some have said that there has not been enough substantive discussion on the issues. Still others state that any protections put in place should extend to registrars.

It is important to reflect on the chronology of events that led to the development of the trademark protections now included in the New gTLD Program for new gTLDs. After the early versions of the Applicant Guidebook were posted, the trademark community spoke out loudly and clearly – more trademark protections were needed. Those comments were heard by ICANN. In response, the Board resolved to establish an Implementation Recommendation Team (IRT), to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program (see <http://www.icann.org/en/minutes/resolutions-06mar09.htm#07>). The IRT described itself as a group of 18 people experienced in trademark protection on the Internet.

Specifically, the Board asked the IRT to develop a set of solutions that addressed trademark protection and consumer protection in a way that was workable, and that was acceptable to other interests. Other parties were invited to respond to the IRT work, to propose solutions, and an extensive public outreach process was initiated, including several regional events held throughout the world.

In a series of face-to-face meeting, conference calls, and public consultations, the IRT engaged in intensive substantive discussion and developed specific recommendations (<http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>), reflecting “the views of business and trademark interests in general.” Those recommendations included proposals for an IP Clearinghouse (“Clearinghouse”), a Uniform Rapid Suspension System (“URS”), a Trademark Post-delegation dispute resolution procedure (“PDDRP”), and a globally protected marks list (“GPML”). Concerns from the broader ICANN Community immediately emerged with respect to several IRT recommendations. After significant public comment, through both the public comment forum and numerous face-to-face meetings, additional refinement of the IRT proposals were needed in order to balance the interests of the community as a whole, the trademark holders, and registrants with legitimate interests in registering domains that might also be the subject of a trademark. Compromises were also required in light of the implementation difficulties of some of the IRT proposals.

The next iteration of the Guidebook included nearly all of the trademark protection mechanisms suggested by the IRT, including the Clearinghouse, the URS and the PDDRP. The GPML was not included in light of the implementation difficulties with, and the significant opposition to, such a list.

After further comment, discussion and revision, the Board sent the Clearinghouse and the URS proposals back to the GNSO. The Board requested the GNSO Council’s view on whether the Clearinghouse and URS recommended by the staff were consistent with the GNSO’s proposed policy on the introduction of new gTLDs, and were appropriate and effective for achieving the GNSO’s stated principles and objectives.

In response to the Board's request, the GNSO established the Special Trademark Issues Review Team ("STI"), consisting of members of each Stakeholder Group, At-Large, Nominating Committee Appointees, and the GAC. The STI issued a final report on 17 December 2009, including several recommended revisions to the Clearinghouse and the URS proposals (see <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm>), which were unanimously adopted by the GNSO.

In addition, ICANN invited community participation in an open consultation process to discuss and propose revisions to, among other things, the PDDRP. This group was formed as the temporary drafting group ("TDG").

Together, the IRT recommendations, the STI revisions, the TDG revisions, and comments from every section of the ICANN community and broader Internet community were taken into consideration in the development of the current trademark protection mechanisms called for in the Applicant Guidebook. These new trademark protections are unprecedented and are intended to create a balance between all interested parties with a main focus of protecting consumers, including both registrants and Internet users.

These trademark protections now part of the new gTLD Program include:

- The requirement for all new registries to offer either a Trademark Claims service or a sunrise period at launch.
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars.
- Implementation of the URS that provides a streamlined, lower-cost mechanism to suspend infringing names.
- The requirement for all new gTLD operators to provide access to "thick" Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.
- The availability of a post-delegation dispute resolution mechanism that allows rights holders to address infringing activity by the registry operator that may be taking place after delegation.

And of course, the existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where a complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.

Each of the recommendations above is intended to provide a path other than defensive registrations for trademark holders.

The application process itself, based on the policy advice, contains an objection-based procedure by which a rights holder may allege infringement by the TLD applicant. A successful legal rights objection prevents the new gTLD application from moving forward: a string is not delegated if an objector can demonstrate that it infringes their rights.

Contrary to the comment that there has been very little substantive discussion on this issue, the likely thousands of emails and hundreds of teleconferences had by the IRT, the STI, the TDG, the GNSO Council, the At-Large and numerous other stakeholder groups and constituencies relating to trademark

protection point to the significant effort and attention dedicated to the evaluation of these new trademark protections. These are in addition to the face-to-face meetings held at each of the ICANN Public Meetings as well as apart from those public meetings, such as those held by ICANN in Marina del Rey, New York and London.

Finally, in response to other trademark protections proposed but not included in the Applicant Guidebook, such as extending applicable trademark protections to registrar conduct, such ideas could be further explored through the initiation of policy development through the GNSO Council.

TRADEMARK CLEARINGHOUSE

General

Key Points

- In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as mark validated by a court, or protected by statute or treaty (subject to some date limitations).
- Steps have been taken to ensure consistency and to prevent similarly situated applicants from being treated differently.

Summary of Comments

Clearinghouse Proposals.

ICANN should share first drafts of the IP clearinghouse process as soon as possible. *dotZON (21 July 2010)*. *HOTEL (21 July 2010)*.

The Clearinghouse section should focus on “what we want” and avoid “how it gets done” as this section will be the nucleus for a later RFP and it is important to stimulate creative and competitive proposals from a wide range of service providers of the trademark industry. *EnCirca (Module 5, 21 July 2010)*.

Evolution of Clearinghouse. There should be a mechanism for the Clearinghouse to evolve in its uses in the future. To enable this, following the sentence “The reason for such a provision would be to prevent the Clearinghouse from using the data in other ways” add the phrase “without undergoing the ICANN public participation process.” *EnCirca (Module 5, 21 July 2010)*.

Support for Clearinghouse as drafted in AGBv4. It was supported by both the IRT and STI, has broad acceptance from ICANN constituencies and received approval from the GNSO Council. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*.

Clearinghouse is not an RPM.

The Clearinghouse is not a protection mechanism—it is merely a database. *VKR Holding (13 July 2010)*. *MarkMonitor (19 July 2010)*. *Comerica (21 July 2010)*. *Solvay (22 July 2010)*. *ETS (22 July 2010)*. *Carlson (21 July 2010)*. *C. Speed (21 July 2010)*. *CADNA (21 July 2010)*. *Sunkist (21 July 2010)*. *Adobe Systems (21 July 2010)*. *LifeScan (22 July 2010)*. *Liberty Mutual (22 July 2010)*. *BC (26 July 2010)*. *NCTA (Module 3, 21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

The Clearinghouse is just a database, and it would promote the need for defensive registrations. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *BBC (21 July 2010)*. *Verizon (20 July 2010)*. *PMI (21 July 2010)*. *HSBC (21 July 2010)*. *DuPont (21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

The Clearinghouse provisions in AGBv4 do not fully encompass the IRT recommendations in focusing support of pre-launch service. *USCIB (21 July 2010)*.

Burden on trademark owners.

The Clearinghouse potentially obliges the trademark owner to record all of their trademarks from all territories, significantly increasing costs and workload. Since the trademark owner receives no notice of the application for registration and no opportunity to communicate with the registrant prior to registration, one national registration per mark may not be sufficient for inclusion in the Clearinghouse.

The Clearinghouse requires an extra charge for brand holders, does not provide comprehensive coverage given that only identical marks can be registered and common law marks are left out. The Clearinghouse is given unprecedented discretion to validate and authenticate trademarks for registration in the Clearinghouse. *MarkMonitor (19 July 2010)*. *Carlson (21 July 2010)*. *Comerica (21 July 2010)*. *Sunkist (21 July 2010)*. *Solvay (22 July 2010)*. *LifeScan (22 July 2010)*. *ETS (22 July 2010)*. *Liberty Mutual (22 July 2010)*.

Analysis of Comments

There have been some comments about the timing and openness of the Clearinghouse proposal process. It should be noted that each version of the proposal (originating with the IRT proposal) has been published for public comment and continues to be revised and improved as a result of public comment. Importantly, as can be seen from the Clearinghouse proposal, not all aspects have been fully addressed as some are necessarily left to the potential providers to explore and develop.

Some commentators have suggested that the Clearinghouse is simply a database and others suggest it will promote the need for defensive registrations. It is unclear as to why that might be the case. The need for defensive registrations should be reduced if trademark holders register their marks in the Clearinghouse because it will better enable the trademark holder to avail itself of all rights protection mechanisms in the pre-delegation process.

The IRT recommendations with respect to the Clearinghouse have been the subject of substantial review and comment. The GNSO appointed the STI to evaluate the recommendations of the IRT and provide input. The STI then set forth its proposal at <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm>. That revision was posted in February 2010 and was the subject of public comment. Again the model was reviewed and published for additional comment in April 2010. In balancing the competing comments, not all suggestions could be incorporated as they often reflected opposite ideas, many of which had been considered by the STI. The resulting Clearinghouse is the product of this detailed review and analysis.

Much discussion surrounded which marks should be eligible for inclusion in the Clearinghouse. On the one hand, trademark holders wanted to be sure that they could register their marks but at the same time there were concerns that fraudulently obtained registrations could be used to game the system. The

result of review and input from a variety of constituencies was to create a list of specific criteria for entry. In terms of entry into the Clearinghouse, all nationally or multi-nationally registered marks are eligible, as well as marks validated by a court, or protected by statute or treaty (subject to some date limitations). In creating objective criteria, steps have been taken to prevent the exercise of discretion and to prevent similarly situated applicants from being treated differently.

Procedural Aspects

Key Points

- Costs should be borne by the parties utilizing the services.
- In order to protect access to data, providers will be the only entities that have full access to Clearinghouse data.

Summary of Comments

Costs.

Registries and registrars (not most trademark owners) will be the main beneficiaries of the Clearinghouse and they should also contribute to its costs. ICANN should also bear some of this cost. ICANN stands to generate substantial revenues through the new gTLD process and it should bear some responsibility to ensure that the new program does not facilitate widespread infringement of brand owner rights and widespread confusion and deception of the public. *BBC (21 July 2010)*. *CADNA (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

The cost of funding the Clearinghouse should be apportioned between the entities that will profit economically from new gTLDs—ICANN, registry operators and registrars (see Clearinghouse, sec. 10). *IOC (21 July 2010)*.

Trademark owners should pay only the transaction costs directly associated with the inclusion of their individual trademarks and they should not pay for elements of Clearinghouse overhead and its fixed operational costs. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

If the cost of the Clearinghouse is to be borne by those using the service, then there should be not additional charges by registries to trademark owners for sunrise/claims services other than the annual domain name registration fee and the fees should be the same as those charged for general landrush registrations. *Grainger (Module 5, 19 July 2010)*.

IBM agrees that the cost of running the Clearinghouse should be borne by the parties utilizing the service and this cost should be nominal. The cost of establishing the Clearinghouse should be assumed by ICANN. Every study indicates that the new gTLD program will be a significant cost to brand owners for enforcement and cessation of brand misuse. The cost of the Clearinghouse should be shared with the new registries via a portion of the funds collected by ICANN for gTLD applications and maintenance. *IBM (21 July 2010)*.

Setting Clearinghouse Fees.

Under subsection 4.2 fees for services should be set by ICANN. We also agree under subsection 4.2 that the detailed registrar accreditation agreement is an appropriate model. *IPOA (21 July 2010)*.

Fees relating to the Clearinghouse should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Fees under subsection 4.2 should be set by ICANN. *AIPLA (21 July 2010)*.

Clearinghouse operator. ICANN must choose a third party contractor with extensive experience in trademark protection issues and do so via an open and transparent process. CADNA requests a preview of the proposed contractual arrangement in order to gain a fuller understanding of what this role will entail. *CADNA (21 July 2010)*.

Access to Clearinghouse. Who will have access to Clearinghouse data and services must be clarified. *CADNA (21 July 2010)*.

Deposit of marks. Deposit of marks into the Clearinghouse should be clarified so that it is clear that a trademark owner does not need to register the corresponding domain name in the many new gTLDs. Trademark owners will not have a significant incentive to participate in the Clearinghouse if they have to deposit both their marks and also engage in multiple defensive registrations. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Analysis of Comments

Many comments revolve around who will pay for the Clearinghouse and the fees that will be charged. ICANN recognizes that this is an important issue, which has been often discussed, including by the IRT and the STI. As stated by the STI and adopted in the latest version of the Trademark Clearinghouse, “Costs should be completely borne by the parties utilizing the services. ICANN should not be expected to fund the costs of ... operating the TC. The TC should not be expected to fund ICANN from its fees.” The cost of establishing the Clearinghouse is to be borne by ICANN and the Clearinghouse provider(s). As for the fees that the Clearinghouse provider(s) will charge, ICANN will select provider on open bidding process and economical fees will be part of the consideration process.

One commenter notes that the Clearinghouse provider should be experienced in trademark issues and be chosen in open and transparent manner. As set forth in AGBv4, the service provider(s) will be selected on the basis of predetermined criteria which includes the ability to store, authenticate, validate and disseminate the data at the highest level of technical stability and security without interference with the integrity or timeliness of the registration process or registry operations. The process will continue to be transparent and subject to public comment. The details of the contractual relationship as it is currently envisioned is set forth in the AGBv4 at section 4.

In terms of access to data, the Providers will be the only entities that have full access to Clearinghouse data. As set forth in the current AGBv4, it is envisioned that one provider will house the repository and another provider will authenticate/validate the marks. There will be extensive provisions in the contract relating to maintenance of the data.

In terms of use of the Clearinghouse, it is not meant to be a bar to registrations of the trademark TLDs or an automatic registration in each TLD. It is a database that registry operators are required to utilize when offering either a pre-launch Sunrise service or Trademark claims process.

Authentication and Validation

Key Points

- ICANN intends to utilize a provider with regional presences so that appropriate expertise exists for complaints from any geographic area.
- Some form of penalty or graduated penalty system will be implemented for a rights holder's failure to keep information current in the Clearinghouse.

Summary of Comments

Regional Authentication. No basis for the regional authentication service appears in the IRT or GNSO-STI reports. IPOA opposes it unless there is some justification. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Updated information. A trademark owner's failure to respond to a legitimate request from the Clearinghouse Administrator to update could yield a series of warnings and ultimately suspension from the Clearinghouse pending a response. It would be impractical to try to collect monetary penalties from trademark owners who may be out of business or who may have failed to advise their successors in interest of their Clearinghouse entries. IPOA also supports mandated periodic renewals (e.g., perhaps every 5 or 10 years) to maintain the quality of information contained in the database. *IPOA (21 July 2010). AIPLA (21 July 2010).*

Data and Authentication Guidelines.

What is the intent of the last paragraph of Section 7, Data Authentication and Validation Guidelines? Is that a backdoor mechanism for Clearinghouse entry for marks that could not otherwise qualify? *AIPLA (21 July 2010).*

A qualifier is missing in the last paragraph for validation of marks by the clearinghouse. For the sentence that reads "in connection with a bona fide offering for sale of goods or services" should be inserted the phrase "in the goods specified in the trademark registration." This will help prevent the inclusion of sham trademarks in the Clearinghouse (e.g. generic words applied for in obscure trademark classes that have never been used in commerce for the goods specified). *EnCirca (Module 5, 21 July 2010).*

The criterion that a trademark owner must submit a declaration is costly and burdensome. Why does it not suffice to use a certified copy of a valid trademark registration certificate or the official online database record of the relevant trademarks registry? *BBC (21 July 2010).*

We strongly object to the Clearinghouse being used as a validator for marks because this is beyond the intended purpose of the Clearinghouse. The term "Clearinghouse—validated marks" should be removed. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Evidence of use for mark validation.

ICANN's proposal for the Clearinghouse's validation of marks through the trademark owner's production of evidence of continuous use of the mark is burdensome and inconsistent with national legislation where there is a grace period between registration of mark and the obligation to use it. Such evidence of use, if produced to "validate" the mark, should

not be published in any way or to any person as it could be highly confidential and commercially sensitive. *BBC (21 July 2010)*

A trademark owner should be required to provide evidence of current bona fide use, but should not be required to prove that they had rights “continuously” since registration. *INTA Internet Committee (21 July 2010)*.

Analysis of Comments

Regional authentication has been the subject of public comment. Because the Clearinghouse will be a central repository that will be tasked with authenticating/validating data from all over the world, it was suggested that a provider with regional presence be enlisted to assist and expedite the process. On balance, given the efficiencies that can be achieved the current proposal suggests utilizing a provider with regional presences to be called upon when appropriate. All will still be subject to the same rigorous standards.

Some have commented on the particular penalties to be implemented for a failure to keep information current in the Clearinghouse. Currently, it is envisioned that some form of penalty or graduated penalty system will be implemented for a failure to keep information current, the details of which will be finalized when the provider(s) are selected. It is understood that monetary penalties will not be practical and will not serve the intended purpose of encouraging prompt communication with the Clearinghouse and keeping information current.

Comments have been submitted surrounding the use and description of the terms “authentication” and “validation”. One commenter requested clarification of the last paragraph of the Data and Authentication Guidelines and another suggested one addition. After careful review, this language will be revised. First, only authentication of registration of marks is required for entry into the Clearinghouse. The “validation” referenced in the final paragraph of this section of the Clearinghouse proposal refers to validation of “use”, which will be needed to ensure protection in a sunrise services offering by a registry. Second, the addition recommended does make the statement more clear and will be included.

In terms of safeguarding data, it is anticipated that to the extent there is confidential or commercially sensitive submissions made to the Clearinghouse for validation purposes, the provider will have the appropriate means in which to safeguard the confidentiality/access to such information. Such means for maintaining confidentiality will be required in the provider(s) contract(s) with ICANN and the tender process will require demonstration of this capability.

One group has commented that a standard for the Sunrise process inclusion that “continuous” use of the mark should not be required. Such level of use was included to ensure that only valid registrations are capable of registration in a Sunrise period. If the rights were not continuous, the registration in some jurisdictions will no longer be valid. Continuous does not mean, however, that it is used everyday, but rather that the use continued over time.

Eligibility for Inclusion and Protection

Key Points

- Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.
- Both the IRT and the STI agreed that identical match is required for a mark to be protected in sunrise or provide notice under claims services.

Summary of Comments

Many critical, open issues remain with the Clearinghouse. It still limits the intellectual property that may be registered in the database to text marks that are (1) nationally registered; (2) court-validated; or (3) protected by statute or treaty. Much greater clarification is needed before the Clearinghouse can serve the objective for which it was intended by the IRT. *News Corporation (21 July 2010). IACC (21 July 2010).*

Substantive Review or Evaluation.

IOC is encouraged that “substantive review” of nationally registered trademarks is no longer a prerequisite for inclusion in the Clearinghouse (Clearinghouse secs. 5 & 9). But this will be futile if later rights protection mechanisms (e.g. Sunrise Registration Services and the URS) apply any “substantive review” standard. IOC reiterates that if domain name speculators are concerned about the ease by which generic words can be registered in certain countries, then the domain name speculators should bear the onus of initiating the challenge procedures previously recommended by ICANN. *IOC (21 July 2010).*

The “substantive review” or “substantive examination” language should be changed to “examination on absolute grounds”. This should address the problem of gTLD applicants basing applications/objections on trademark registrations for purely descriptive words obtained in countries that conduct no examination on absolute grounds. *C. Speed (21 July 2010).*

Under sec. 4.1.1, the language provides that the entity would “validate” marks from jurisdictions that do not conduct substantive review. If the disparate treatment of such marks remains in the Clearinghouse implementation scheme then the criteria for this validation should be specified. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The term “substantive examination” should be clarified to specify that “substantive review” refers to examination for “inherent registrability” or “on absolute grounds”. *IPOA (21 July 2010). AIPLA (21 July 2010).*

“Substantive review” needs to be clarified to eliminate confusion as to what types of marks qualify for the Clearinghouse. *AT&T (21 July 2010). INTA Internet Committee (21 July 2010).*

ICANN should create a proper definition of “substantive review” or better still abandon the idea in favor, e.g., of “review on absolute grounds.” It is unfair to expect the operators of the Clearinghouse to decide which marks from which jurisdictions can be included. Discriminating between official trademark registries is not a role for the Clearinghouse operator or an appropriate issue upon which ICANN itself

has any standing to influence. *MARQUES/ECTA (21 July 2010)*. *Microsoft (21 July 2010)*. *AIM (Module 5, 14 July 2010)*.

Absence of a proper definition of “substantive review” means that mark owners in some parts of the world will be discriminated against (including the EU). Any Clearinghouse must be nondiscriminatory and the Clearinghouse operators must not be the arbiter of the validity of trademarks. *Com Laude (21 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*

ICANN should clarify what constitutes “substantive review” and what validation processes will be required, e.g., for marks registered in jurisdictions that do not require a “substantive” review. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *SIIA (21 July 2010)*.

“Substantive review” clarification is needed as it pertains to eligibility for Sunrise Services. I.e., whether “substantive review” includes: (1) absolute grounds; (2) relative grounds; or (3) absolute grounds plus an opposition period. Trademarks in many jurisdictions (e.g. from some European national trademark offices) could be excluded from eligibility for Sunrise Services if “substantive review” does not include examination based only upon “absolute grounds.” The trend for trademark examination in several jurisdictions such as Europe is moving away from a relative ground review and towards solely an absolute ground review, leaving relative ground review to oppositions. It would be anomalous if such trademarks were only eligible for Sunrise Services if they have been successfully opposed. *IBM (21 July 2010)*.

The current design appears to turn the Clearinghouse into an arbiter of the validity of trademarks legitimately obtained through systems applied in many jurisdictions. The Clearinghouse must be non-discriminatory to counter possible gaming. (The possibility could be explored of treating registered marks as prima facie valid, e.g., where subject to later challenge.) *WIPO Center (16 June 2010)*.

The Clearinghouse falls short because registries are not required to incorporate their pre-launch RPMs protections for all trademark registrations of national or multinational effect. *COA (21 July 2010)*.

The Clearinghouse should not be biased in a selective recognition of valid trademarks. If the Clearinghouse adopts exclusionary standards, many trademark holders will remain unjustly exposed to fraud and abuse. It is not the role of the Clearinghouse to judge the quality of international trademark regulations, but to enforce them. *IHG (20 July 2010)*. *AIPLA (21 July 2010)*. *Nestle (21 July 2010)*.

Identical match limitation.

Limiting use of clearinghouse data to identical matches (and only at launch) would miss many abusive domain name registrations. *WIPO Center (16 June 2010)*. *Verizon (20 July 2010)*. *C. Speed (21 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *Coca-Cola (21 July 2010)*. *Adobe Systems (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *USCIB (21 July 2010)*. *ABA (22 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

The identical match definition should at least be the same as IRT, should take into account the singular and plural of the Mark, and account for typographical variations (for typosquatting). *BC (26 July 2010)*.

The “identical match” for the Clearinghouse should be expanded slightly to avoid numerous potential instances of typosquatting (e.g. plural forms of domain names containing the mark). *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Given how cybersquatters and phishers operate, it is imperative that the Clearinghouse be broadened to include domain names which are “confusingly similar” not just identical. *IHG (20 July 2010)*.

The failure of Sunrise or Claims Services to recognize confusing similarity and foreign equivalents ignores rampant typosquatting in the domain name system (see Clearinghouse sec. 8). At a minimum, Claims Services should require registries to report domain names that are confusingly similar to, or a foreign equivalent of, trademarks in the Clearinghouse. If registries utilizing a Claims Service simply must provide notice and a mark holder does not obtain an advantage as it does if the registry offers a Sunrise Registration period, then no advantage is obtained in a Claims Service and “similarly situated applications are treated in the same way” regardless of whether the Claims Service protects against confusingly similar or foreign equivalent domain names. *IOC (21 July 2010)*.

Trademark owners should be permitted to deposit into the Clearinghouse names consisting of exact registered trademarks plus generic terms incorporated into their goods or services. We support the solution set forth by the Commercial and Business Users Minority Position under Annex 4 of the STI Work Team Recommendations. Such procedures have been used successfully with prior gTLD launches such as for the ASIA registry. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Plural and singular forms of marks should be included in the Clearinghouse either through automatic operation or express request of a trademark owner. A substantial portion of abusive domain name registrations take advantage of either variant plural or singular forms, and the current rules do not address this issue. *AIPLA (21 July 2010)*.

The scope of searches for matching should be determined with input from proposed Clearinghouse operators about what searches could reasonably be conducted. ICANN’s rationale for limiting it to “identical matches” has not been supported. At a minimum, a match should include plurals of and domain names containing the exact trademark. *INTA Internet Committee (21 July 2010)*.

Contrary to the language about punctuation or special character replacement in the definition of identical match in this section, “underscores” are not a valid character for a domain name. *EnCirca (Module 5, 21 July 2010)*.

To maintain operational integrity and keep the processing volume manageable, it should not be expanded to include typographical variations of a mark. ICA questions whether any meaningful standard can be established to define the acceptable limits of such variations. Trademark owners should not be given the ability to assert potential control and have the Clearinghouse fire “warning shots” to potential registrants for the many thousands of possible variations of a single mark—especially as trademark infringement involving such names must arise from actual use and cannot be determined from the domain name alone. *ICA (21 July 2010)*.

The identical match definition (2.3) should be widened to catch “obvious misspellings.” *AIM (Module 5, 14 July 2010)*.

The refusal to extend clearinghouse-based RPMs beyond exact matches, or to incorporate any form of a globally protected marks list, means that the impact on reducing the volume of defensive registrations will likely be negligible. *COA (21 July 2010)*.

Design marks with a slight design element should be included in the “identical match” definition. *IBM (21 July 2010)*

Per comments with recommendations previously submitted by the BC: if the applied-for domain string anywhere contains text of a trademark listed in the Clearinghouse, then a TM notice is given to the applicant per the proposal in the Staff recommendation. If the domain is registered then the trademark owner is notified. Trademark owners would also have the option of triggering notices in the event that the applied-for domain string includes the trademark string altered by typographical errors as determined by an algorithmic tool. The domain applicant must affirmatively respond to the trademark notice either on screen or email and the registrar must maintain written records of such responses for every domain name. The trademark owner must get notice of every registration that occurs. The trademark notice should allow registrant the option of stipulating their intended response. *BC (26 July 2010)*.

Marks included in the Clearinghouse should generally include the text elements of marks consisting of stylized text, or designs plus text, rather than only word marks. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *BBC (21 July 2010)*.

ICANN should further define the term “text mark” to avoid misinterpretation. *IBM (21 July 2010)*.

Text marks should be defined to include the text elements of design marks where the text in its entirety has not been disclaimed. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Best practice as used in recent RPMs should be explored with regard to the Clearinghouse. For example, the Clearinghouse scope should be widened to include device marks and plurals. *Com Laude (21 July 2010)*.

ICANN must clarify the definition of a “text mark” included in the Clearinghouse—it should include protection for stylized letters and text with design components. *CADNA (21 July 2010)*. *AT&T (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *News Corporation (21 July 2010)*. *BC (26 July 2010)*.

Marks protected by treaty.

ICANN should clarify to which marks “protected by treaty” it refers (page 2). *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Inclusion in the Clearinghouse of “Any text marks protected by a statute or treaty” should not be limited to those “in effect on or before 26 June 2008.” That limitation discriminates against future Olympic Games in new host cities that will receive statutory protection. *IOC (21 July 2010)*.

The punctuation used in section 2 for the two bullets labeled A and B is unclear. Does the phrase “and that was in effect on or before 26 June 2008” apply only to (iii), as it currently reads? That was not the intent. *EnCirca (Module 5, 21 July 2010)*

Reserved marks list for Olympic trademarks. If and when new gTLDs are introduced, the Olympic trademarks should be put on a list of reserved marks—just as ICANN currently reserves its own trademarks (see Module 2.2.1.2). ICANN is subject to and must act in a manner consistent with the U.S. Olympic and Amateur Sports Act and the Anti-Cybersquatting Consumer Protection Act in deciding whether or not to offer for sale any new gTLDs containing Olympic trademarks. *IOC (21 July 2010)*.

Classes of trademarks. Missing from the Clearinghouse is a provision that allows trademarks to be put in classes mirroring the International Classes of Goods and Services. This is crucial as it will compensate for similar and identical trademarks that under traditional law co-exist harmoniously. This is especially important for small and medium sized businesses and for trademark owners in developing countries. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Dot-Trademark.

Exclusion of registrations that include top level domains as part of the trademark or service mark appears to be discriminating against valid trademark registrations and fails to take into account contemporary business trends. ICANN needs to provide the rationale why such trademarks cannot be included in the Clearinghouse. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010). BBC (21 July 2010).*

The AGB should specifically prohibit any advantage to holders of trademarks for a top-level domain (i.e., a trademark on “dot TLD”). While dot-TLD trademarks are not granted by the U.S. Patent and Trademark office, they are available in other jurisdictions to the detriment of all applicants. ICANN should provide assurances that not only will such TLD-specific trademarks be denied any priority in an application but that they will not be considered a valid ground for objection. *Minds + Machines (21 July 2010). NIC Mexico (21 July 2010). Domain Dimensions (22 July 2010).*

It is important that a “dot TLD” not put an applicant into any unjustified advantage and not be a ground for a later objection. In the case of a geographical application, this would compromise the position of a relevant government that wants to support the initiative that works in the best interest for the geographical area. *Bayern Connect (21 July 2010).*

ICANN offers no protection against the gaming of TLD applicants who have been publicly announced initiatives and have done all the leg work and communications outreach campaigns. Given this, TLD trademarks for publicly announced TLDs with years of exposure, lobbying, participation and business activities are warranted and in the public interest if used legitimately. While trademarks alone should not be the sole determinant of earning a TLD, it is the only means we have of protection since ICANN has not incorporated any mechanisms to prevent TLD applicant abuse, gaming and unfair piggybacking. *.MUSIC (21 July 2010).*

Use of Clearinghouse in URS and UDRP proceedings. The Clearinghouse has a potential to provide authentication of rights for both complainants and respondents in the case of any ICANN dispute proceeding. The Clearinghouse should incorporate a recognition of its use for this purpose in any ICANN dispute proceeding. *AIPLA (21 July 2010).*

Analysis of Comments

The Clearinghouse is intended to be a repository for trademarks. In keeping with that aim, specific criteria for entry and management had to be articulated. The aim was to create a list of criteria that could be verified in a cost effective, consistent and efficient manner while, at the same time, prevent gaming of the system since it is intended to form as a basis for rights protection mechanisms. When the provider(s) are selected further detail will be provided.

Criteria for entry, and later validation, has been the subject of widespread comment and review. Authentication will ensure that all marks submitted for inclusion in the Clearinghouse are in fact nationally or multi-nationally registered. Validation will be required if a trademark holder wants to be ensured protection in a sunrise service - that mark must be either: validated for use at registration or by a court, protected by statute or treaty (subject to some date restrictions), or (if none of these above), validated by the Clearinghouse provider.

To be an effective RPM, the Clearinghouse must operate efficiently. Out-of-date or inaccurate data in the Clearinghouse will harm applicants, trademark holders, and others. To that end, it was agreed that as an additional safeguard to ensure reliable and accurate data, mark holders will verify the accuracy of their information and agree to keep it current. The mere fact that a certified copy of a registration exists does not mean that the named registrant is the mark holder or that the information is current and accurate. A sworn declaration in many cases is less time consuming and much less costly than a certified copy of a registration.

Numerous comments, as seen above, seek understanding and clarification of “substantive evaluation” as it is set forth in the guidebook. In order to make clear what was required for substantive evaluation, the Board adopted the following resolution on 25 September 2010 (see <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>:

Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark. Substantive evaluation upon trademark registration has essentially three requirements: (i) evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use. Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.

The Applicant Guidebook language will be revised to reflect the above clarifications.

A variety of comments suggest that limiting protections to “identical match” under trademark claims or sunrise services is too restrictive. This suggestion has been the topic of much discussion. Both the IRT and the STI adopted this same limitation to identical match. Accordingly, this definition and scope will not be revised.

Clarifying questions have been raised with respect protection for names or marks that are protected by treaty or statute. To address each of the questions above:

- Inclusion into the Clearinghouse does not require protection under statute or treaty.
- The reference to effective date is the effective date of the statute or treaty, not the date of the mark registration (i.e., the punctuation in the AGB paper is correct).
- Only marks under existing treaties are protected. While some future protections might be excluded, the limitation was developed in order to prevent potential abuse.

Two commenters suggest that classification of goods and services must be addressed. The Clearinghouse allows for entry regardless of international classification (“IC”) of goods and services. The description of the goods/services drives whether there is a possibility of confusion, not the class in which the good or service might be assigned. Moreover, not every jurisdiction follows the international classification system so to require it would result in unfair or inconsistent treatment for those registrations which issue from jurisdictions that do not use the IC system.

In response to comment for clarification about national effect, the language in Section 9 should be revised to be of national effect, not multinational effect. (The reference to the word “applications” refers to gTLD applications, not Clearinghouse applications.)

Whether a “dot-TLD” mark (e.g., “ICANN.ORG” or “.ICANN”) should be included in the Clearinghouse has raised differing views. Some do not understand why they should be excluded, while others support the exclusion. The Clearinghouse is designed as a repository for trademarks. To fulfill the objectives of the IRT and the STI, it has been decided that those marks that actually function as trademarks, i.e., indicate source, are those that will be eligible for inclusion. Many safeguards have been established to prevent abuse and to ensure neutral application of validation standards, including objectively verifiable data that the mark does serve a legitimate trademark purpose. It has been successfully argued that TLDs standing alone do not serve the trademark function of source identification. Instead of telling consumers "what" a product is or who makes it, they tell consumers where to get it. Because the TLD does not indicate source, and because allowing marks in the Clearinghouse that include a TLD will increase the likelihood of abuse and gaming substantially, on balance they are excluded. This will obviate the need for registration of defensive trademarks.

In answer to a query about potential uses of the Clearinghouse: the Clearinghouse was designed to serve the Sunrise and IP Claims services specifically. It may or may not also support the URS depending upon the results of the tender of services for the URS.

Clearinghouse Provider Services

Key Points

- The Clearinghouse can provide ancillary services but cannot use its position to a competitive advantage.
- Optional services may include post-launch registry services such as IP Watch.
- The standard for “match” to identify Clearinghouse “hits” was developed by the IRT.

Summary of Comments

Pre-launch versus post-launch sunrise and claims services.

Both of these RPMs are pre-launch and they need to be post-launch to have any real value. Limiting the Claims Service to exact matches is clearly insufficient as most cybersquatting is not an exact match. There is no explanation for the different recognition accorded trademark rights for Sunrise Services and Trademark Claims Services (regarding substantive review/examination). *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk 913 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *DuPont (21 July 2010)*.

Additional protection for trademarks in the Clearinghouse should be extended by requiring mandatory post-launch notification procedures. A substantial portion of cybersquatting can be expected to occur well after a registry has launched. *AIPLA (21 July 2010)*. *Grainger (Module 5, 19 July 2010)*.

The Trademark Claims service should not be limited to pre-launch but should be required for post-launch registration applications, despite whether the registry uses Trademark Claims or Sunrise services at the pre-launch stage. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Making the clearinghouse-based mechanisms such as trademark claims services wholly voluntary for registries in the post-launch environment kicks the bulk of the abusive registration problem into a later time frame. In many cases the RPMs will be wholly inadequate without these post-launch protections. *COA (21 July 2010)*.

In their present form neither the Claims nor Sunrise services reduces the number of domains being registered in bad faith. To be effective, the services should be mandatory both pre-launch and post-launch. *C. Speed (21 July 2010)*. *BC (26 July 2010)*.

Will not solve cybersquatting. No one should assume that the new gTLD registry operator’s option in the current proposal to have the Sunrise or Trademark Claims Services, while a positive development, will in fact solve the abuse problems given the limitations of these services in deterring cybersquatting and other abuses. *Coca-Cola (21 July 2010)*.

The requirement for registries for claims and sunrise should be standardized so that they are the same. *C. Speed (21 July 2010)*. *BC (26 July 2010)*. *AIM (Module 5, 14 July 2010)*.

Exclusive use of Clearinghouse. It should be made clear that registries must use the Clearinghouse exclusively for the submission of Sunrise or IP Claims submissions. *EnCirca (Module 5, 21 July 2010)*.

The Trademark Claims and Sunrise Services are not feasible for or applicable to all applicants. ICANN should not force a policy that is inapplicable to some entities. E.g. Chinese governmental organizations are prohibited from practicing commercial-related activities. CONAC, the registry for domain names of Chinese governmental organizations and public interest organizations, must pre-check all the domain names before registration. There is no way for a single brand name to be registered as a domain name in such categories, so that it is of no value to utilize Sunrise or Trademark Claims in these circumstances. It would force CONAC to bear the cost of using the Clearinghouse also. *CONAC (22 July 2010).*

Option for “Sunrise Period” or “Claims Service”. A Sunrise is likely unnecessary for a .brand registry operator planning to use its gTLD as a private registry, so it should have the option to implement only a Claims Service rights protection mechanism. *IBM (21 July 2010).*

Notice to trademark owner.

We disagree with the advantage given to prospective registrants by delaying notice to the trademark owner under the Trademark Claims service until after the registration is effectuated. The objective should be to prevent registrations by would-be cybersquatters and innocent prospective registrants to the extent possible before after-the-fact enforcement efforts by trademark owners are required. *IPOA (21 July 2010). AIPLA (21 July 2010).*

The Trademark Claims service should require a waiting period before registration is effectuated following notice to both the prospective registrant and the trademark owner. The notice to the prospective registrant should include the following: “A copy of this Trademark Notice has been sent to the Trademark Owner. If the Trademark Owner deems that granting your requested domain name conflicts with existing trademark rights, it may initiate an ICANN dispute resolution proceeding and/or court action against you.” *IPOA (21 July 2010). AIPLA (21 July 2010).*

The pre-launch proposals are unfairly balanced in favor of registrants. Trademark owners should be able to object prior to registration of a domain name. This could save time and money, instead of forcing parties into the post-grant URS. *BBC (21 July 2010)*

Sunrise fees.

Most registries will continue the established practice of offering pre-launch “sunrise processes” which only work to extract additional fees for defensive registrations most brand owners have no affirmative reason to want. There is no provision to limit sunrise fees; ICANN recommends that they operate “based on market needs” which means the highest fee the market can extract from the trademark holder. *Verizon (20 July 2010).*

CADNA noted the addition of a mandatory sunrise period, which could be beneficial to the trademark community as long as the domain names are not offered for inflated prices. Domains should not be held “hostage” by requiring trademark owners to pay more than anyone else would for their own trademarks. *CADNA (21 July 2010).*

Not-for-profits are concerned that most registries will pick the Sunrise service in order to create a revenue stream for registries. Not-for-profits with limited resources for registering numerous domains may not be able to take part in all or any of these Sunrise services. ICANN should consider suggesting or requiring alternative domain name pricing for not-for-profits. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Ancillary services.

The proposal allowing the Clearinghouse operator to provide ancillary services is contrary to what the STI recommended. The STI made clear that any ancillary services should be directly related only to trademarks (common law marks, etc.). It was decided that all other intellectual property rights fall outside the scope of the Clearinghouse and therefore should not be included. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

INTA Internet Committee applauds ICANN's recognition that the Clearinghouse operator may offer certain ancillary services and maintain a separate database containing a "panoply" of rights, such as "unregistered trademarks, company names, trading names, designations of origin, family and personal names, etc." These services would be for the purpose of allowing trademark owners to better police their marks. Offering of such services should be mandatory in the evaluation and grant of certain TLDs (e.g. High Security Zone). *INTA Internet Committee (21 July 2010).*

ICANN must reconsider the provision allowing ancillary services to be provided by the Clearinghouse operator on a non-exclusive basis. These services could include release of lists of generic words or common typographical variations of various trademarks—exactly the type of information that facilitates and enables cybersquatting and typosquatting. This data should not be available on a non-exclusive basis; it should be guarded for exclusive use by relevant trademark owners. Third parties should not be able to profit from public confusion by warehousing variant spelling and combination domain names that derive value precisely because of the association with the trademark owner. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010)*

Analysis of Comments

Comments question that:

- some pre-launch services, such as IP Claims, should also be required post-launch,
- identical match is not sufficient to protect marks, and
- there is no explanation for distinction between marks afforded protection in Sunrise versus those afforded protection in claims services.

With respect to suggestion that pre-launch claims services be extended to post-launch, the IRT stated the following: "The IRT considered whether the IP Claims Service should also extend to the post-launch period. The IRT concluded that it was unnecessary to extend the IP Claims Service post-launch because of the protections afforded by the URS that the IRT also recommends herein." (See <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>, footnote 6.) Such services will not be mandatorily extended to a post-launch environment. Although post-launch services are certainly something that the Clearinghouse service provider could offer as an ancillary service. Discussion about why exact matches are required for protection is set forth above. As to why there is a difference between marks afforded protection in sunrise versus claims, it has previously been made clear that in Sunrise there is an affirmative advantage, while a claims service is just notification. Other post-launch rights protection mechanisms are available including the URS procedure, the UDRP and the PDDRP as well as any remedy available in a court of competent jurisdiction.

Comments suggest that Sunrise or claims be required. This is the case. As set forth in the AGBv4, all new gTLD registries will be required to use the Clearinghouse to support its pre-launch rights protection mechanisms. These must, at a minimum, consist of either a Sunrise or Trademark Claims Service.

Some have suggested that notice to trademark holders should be provided before someone is allowed to register a name that is in the Clearinghouse, thereby allowing for a pre-registration dispute. As set out by the IRT, the goal of the service is not to be a blocking mechanism, as there are often numerous legitimate reasons for many different people to use the same word or phrase that may be trademarked. In addition, the potential registrant must indicate that it has a legitimate interest in the applied for name.

The Fee structure for Clearinghouse is that fees will be matched to transactions. Mark holders will pay for registrations of a name and registries will pay for administration of a Sunrise or IP Claims service. Matching the transaction to the fee will enable most efficient, economical operation.

Allowing the Trademark Clearinghouse Service Provider to offer ancillary services is something that the STI discussed at length. The Clearinghouse proposal has adopted the intent of the STI to ensure that the Trademark Clearinghouse Service Provider does not obtain any competitive advantage over competitors for ancillary services, such as post-launch claims services, or databases making other information available.

UNIFORM RAPID SUSPENSION SYSTEM (URS)

General

Key Points

- The URS is meant to supplement other rights protection mechanisms, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.
- Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future.

Summary of Comments

Lack of Support for URS as drafted.

The URS is unlikely to achieve its full potential because it will in many cases be hardly faster than the UDRP and with weaker remedies, without adequate protections against abusive registrants, such as a loser-pays system for cases brought against high-volume registrants. *COA (21 July 2010)*. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *DuPont (21 July 2010)*. *AT&T (21 July 2010)*

The URS is overburdened for just a transfer and the burden consists of a combination of factors including: panel appointment even in default cases; panel examination of possible defenses in default cases; appeal possibility during two years from default; a higher burden of proof; uncertainty as to results (e.g., possible gaming and “revolving door” monitoring); use of the conjunctive bad faith registration and use; limiting marks forming the basis for a URS claim to either so-called substantive

review or clearinghouse validated marks (with cost and time implications); apparent translation requirements; a seeming option for re-filing; the possibility for de novo appeals; and significant timelines. *WIPO Center (16 June 2010)*. We support WIPO's call for the URS to be re-engineered. *JONAS (11 July 2010)*.

The BC has urged ICANN to undertake a feasibility study before making any decision to address whether the URS will be implementable as a sustainable business model and if it would be more sustainable if transfer were allowed (i.e. how many more complainants would use it). *BC (26 July 2010)*.

The URS is not "rapid" and given its required procedural elements it is not inexpensive. Since the ultimate remedy of the URS yields only suspension, it is likely that a majority of brand holders will be forced to buy a domain name in each gTLD corresponding to their trademarks or will be filing requisite UDRPs as opposed to relying on the equally time consuming and costly URS process. *MarkMonitor (19 July 2010)*. *Comerica (21 July 2010)*; *Carlson (21 July 2010)*. *C. Speed (21 July 2010)*. *Hogan Lovells (21 July 2010)*. *BBC (21 July 2010)*. *HSBC (21 July 2010)*. *IPC (21 July 2010)*. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *Adobe Systems (21 July 2010)*. *IACC (21 July 2010)*. *Sunkist (21 July 2010)*. *ABA (22 July 2010)*. *Solvay (22 July 2010)*.

Given the intent underlying the URS, it is imperative that the URS not be crippled by unnecessary, burdensome regulations, high expenses and limited remedies. *IHG (20 July 2010)*. *CADNA (21 July 2010)*. *M. Jaeger (22 July 2010)*

As currently structured the URS screams uncertainty for trademark owners and they will rationally choose the certainty and full remedies afforded by the UDRP. *Verizon (20 July 2010)*. *IPOA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

All the changes and alterations have turned the URS into a weaker version of the UDRP (cheaper but no speedier and a weak means of redress—i.e. no transfer of the domain to the complainant). *C. Speed (21 July 2010)*. *AT&T (21 July 2010)*.

The URS has been watered down from the IRT version and is not effective: it is not rapid, it has become complex, burdensome and unworkable. ICANN should return to the version proposed by the IRT and improve it by making it faster (21 days at most); simpler (pro forma complaint with copy of Whois and website copy, not a 5,000 word document); practical (only for case with no real contestable issue); efficient (experienced examiners); and reasonable (remove the "questionable fact" defense and dismissal if examiner thinks defense would have been possible). The concept of "loser pays" should be looked at again and the URS should be open to all trademark owners without discrimination provided their registration is current. *MARQUES/ECTA (21 July 2010)*.

The URS has been seriously diluted; ICANN should revert to the URS as proposed by the IRT. *Com Laude (21 July 2010)*. *News Corporation (21 July 2010)*.

Support for URS as drafted.

I support the URS as detailed in the DAGv4. Critics who say it will be longer than the UDRP do not make a valid comparison—they compare the longest possible URS action to the shortest possible UDRP action. Similarly it seems very likely that the average URS cost will be substantially less than the average UDRP cost. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *Demand Media (22 July 2010)*.

The changes have addressed many concerns of ICA members regarding due process, adequate notice and meaningful appeals. *ICA (21 July 2010)*.

Fees.

Fees relating to the URS should be determined as soon as possible so that not-for-profit organizations can budget in advance for the new gTLD process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

ICANN should firmly commit to the URS being much less expensive than the UDRP—i.e., commit to a “not to exceed” fee (e.g. a URS complaint shall not exceed \$400) in final Guidebook. This would give trademark holders much more comfort. *Domain Dimensions (22 July 2010)*.

Paragraph 2--Fees edit. The phrase “it is thought, more often than not, that no response to complaints will be submitted” should be deleted. This sentence makes it appear that the URS is instructing its examiners to view URS disputes under a presumption of guilt for respondents, which is unfair, and against due process. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

All URS providers should be put under contract. The STI-RT reached unanimous consensus on this point. This will promote uniformity. *ICA (21 July 2010)*.

Qualifications of examiners. Examiners need only a legal background. How is this to be defined? *Hogan Lovells (21 July 2010)*.

Rotation of examiners. There might be an issue with the rotation of examiners given the variety of jurisdictions and languages. *Hogan Lovells (21 July 2010)*.

Analysis of Comments

Some comments suggest that the URS as currently drafted will be effective. Others suggest it will not be effective, that the burden of proof is too high, that its remedies are not sufficient, that it is not fast enough and that it will lead to uncertainty.

The URS was devised by the IRT, modified by the STI and influenced and revised to take into account significant public comment. This procedure is not intended to be a replacement for any other additional methods of redress that a trademark holder may have for infringement. Rather, the URS is meant to supplement those other methods, such as the UDRP, and is purposefully drafted to target a very narrow class of clear-cut cases of abuse.

Indeed the URS is not intended to provide uncertainty. Different procedures in different jurisdictions provide different types of relief. If immediate relief for clear-cut cases of abuse is the goal the URS may be the right alternative, if transfer of a domain is sought the UDRP might be the right alternative, if damages are sought a court might be the right alternative. The objective of the trademark holder will ultimately drive where an action is brought. The URS provides an additional remedy, not a replacement.

Further, feedback on the effectiveness of the URS once it is implemented is encouraged so that it can be evaluated in the future. As a part of its introduction, as set forth in Section 14 of the URS, a review of the procedure will be initiated one year after the first Determination is issued. It is expected that the

evaluation will cover usage and statistics and will be posted for public comment to gauge the overall effectiveness.

Each of the specific comments as to the deficiency of the URS is addressed in detail in the sections below.

The amount of the fee for a URS has been the subject of comments. The precise amount is still under consideration and will be set by the provider with the goal of being as cost effective as possible. A suggested revision to omit an editorial comment regarding why a loser pays provision has not been adopted for the URS will be adopted.

While one comments suggests that all URS providers should be put under contract, it should be clear that all providers will be required to comply with standards and procedures, regardless of the mechanism under which they are engaged to provide URS services.

There has been one comment on examiners legal background and another on the rotation of examiners. Legal background of examiners will be determined based upon legal training or training in dispute resolution processes. With respect to the rotation and examiners in light of jurisdiction and language variations, this is something that the URS providers will be required to consider in rotating examiners.

Complaints and Responses

Key Points

- The trademark holder will have the burden of proof since it is the person or entity that seeks relief.
- Given other safeguards that are in place, the time to respond to a complaint has been changed from 20 days back to 14 days, with an opportunity for an extension of seven additional days.

Summary of Comments

Trademark owner burdens.

The URS is flawed because the burden is on the trademark owner to prove that the registrant has no legitimate interest in the domain name. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *Adobe Systems (21 July 2010)*.

The burden of proof should not fall on the trademark holder. The complainant's case should be considered legitimate by virtue of evidence of a valid trademark and in such instances the registrant should be responsible for proving its "good faith". *IHG (20 July)*

Response filing fee.

The URS lacks a fee for filing a response to a complaint. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*.

What is the reasoning behind allowing the respondent to be in default for up to 30 days following a determination before they would be charged any fee with their response? The respondent should be obliged to file a fee in all cases where it files a response to provide some balance between the parties. Even if this is not the case there should be a fee when a response is filed late. *BBC (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

A fee should be charged for any response filed after a decision has been entered. No 30-day "grace" period should be allowed as currently proposed. *Grainger (Module 5, 19 July 2010)*.

Notification to registrar (6.2 & 6.5): Is essential that a copy of the notification must also be sent to the domain's sponsoring Registrar by the URS Provider. The Registrar should always be informed of actions that change the domain's status, because the Registrar is the party with the service and contractual relationship with the Registrant. Registry Operators are not in a position to communicate with Registrants. *RySG (21 July 2010)*.

Simple forms. ICANN should develop simple forms for the complaint, answer and decision, with a requirement that complaints that are too lengthy or complex to make use of such a form instead be required to be filed as UDRP complaints or that the complainant seek other remedies. This would reduce burdens and likely expedite the process. *AAMC (21 July 2010)*. *CADNA (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Word Limitations.

The 5,000-word limit for the complaint and response is too high for what should be a clear cut case and will increase preparation costs. *Hogan Lovells (21 July 2010). CADNA (21 July 2010).*

Any word limitation should be much smaller, such as 250 or 500 words. AT&T suggests a return to the initial form complaint and response approaches. *AT&T (21 July 2010).*

Timeframes.

The registrant should have 14 days to file an answer. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

The examiner should be required to render a decision within 7 business days, with a goal of providing it within 3 days as a best practice. *AAMC (21 July 2010). NPOC-FC (21 July 2010). Red Cross (21 July 2010).*

At a minimum, a decision should be rendered within 3 business days in cases of default. *INTA Internet Committee (21 July 2010).*

The response and decision-making timeframes are too long. The process needs to be streamlined. *CADNA (21 July 2010). AT&T (21 July 2010). AIPLA (21 July 2010).*

The URS fails to provide an expedited remedy; the URS timeline proposed by the IRT has been so extended in the current draft proposal that the timing for an initial decision may often be equal to or longer than under the UDRP. *INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). SIIA (21 July 2010). USCIB (21 July 2010). Microsoft (21 July 2010). EuroDNS (22 July 2010). BC (26 July 2010). AIM (Module 5, 14 July 2010). Nestle (21 July 2010).*

URS needs to be refocused to immediately take down a website. The role of the URS provider is to act as a rapid check on the bona fides of the complainant and to be a conduit between the complainant and the registry. The URS should operate with dramatically reduced timelines, which will stop the criminal act being conducted and cover probably 99% of URS cases:

- Complaint starts
- 24 hours—URS provider validates bona fides of complaint and notifies registry;
- 24 hours—Registry notifies Registrant that it will act to lock and then prevent resolution of the web site in 24 hours.

If the registrant reacts (defined as confirmation of registrant data and a statement that the complaint is or is not valid) within 24 hours the presumption of bad faith should be reversed and the web site should immediately be allowed to resolve again. If the registrant reacts as defined, the Registry notifies the URS provider who notifies the complainant within 24 hours and the URS finishes. At that point the complainant should then be invited to instead launch a de novo UDRP. *AIM (Module 5, 14 July 2010).*

Revisions needed.

Section 1.2(f) seems to need revision, as it is inconsistent with the examination standards in Section 8.1(a). *INTA Internet Committee (21 July 2010).*

Paragraph 1.2(f) should be rewritten to place the word “and” in front of (ii), deleting the word “and” after (ii) in the original, and so that “;and” appears before (iii), deleting “and;” before the (iii) in the original. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

This edit does not change the content, seems to make sense.

Split Paragraph 4.3. For purposes of clarity paragraph 4.3 should be split into two sections:

- 4.3—“All Notices to the Registrant shall be sent through email, fax (where available) and postal mail. The complaint and accompanying exhibits, if any, shall be served electronically.”
- 4.4—“The URS provider shall also notify the registrar of record for the domain name at issue via the addresses the registrar has on file with ICANN.”

K. Komaitis (21 July 2010). R. Dammak (22 July 2010)

Analysis of Comments

Who has the burden of proof and what the standard of proof should be have been the subject of comments. The trademark holder will have the burden of proof since it is the person that seeks relief. To hold any other way would afford the trademark holder a presumption it is not entitled to hold. All use of a trademark is not unlawful or infringing use, as such, the mere ownership of a mark by “A” and use of a similar mark by “B” does not mean that A should prevail.

Whether a respondent should have to pay a fee and at what point in time has been the subject of comments. A loser pays system was rejected by the IRT and STI but is still being discussed. Currently, the respondent needn't pay a filing fee for the action to commence. This is because in most cases the registrant abandons the registered name and does not reply or pay. In other cases, the respondent may respond but not pay. Therefore, waiting for a reply and fee before proceeding would delay righting the wrong while not garnering any extra fees.

Therefore, it was decided there would be no filing fee unless the registrant decides to respond after being in default for a prolonged period of time. The ability to respond after default provides legitimate registrants the right to regain the use of a legitimate domain name. Thus, default responses will continue to be allowed under the URS Proposal.

Some commenters suggest use of “form complaints” and answers, and others suggest a limitation on the submission. While forms can facilitate filings in certain situations, given the fact-intensive nature of the bad faith standard, a form complaint would not be appropriate. In a similar vein, the 5000-word limit was arrived at by balancing the need for the RPM to be rapid against the need of the complainant to be able to plead and prove its case with a clear and convincing standard of review. There is no requirement that a complainant use all 5,000 words.

Many think that the time frame to respond is too long. ICANN agrees. The Board has stated as follows: “URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days, with one opportunity for an extension of seven days if there is a good faith basis for such an extension.” (See <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>.) The URS Proposal will be revised to reflect this change.

There are other protections available for registrants in the event they cannot respond within 14 days. First, a seven-day extension can be requested. Second, there are opportunities for filing after default and for appeal. It is thought that there will be very few legitimate cases where the registrant will not be able to respond within the prescribed period. For those instances, there are the safeguards of default

filing and appeal. On the other hand, increasing the period to reply from 14 to 20 days means that every harmful registration can be misused for an additional period.

While some have suggested that a URS complainant should be referred to UDRP under certain scenarios, the UDRP and the URS are separate procedures, tying rights to initiate one to the result of another is therefore inappropriate.

Comments relating to language revisions are appreciated, will be considered and made where appropriate.

Eligibility and Standards

Key Points

- The URS is meant to provide a quick process in the most clear-cut cases of abuse, thus a clear and convincing burden of proof is appropriate.
- Standing is not limited to certain jurisdictions; standing is afforded to those holding trademarks registered in jurisdictions that conduct substantive review or that are otherwise validated in certain ways.

Summary of Comments

Eligibility requirements.

By requiring that complainants' trademarks be registered in jurisdictions requiring "substantive review", ICANN is making the eligibility requirements for the URS unreasonably high. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

There is no reason why the URS should be available only for certain marks that were registered in countries with substantive review. A procedure for rapid take down of a clearly abusive site is needed regardless of where the mark at issue was registered. Remedies can be put in place (and indeed are in place) against abusive use of the URS proceeding. *Coca-Cola (21 July 2010)*.

The URS, now much weaker than what the IRT report proposed, is apparently only available to owners of trademarks registered in countries conducting a so-called substantive review (para. 1.2(f)), so that all CTMs and most national European trademarks are excluded. *Arla Foods (6 July 2010)*. *LEGO (6 July 2010)*. *VKR Holding (13 July 2010)*. *Nilfisk (13 July 2010)*. *LEO Pharma (14 July 2010)*. *Vestas (16 July 2010)*. *Coloplast (19 July 2010)*. *PMI (21 July 2010)*. *BBC (21 July 2010)*. *Red Cross (21 July 2010)*.

Clear and convincing standard.

It will be difficult for many trademark owners to meet and will be easily gamed by defendants to thwart a URS finding. This standard is not only higher than the UDRP but higher than that required in most civil actions. *Verizon (20 July 2010)*. *Hogan Lovells (21 July 2010)*. *News Corporation (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

A clear and convincing standard is appropriate. *Domain Dimensions (22 July 2010)*. *ICA (21 July 2010)*.

The URS clear and convincing standard is higher than the UDRP; mark owners will continue to use the UDRP as they have in the past with success. The statement that a URS complaint will only be granted in favor of complainant if there is no genuine issue of material fact seems appropriate. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

Dismissal threshold for complaints is far too low. ICANN permits a URS complaint to be dismissed by an examiner based on a vague and exceedingly low threshold—i.e. if "evidence was presented" to indicate a domain name is non-infringing or a "defense would have been possible" to show it is non-infringing. *Verizon (20 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPOA (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Microsoft (21 July 2010)*.

Bad faith criteria.

To be truly rapid, the URS should use a conjunctive “OR” standard of bad faith. *IOC (21 July 2010).*

Criteria (iii) in paragraph 1.2 (g) should refer to the registrant having registered the name primarily for the purpose of disrupting the business of another, rather than of a competitor. There may be many reasons why someone might register a domain name in order to disrupt the business of a third party that is not a commercial competitor. *BBC (21 July 2010)*

The sale of traffic (5b) should be presumed to be bad faith, not merely a factor for consideration. The Registrant should bear the burden to prove that the sale of traffic is not bad faith, once it has been pled in the Complaint. *IPOA (21 July 2010). AIPLA (21 July 2010).*

“Pattern”. If the registrant exhibits a pattern of abusive registrations, it should not be a point in its favor that this particular registration does not seem to share the same abusive characteristics as those in the pattern (5.8(d)). *AIPLA (21 July 2010).*

Analysis of Comments

Comments suggest that eligibility requirements for utilizing the URS are too high and limited to certain jurisdictions. The IRT developed the URS in order to provide a quick avenue for the most clear-cut cases of abuse. In order to provide such a process, some limitations on standing to file a complaint pursuant to the URS are necessary. Nevertheless, standing is not limited to those holding trademarks registered in jurisdictions that conduct substantive review. There will be a provider to validate use of marks if such validation was not conducted in the jurisdiction of the trademark registration, or the mark is not otherwise protected by statute or treaty. Such limitations are placed on the marks eligible for URS consideration in order to limit gaming of the system by those who simply register marks for no reason other than to obtain a domain name.

Some think a clear and convincing standard is appropriate while others do not. Further, some have pointed out that this is higher than the UDRP standards, and thus complainants will simply bypass the URS for the UDRP. Others suggest that the dismissal threshold for URS complaints is too low. It is true that a clear and convincing standard is higher than the UDRP; that is the intent. In addition, the threshold for dismissal of complaints is intended to be low. As noted above, the URS is meant to provide a quick process in the most clear-cut cases of abuse. Thus, a higher standard is appropriate. Further, as the IRT stated: “If there is a contestable issue, the matter is not appropriate for decision under the URS and the Complainant should pursue a decision in a different forum.” (See page 34 of IRT Final Report at: <http://www.icann.org/en/topics/new-gTlds/irt-final-report-trademark-protection-29may09-en.pdf>).

Therefore, neither the clear and convincing standard, nor the threshold for dismissal of a URS complaint will be revised.

The evidence needed to show bad faith has been the subject of commentary. Some comments have suggested that a disjunctive requirement should comprise the standard of review in a URS case, i.e., that the domain name was registered **or** is being used in bad faith. Further, it has been suggested that the requirement of bad faith reach would reach “disrupting the business of another”, instead of a “competitor.”

While two different types of possibly infringing conduct are captured by the disjunctive standard, the goal of the URS is to reach only the most clear cut cases of abuse. Because of this heightened standard, the decision was made to require a complainant to plead and prove both that the domain was registered and is being used in bad faith. Thus, the conjunctive will remain as the standard for a URS case. This is not the standard in every type of RPM. Further, because of the type of harm the URS is intended to address, the “competitor” standard will be retained.

One question above is, what is meant by 5.8(d). In addition, some think that the sale of traffic data, as referred to in 5.9, should be presumed bad faith. The language as proposed in section 5.8(d) is not meant to provide a way to avoid liability for deviating from previously abusive practices. The standard in this section is meant to capture the good faith registrant that does not register a series of typographical spellings of a registered trademark - it is not meant to provide a safe haven for serial cybersquatters. Further, given that the Complainant must show clear and convincing evidence to prove its case, a presumption against the respondent for a URS case is not appropriate. However, a factor that an examiner can consider as evidence of bad faith is the sale of traffic in the appropriate cases. Thus, the standards set forth in Section 5.9, allowing consideration without creating a presumption in favor of the complainant, will remain as written.

Defenses

Key Points

- The purpose of this more restrictive entry standard (as compared to UDRP) is to avoid time-consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse.
- Evidence of fair use of the disputed name must be analyzed by the Examiner to determine its validity

Summary of Comments

Common law rights.

It is ironic that a complainant can only launch a URS complaint based on trademark rights but a registrant can defend such action on the basis of common law rights. We do not see why the procedure cannot accommodate a consideration of the complainant's common law rights also. *BBC (21 July 2010).*

Wider pattern—defense. We do not agree that the fact that the domain name is not part of a wider pattern or series of abusive registrations should in itself be a freestanding defense. *BBC (21 July 2010).*

Language change from “safe harbors” to “defenses”. ICANN should provide to the community the independent analysis that led to the change of wording from “safe harbors” to “defenses”. Instead of “defenses” the term should be changed to “absolute or complete defenses”, which is closer to the original term “safe harbors”. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Paragraph 5, section 5.4—addition. Another paragraph (e) “Absolute/Complete Defenses” should be added. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Fair use defense Paragraph 5, section 5.8(b). The current language implies that the Examiner has discretion to determine whether a fair use defense will be acceptable. This is against due process and would give Examiners too much power. The phrase “that is found by the Examiner” should be removed. Fair use is an affirmative defense and as long as the registrant can provide evidence of such use the Examiner should accept it unwittingly. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Paragraph 5.9 edit. The word “not” is missing and this appears to be a typographical error. It should read: “Other considerations that are not examples...” *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

To many defenses.

The current version of the URS adds more factors to support a defense that the registrant has not acted in bad faith, without adding any additional presumptions in favor of trademark owners, which seems to reflect a bias against trademark owners. *NCTA (Module 3, 21 July 2010).*

To be truly rapid, the URS should reduce the number of defenses for panelists to consider. *IOC (21 July 2010).*

Analysis of Comments

One commenter challenges why a complaint cannot be based on common law rights. The intent for the URS is to be applicable only in cases of clear-cut abuse. The UDRP, which is still available to any URS complainant, allows for determination based upon common law rights. As stated in footnote 38 of the IRT Final report (see <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>), the “IRT recognizes that entry standard for utilizing the URS is more limiting than the standard provided in the UDRP, which permits claims to proceed based on any registration of trademark rights or on common law rights. Parties that do not meet the higher entry standard proposed for utilization of the URS may, of course, still proceed with claims under the UDRP or in courts, as appropriate. Exclusion from the URS is not intended in any way to prejudice a party from proceeding under other available avenues. The purpose of this more restrictive standard is to avoid time consuming analysis over the question of rights, which would undermine the intended purpose and ability of the URS process to provide a fast inexpensive remedy for cases of clear abuse.” Thus, the URS will not entertain complaints from those with only common law rights.

Two commenters have asked for an explanation for changing “safe harbor” to “defense.” As explained in the comment summary and analysis posted on 28 May 2010, “[t]he language modification strikes a balance between the trademark holder bringing the claim and the rights of the registrant who remains free to allege a defense of good faith. However just as there is no absolute right for the trademark holder to prevail, similarly there is no absolute right to prevail in the basis of alleged good faith, otherwise all would allege it and no successful claim could ever be brought.” See <http://www.icann.net/en/topics/new-gtlds/urs-comment-summary-and-analysis-28may10-en.pdf>. Therefore, it is thought the term “defenses” is more accurate. These same commenters suggest that a new paragraph for absolute defense should be added. Absolute defenses, if any, are contained within the term defense.

Two comments suggest that that the Examiner must unconditionally accept evidence of fair use for trademarks from jurisdictions without substantive review. This is not correct. The Examiner will be required to determine whether evidence of fair use exists. Evidence of fair use must be analyzed by the Examiner to determine its validity, which is why the phrase “that is found by the Examiner” is included. Accordingly, a change of language in response to these comments is not required.

Two commenters suggest revision to some of the language of 5.9. While the word “not” was never intended to be part of this section, there may be some lack of clarity in the language. Thus, the language will be changed from “Other considerations that are examples of bad faith for the Examiner” to “Other factors for the Examiner to consider.”

One comment suggests that the defenses create bias for trademark holders and another says there are too many defenses for URS respondents. There is no intent to create a bias for trademark holders. The URS was developed by the IRT, subsequently modified by the STI and others, solely for the protection of trademark holders. The result is an attempt to balance the rights of a trademark holder, against a registrant of a domain name that may have the same words as a trademark, but is being used in a non-infringing manner.

Default

Key Points

- Full examination, even in cases of default, is intended to ensure all parties, whether or not they respond, are provided an opportunity to a fair analysis of the facts.

Summary of Comments

No panel in cases of default.

Where a registrant fails to present a defense (default), an immediate judgment should be rendered in favor of the complainant. A panel should not be appointed to debate hypothetical points of defense. IHG (20 July 2010). IPOA (21 July 2010). Coca-Cola (21 July 2010). NCTA (Module 3, 21 July 2010).

Respondent default should result in suspension of the domain name. There is no need for panel appointment and substantive review in the event of a default. IPOA (21 July 2010). AIPLA (21 July 2010).

To be truly rapid, the URS should deny panel review in cases of respondent default. IOC (21 July 2010).

Returning name servers upon default response. In case of a default response, name servers should not immediately be returned to the state prior to “hold” status until an initial examination of a default response is completed to prevent frivolous filings and delays in implementing decisions. Allowing the return to initial status would be contrary to the “rapid” intent of the URS and provide a loophole for cybersquatters to extend the process. Grainger (Module 5, 19 July 2010).

No default responses should be allowed. No default responses should be allowed unless, upon initial examination, there is strong and compelling evidence that the decision was in error. As with a UDRP the registrant still has the option of filing suit in court to reclaim the disputed name. Grainger (Module 5, 19 July 2010).

Analysis of Comments

Some commenters are against evaluation upon default and think an immediate ruling in favor of the complainant should be issued. Others think that default responses should be allowed. One commenter has suggested that until an initial examination of a default response is completed, the name server should not revert to allow the registrant to utilize the domain name.

Examination in case of default is something that was identified by the IRT, and accepted by the Special Trademark Issues Review Team (“STI”). The intent was to ensure that someone other than the Complainant had a chance to at least analyze the claim for merit. Thus, there is full review even when there is no response. Further, given the quick nature of the URS proceedings, the intent is to provide a balance to legitimate registrants that may not have been available to respond in a timely fashion. The ability to respond after default and revert to the same position as if the response had been timely filed, provides legitimate registrants the right to regain the use of a legitimate domain name, at least pending Determination. Thus, default responses will continue to be allowed under the URS.

Appeals

Key Points

- If there is an appeal, independent review (rather than review by the same panel that decided the complaint) seems to be in the best interest of all parties given the type of proceeding, and the bad faith standard a complainant must meet.
- The filing of an appeal will not change the domain name's registration until the appeal decision is issued.

Summary of Comments

De novo appeals—statute of limitations. A proposed 2-year statute of limitations for filing a de novo appeal from a panel decision would address any concern about registrants missing the notice and having a review on the merits of every case. *IOC (21 July 2010)*.

Appeals must be efficient.

In case of any judgment (default or otherwise) the appeals process must be efficient and succinct. Allowing a defendant to appeal up to two years later is counter-intuitive and counter-productive. *IHG (20 July 2010)*. *Verizon (20 July 2010)*. *Hogan Lovells (21 July 2010)*. *IPOA (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 30 days from issuance of the Notice of Default, and subject to a showing of good cause why the default should be lifted. *INTA Internet Committee (21 July 2010)*.

Two years for a defaulting registrant to reopen the proceeding is much too long. The window should be reduced to 90 days from issuance of the Notice of Default. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *BC (26 July 2010)*.

De Novo review.

The de novo appeal standard is inappropriate; it allows an unsuccessful appellant to simply hope for a different decision by a new reviewer. De novo appeals will take longer to resolve. *NCTA (Module 3, 21 July 2010)*.

De novo reviews by filing an answer during the life of the registration period should not be allowed. If the abuse is clear cut and obvious enough to warrant a decision in favor of the complainant, there should be nothing compelling enough in a response filed after default, and certainly not months or a year or more later, to warrant automatic reinstatement of the site. *Grainger (Module 5, 19 July 2010)*.

We strongly object to the proposal that a registrant who fails to file a response shall have the right to a de novo review at any time up to two years after the determination. Two years is much too long. We also object to the domain name resolving back to the original IP address where the registrant files a request for de novo review. The domain name should resolve back to the original IP address only where the response has been filed within a limited grace period, i.e. a few months. *BBC (21 July 2010)*

Time for filing appeal.

The window to file an appeal after issuance of a URS decision should be reduced to 14 days. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

There should be a de novo appeal by either party; the filing deadline should be shortened. *AIPLA (21 July 2010)*.

Notice of appeal should be filed within 10 days and a date for a decision on appeal must be set. *INTA Internet Committee (21 July 2010)*.

Limits on new evidence. Any new evidence submitted as part of the appeal should be limited to evidence that (1) was not available at the time of the initial proceeding; or (2) relates to an issue that was not raised by the parties but formed part of the basis for the decision. *NCTA (Module 3, 21 July 2010)*.

Fee for Evidence on Appeal. Making the introduction of new evidence contingent upon an additional fee is unfair and we fail to see the rationale for it. If an appellant pays the required fees for an appeal, there is no justification for another fee for introducing new evidence. ICANN should waive this requirement. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Appeal procedures (paragraph 12) are inadequate. 12.5 merely says that “The Provider’s rules and procedures for appeals shall apply.” There must be explicit provision that notices will be sent via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. The current lack of specificity also exposes Registry Operators to needless liability and unpredictable procedures. If an appeal is successful, URS requires the Registry Operator to unlock the domain and possibly restore back to the previous name servers. Registry Operators should perform domain actions only under explicit and formal notification from the URS Provider, under fully documented procedures. *RySG (21 July 2010)*.

Analysis of Comments

Questions have arisen with respect to why two years for an appeal is permitted. Some have suggested that this time period is too long. The only way in which an appeal can be taken two years later is if the respondent is seeking relief from Default. Otherwise, the appeal must be filed in 14 days pursuant to Section 12.4. To balance any perceived harm and to deter any gaming of the default mechanism, the filing of an appeal does not change the domain name’s resolution. So if there is a determination in favor of the Complainant, the domain will continue to point to the informational page of the URS provider. Given that the status quo is preserved, it is unlikely that the default/appeal procedure will be gamed for the two-year period. Also, the intent of the URS is to address clear-cut abuses. In these clear-cut cases, the appeal will be lightly used and have little effect on process administration.

Other comments have been submitted regarding the de novo review. Some commentators support it while others believe that it will lengthen the appeal process. Given the limited evidentiary submission before the URS examiner, it is unlikely that the de novo review will substantially increase the time in which review and appeal resolution are complete. Moreover, given the type of proceeding at issue, and the bad faith standard a complainant must meet, on balance, independent review of the materials submitted seems to be in the best interest of all parties. As such, the de novo standard should remain.

Additional comments question the right to introduce new evidence on appeal and suggest that it be limited only to evidence unavailable at the time of the initial proceeding or relates to an issue that was not raised by the parties but formed part of the basis for the decision. As the appeal standard is currently drafted, it reflects the intent to prevent handicapping an opponent on appeal with the requirement that the evidence be limited to that which predates the filing of the Complaint. The availability or unavailability of the evidence is a factor that could be considered by the appeal panel.

One commentator has suggested that since the registrant is filing an appeal, it should not have to pay to submit additional evidence. While costs are a concern, merely instituting an appeal does not carry with it the right to introduce new evidence. Also, the additional costs of the hearing associated with the introduction of new evidence must be recovered. As such, a separate payment will still be required.

One group has requested additional rules and procedures on appeal. In response, some additional notice requirements have been included in the current version of the URS posted in November 2010 at the same time as this analysis is posted. Further, the comment about time for filing an appeal seem reasonable and the time for doing so has been reduced from 20 to 14 days. Additional procedures will be developed once URS Providers have been selected.

Abusive Filings

Key Points

- The URS attempts to balance benefits and harms by permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.
- If persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds.

Summary of Comments

Abusive complaints and Deliberate Material Falsehoods.

The definition of “abusive” complaints is not clear; legitimate trademark owners could be labeled as having an abusive behavior and thus barred from using URS. *PMI (21 July 2010)*.

The standard for imposing a penalty on complainants has been unjustifiably lowered, and the process is silent on the burden of proof placed on the examiner making a finding of an abusive complaint. The bar should be set extremely high given the severe consequences of such a finding. *NCTA (Module 3, 21 July 2010)*.

IBM welcomes the clarifications provided for identifying an “abusive” complaint and for identifying a “deliberate material falsehood” (11.4). Clarification is required on what is considered “material”. *IBM (21 July 2010)*.

The abusive complaints section should be removed or reworked; the current section is troubling because it is highly likely that every registrant will plead the abusive nature of the complaint, thereby increasing costs and time to respond. *IPOA (21 July 2010)*. *AIPLA (21 July 2010)*.

The safeguards for abusive complaints go too far. The requirement in Section 11.4 that the false statement would have an “impact” on the outcome is too low for it to be held to be a deliberate “material” falsehood. *INTA Internet Committee (21 July 2010)*. *BC (26 July 2010)*.

No time period is set with regard to the two findings of “deliberate material falsehoods” that can permanently bar a party from using the URS. *INTA Internet Committee (21 July 2010)*.

The threshold for the sanction is too low. Perhaps two abusive complaints or deliberate material falsehoods within a five-year period should warrant the sanction (barred from URS for one year). *AIPLA (21 July 2010)*.

The “two strike policy” is unprecedented in international law (see URS sec. 11). Jurisdictions do not bar trademark owners from filing complaints—under any circumstances—and neither should ICANN. *IOC (21 July 2010)*.

IBM agrees that two findings of “deliberate material falsehood” by a party should permanently bar the party from utilizing the URS. *IBM (21 July 2010)*.

The abusive complaint provisions should not be diluted. Those who make deliberate misstatements of material facts to prevail in a URS should face sanctions stronger than being barred from using the process; such sanctions should include monetary fines for egregious cases. *ICA (21 July 2010)*.

The appeal standard of review for findings of abuse should be *de novo*—as is proposed for a default appeal or appeal of a determination. *INTA Internet Committee (21 July 2010)*.

Analysis of Comments

There have been several comments about the terms and application of the abusive complaint standards. Some commenters think being barred from utilizing the URS requires a much higher standard or should not ever be allowed, some think that the stated standard is too lenient, and others think simply barring a complainant from the URS is not enough. What was provided for in the URS Proposal attempts to balance all of these positions, by only permanently barring those who have submitted two material falsehoods, and barring those submitting two abusive complaints for just a year after the second complaint is deemed abusive.

It is true that if trademark holders are found to have submitted abusive complaints, as they are defined in the AGBv4, they will be barred from using the URS. This will not bar them, however, from using other enforcement mechanisms, including the UDRP.

One commenter asked for a clarification of the term material and another has stated that a false statement simply having an impact should be insufficient to be deemed a deliberate material falsehood. We used section 11.4 of the URS, where deliberate material falsehood is one that “contained an assertion of fact, which at the time it was made, was made with the knowledge that it was false and which, if true, would have an impact on the outcome on the URS proceeding.” Something is material if it would have an impact on the outcome of the URS proceeding. Whether or not something would have an impact on the outcome, however, only goes materiality. This does not discount the fact that it must also be a “deliberate material falsehood,” and not merely a “false statement.”

One commenter has suggested that the appeal standard of review for findings of abuse should be *de novo*. But, the purpose of the URS is to address only the most clear-cut cases of abuse. Thus, if persons have been found to be abusive in the complaint process an appeal of the finding must be only on very limited grounds. This helps ensure that only legitimate trademark holders with legitimate reasons for filing a URS complaint are permitted to use the process in an unfettered manner.

Remedies

Key Points

- Both the IRT and the STI called for suspension, not transfer of a domain name in the event a URS complainant prevails.
- In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

Summary of Comments

Notice of Determination. Section 9.2 says that “[i]f the Complainant satisfies the burden of proof, the Examiner will issue a Determination in favor of the Complainant. The Determination will be published on the URS Provider’s website. “There is a vital omission here: the procedures do not require any active notice to the various parties involved. The procedure MUST be amended so that the URS Provider sends a copy of the Determination via e-mail to the Registrant, the Complainant, the Registrar, and the Registry Operator. These formal notices MUST be sent. If the Determination is in favor of the Complainant, the Registry Operator is then required to suspend the domain as per 10.1. Registry Operators should act only under explicit notification from the URS Provider, and this notification should be documented in the URS requirements. And in general, it is only logical that the various parties should receive an e-mail notice of the Determination, as is done with UDRP decisions. *RySG (21 July 2010)*.

Remedies not sufficient.

The URS should provide trademark owners with the ability not only to temporarily suspend a domain name but also to have the option to transfer valuable domain names back into their portfolios. At best the URS as now proposed allows only a temporary suspension for the remainder of the registration period with the option to suspend for an additional year. During this time the trademark owner cannot make use of a valuable domain name itself. This forces trademark owners into perpetual monitoring and enforcement obligations as the frozen domain name eventually lapses, falls into the pool and is likely picked up by another cybersquatter. *Verizon (20 July 2010)*. *PMI (21 July 2010)*. *DuPont (21 July 2010)*. *IPOA (21 July 2010)*. *CADNA (21 July 2010)*. *Coca-Cola (21 July 2010)*. *News Corporation (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *AIPLA (21 July 2010)*. *BC (26 July 2010)*. *NCTA (Module 3, 21 July 2010)*.

URS should offer a meaningful remedy—e.g., transfer, placement on a registry-maintained black list, or imposition of a presumption of bad faith for all domains that have already been suspended once (see URS sec. 10). *IOC (21 July 2010)*.

Suspension as the only remedy would not lower costs for the trademark owner because of the risk that the same squatter will or another squatter could register the name upon expiration. If a complainant opts for the 1-year extension of the suspended domain name, will the Whois information continue to reflect that of the respondent after the initial expiration date? Who will monitor suspended domain names to ensure that no changes are made to the Whois or the site during the suspension period? *Grainger (Module 5, 19 July 2010)*.

The URS decision should be binding for life, not a few months. *AIM (Module 5, 14 July 2010)*.

Regarding the remedy (10.2), a successful complainant should have the right to cancel the domain to avoid causing damage to the goodwill associated with its trademark through having the contest url containing its mark resolve to a website not under its control for a lengthy period of time. *IBM (21 July 2010)*.

If the point of the URS is to address blatant abuse, then the domain should not resolve past the point at which initial administrative review is passed in an initiated URS proceeding and internet access should be promptly disabled. *Coca-Cola (21 July 2010)*.

Transfer should not be available under the URS. The UDRP and URS remedies should remain distinct. *ICA (21 July 2010)*. *Domain Dimensions (22 July 2010)*. *M. Jaeger (22 July 2010)*.

No re-registration after an adverse URS decision. To not exacerbate the “revolving door” problem and the need for costly defensive registrations, registrants should not be able to re-register a domain name after an adverse URS decision. *IHG (20 July 2010)*.

Right of first refusal. At the very least the successful complainant should be given the right of first refusal to register the domain name when it next comes up for renewal. *BBC (21 July 2010)*

Paragraph 4 Domain lock.

Asking registry operators instead of registrars to perform the domain lock is highly problematic. This paragraph bypasses one layer of the registration hierarchy (registrars) and in this respect conflicts with the way the UDRP operates. Registrars should be the point of contact for the URS panel. Registrars have existing procedures in place to perform similar functions, have a direct relationship with registrants and already have customer services that seek to assist registrants. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

The lock process could cause substantial ongoing damage to a trademark owner whose rights are being infringed or to the public by virtue of how it operates (name still resolving for a period of time with website visible). There should be some provision for an interim remedy at least in cases of significant potential harm (akin to an interim injunction in court actions). *BBC (21 July 2010)*

Extension of registration period. Section 10.2 says: “There shall be an option for a successful complainant to pay Complainant to extend the registration period for one additional year at commercial rates.” The mechanism for this is unspecified. The RySG notes that Registry Operators are generally precluded from offering registration services directly to registrants, and the RySG assumes this option will be offered without Registry Operator involvement. *RySG (21 July 2010)*.

Analysis of Comments

The method and manner in which notice should be provided to the parties has been the subject of comments. In addition to requiring the URS Provider to post the Determination on its web site, the requirement to provide electronic notice to relevant parties has been added.

Many comments submitted involve the nature of the remedy available to a URS complainant. Some have suggested that the remedy should be a transfer; others have suggested that the decision should be binding for longer periods of time. Both the IRT and the STI called for suspension, not transfer of a

domain name in the event a URS complainant prevails. As noted above, the URS is intended to be a way in which trademark holders can obtain prompt relief from the most clear cut cases of abuse. The remedy reflects the evil it is designed to prevent. If cancellation is sought, that option can be obtained through a different rights protection mechanism, such as the UDRP.

The manner in which registrants losing URS proceedings can continue to register domain names has been the subject of comments. It has been suggested that an adverse ruling should prevent the registrant from re-registering a domain name. Each case would be determined on its own basis. Accordingly, the URS procedure will not include a ban on future participation in the domain name registration process.

Some have suggested that a successful URS complainant should be given a right of first refusal for the domain name when it comes up for renewal. On balance, this remedy was rejected since the purpose is to stop blatant abuse and the remedy of suspension achieves that end. Another has suggested that an interim remedy, similar to that found in injunction proceedings, be imposed. The URS is designed to remedy a very specific harm and the remedy reflects that precise harm—clear-cut cases of abuse, and to do that quickly. Such a rapid process will obviate the need for any interim remedy. Further, the URS is not the only manner in which an aggrieved trademark holder can obtain relief, it is simply one of many different rights protection mechanisms available to it. If injunctive relief is sought, the trademark holder can proceed in the appropriate jurisdiction to obtain it.

With respect to the comment relating to the ability of a successful URS complainant to register a domain name for an additional year, we agree that this mechanism requires implementation details that will need to be resolved in consultation with the registries and the providers.

ECONOMIC ANALYSIS

Key Points

- Independent economists retained by ICANN will answer substantive comments.
- Regarding the timing of the analysis, this study is not a new effort but rather part of the ongoing question of whether to undertake the new gTLD program that was first answered in ICANN's founding documents and later in ICANN's policy development process.
- ICANN took the results of earlier studies seriously, implementing trademark protections and malicious conduct mitigation measures.

Summary of Comments

The economic analysis work is incomplete.

ICANN has not yet performed analysis of the economic effect of the program on trademark holders (e.g., cost of defensive registrations, costs/benefits) nor has it analyzed consumer demand. ICANN has not yet shown that the new gTLD program will achieve its stated goal of creating innovation and competition. MarkMonitor agrees with Economic Framework report's conclusion that new unrestricted gTLDs with traditional business models for domain name registration will not provide any significant competition to .com. Community-based gTLDs and IDN gTLDs should be expedited. It is hard to predict a successful launch of the new gTLD program without further study and analysis. The initial conclusions in the Economic Framework document contradict the original reasoning by ICANN for introducing new gTLDs

(i.e., .com is the dominant gTLD and introducing additional gTLDs may not untether its dominance). *MarkMonitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). DuPont (21 July 2010). Comerica (21 July 2010). Carlson (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

Report does not add value. The economic report, while professional in appearance, says very little and its main message regarding the issues is “it depends.” The report predicts various possible risks and benefits without quantifying any of them and lacks empirical evidence. *Minds + Machines (21 July 2010).*

ICANN released the Economic Framework report just days before the last ICANN meeting, with little time for review by the community. Before rolling out new gTLDs, ICANN must perform an economic analysis including the cost to trademark holders and users and the actual consumer demand for various types of new gTLDs. It appears that IDNs have the most demand and other gTLDs have little if any. *Verizon (20 July 2010).*

Launch of new gTLDs must be preceded by a more thorough economic analysis that takes into account actual consumer demand and costs to trademark owners. ICANN needs to decelerate its new gTLD launch plans and take time to ensure that the costs do not end up outweighing the benefits of registrants and users. *CADNA (21 July 2010). INTA Internet Committee (21 July 2010).*

The Economic Framework paper cautioned that an open entry process may not lead to the societally optimal number of new gTLDs. Yet ICANN has persisted on following an open-entry process that will certainly lead to an avalanche of new gTLDs that will bury users of the Internet in confusion, abuse and higher costs. *MPAA (21 July 2010).*

The economic analysis findings suggest that far from responding to an economic demand for new gTLDs, the approach ICANN has taken could have devastating consequences for the stability of the DNS. The economic analysis recognizes the tremendous costs imposed by the new gTLD program on brand owners, consumers and ultimately civil society. Further work needs to be done—especially in the area of identifying the risks and impacts on existing markets for gTLDs. *SIIA (21 July 2010).*

It is alarming to see the introduction of an economic analysis at such a late stage of planning. We expect ICANN to fully consider the recommendations now put forward under the Economic Framework and to undertake the relevant pre-launch studies. These results should be factored into the DAG and the overall approach to launching new gTLDs. *HSBC (21 July 2010).*

The Economic Framework study suggested that positive competitive effects from new gTLDs may not be large, while it also suggested some potentially important and beneficial innovations from new gTLDs such as the opportunity for differentiation. ICANN should seek mechanism and applicant structures to maximize competition and encourage innovation in the DNS. DAGv4’s rules on community-based gTLDs both in the evaluation and objection portions represent a good example of the way in which gTLDs can offer innovation in the DNS. ICANN should also be deliberate in its ongoing analysis, rollout and evaluation processes once new gTLDs are launched. USCIB supports the Economic Framework study’s suggestion for ICANN to gather information from any new gTLD program in order to more clearly identify the general benefits and costs of implementing new gTLDs, including those related to consumers. *USCIB (21 July 2010).*

More comprehensive data and study required.

To facilitate a proper economic analysis of the costs and benefits of new gTLDs, AT&T fully supports the Economic Framework Paper's recommendations that ICANN gather much more comprehensive data about new and existing gTLDs, and conduct several types of studies, *before* new gTLDs are introduced. This information will also help in understanding the costs created by malicious conduct and inform the decision making on security, stability and resiliency issues. *AT&T (21 July 2010). ABA (22 July 2010).*

Microsoft supports the Economic Framework study recommendations to ICANN in paragraph 117 (introduce new gTLDs in discrete, limited rounds) and paragraph 118 (require registries, registrars and registrants to provide information, including about trademark disputes, sufficient to allow the estimation of costs and benefits of new gTLDs). *Microsoft (21 July 2010).*

ICANN should not issue a final Applicant Guidebook before the case studies and further analyses called for in the Economic Framework paper are complete and before the community has a chance to comment on their incorporation in another Draft Applicant Guidebook. *News Corporation (21 July 2010). AIPLA (21 July 2010). BITS (22 July 2010).*

Introduce new gTLDs in discrete, limited rounds.

AT&T supports the Economic Framework Paper's recommendations that ICANN introduce new gTLDs in discrete, limited rounds with prioritization of IDNs. In this way, ICANN will be able to mitigate consumer confusion and make any necessary adjustments to the implementation plan based on learning from initial rounds. As the economic paper acknowledges, there is no way for ICANN to fully assess and understand all of the potential costs and implications of introducing new gTLDs. By prioritizing introduction of IDNs, ICANN will be facilitating new gTLDs that are likely to deliver new benefits to global Internet users. *AT&T (21 July 2010).*

Until we have achieved a rollout of a substantial number of domains there will be no evidence to study regarding competition in the name space. Therefore the BC recommends that ICANN continue its practice of introducing new gTLDs in discrete, limited rounds. *BC (26 July 2010).*

Certainty not realistic. There will never be certainty about future extensions of the domain name space. *dotZON (21 July 2010).*

Do not delay the new TLDs launch and proceed with the implementation plan.

Nothing in the economic study should cause further delay in introduction of new TLDs or change the implementation plan. ICANN is, in fact, recommending in DAGv4 that it introduce new TLDs in discrete, limited rounds: there will be a discrete window which will open and close; all applicants must pass a background check, meet qualifications, establish their technical ability and meet all financial criteria and will have to have about \$1 million to file a new TLD application. This round will thus be limited in duration to a discrete group of entities that can meet very limiting qualifications. Due to the nature of the evaluation, objection and approval processes, all of the names applied for in this round will, in practice, enter the root in batches or phases. ICANN could use the experience of this round and make any necessary adjustments prior to future rounds, as recommended in the economic study. *Domain Dimensions (22 July 2010).*

Analysis and Proposed Position

These comments have been forwarded to ICANN retained independent economists for response. However, some response can be made now regarding the timing of the reports and the comments that this analysis should have occurred earlier in the process. The current study is the last in a series of many investigations as to whether new markets should be opened and gTLDs should be delegated in an open way.

This is not the first opening of markets by ICANN. ICANN has opened up competition and opportunity on the marketing/distribution end of the spectrum (registrars), with spectacularly good results for consumers and entrepreneurs. It has, in contrast, been very measured in opening the market on the manufacturing side (registries), because of technical and other concerns that have been addressed.

It has always been ICANN's mission, as defined in its founding documents, to open up competition in the DNS – that has been one of the principal reasons for ICANN's existence from even before its beginning. After two initial rounds and learning lessons on benefits and costs there, ICANN undertook an intensive policy development process where all the stakeholders groups in ICANN's GNSO endorsed the opening of this market – after extensive discussions regarding costs and benefits.

After the ICANN Board approved the policy, ICANN undertook several independent economic studies regarding: price controls, vertical integration and the possible benefits of the program.

The previous studies and community discussion indicated potential social costs in the program. As a result, ICANN has tried very hard to take into account input from trademark interests, resulting in a thorough program of trademark protections and malicious conduct mitigation measures built into the Guidebook.

After all of these, there was a call for additional analysis and this study was launched. The timing of the report is not due to a late realization but rather it is an additional undertaking of an ongoing effort.

MALICIOUS CONDUCT

Key Points

- Working Groups have developed two added methods to deal with malicious conduct in relation to the new gTLD program: the High Security Top Level Domain (“HSTLD”) and the Centralized Zone File Access (“ZFA”) programs. See updated HSTLD Snapshot published under separate cover.
- Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA.

Summary of Comments

Integrated approach to trademark protection and malicious conduct. ICANN should integrate its consideration of malicious conduct and trademark protections as they are directly related. Additional proactive measures are needed to keep deceptive gTLDs out of the system in the first place, and they

should be an essential component of ICANN's comprehensive plan for avoiding end user confusion and the associated harms resulting from malicious conduct. *AT&T (21 July 2010)*.

Mandatory baseline for registries. The main problem is the voluntary nature of many of the key safeguards that ICANN has proposed to deal with malicious conduct. At a minimum, ICANN should require registry operators of new gTLDs to implement basic procedures to help prevent, or to expedite response to, malicious conduct involving registrations that they sponsor. *Time Warner (21 July 2010)*.

Proxy and privacy registrations. Measures should be taken prior to the launch of new gTLDs to deal with the increased use of proxy and privacy registrations by bad actors for unlawful purposes. If this issue is not dealt with prior to the new gTLDs launch, the scale of use for unlawful purposes could spiral out of control. *Hogan Lovells (21 July 2010)*.

Liability for invalid or inaccurate Whois data. If a registrant is untraceable due to invalid or inaccurate Whois data, liability should be passed on to the Registrar or Privacy Whois providers. This could reduce the harm to Internet uses and be leveraged to improve the accuracy of Whois data. *HSBC (21 July 2010)*.

Built-in mechanisms and compliance efforts to combat malicious conduct. The rollout of new gTLDs and accompanying structures in DAGv4 should, where possible, build-in mechanisms to limit further criminal activity, including spam, malware, WHOIS abuse and other illegal activities. Ensuring strong contract compliance and increasing funding for ICANN compliance efforts will help in this regard. *USCIB (21 July 2010)*.

Additional measures for vetting registry operators. The background check is a positive addition to the process for vetting registry operators. Additional measures would decrease the likelihood of malicious conduct, including: (i) rendering denial of an application automatic as opposed to discretionary as suggested by the wording of the notes to question 11; (ii) extending the class of persons to include persons who operate, fund or invest in the registry operator; (iii) eliminating the temporal restrictions in (d) regarding disqualification by ICANN such that any disqualification at any time is relevant; (vii) revise (e) to read "is the subject of a pattern or practice of either liability for, or findings of bad faith in connection with, trademark infringement or domain name registrations, including." (viii) add a new category (f) that covers "has materially breached an existing registry agreement or the Registrar Accreditation Agreement." *Microsoft (21 July 2010)*.

Rapid takedown or suspension systems. It is extremely disappointing that ICANN has failed to take the opportunity to require registry operators to adopt and implement rapid takedown or suspension systems to combat malicious conduct. Microsoft reiterates the proposal it made for this in its version 3 comments, including being amenable to having one or more Microsoft employees with relevant expertise to work on an ICANN-convened expert group to develop a required rapid takedown or suspension system. *Microsoft (21 July 2010)*.

Support for malicious conduct efforts in DAGv4. I support and commend ICANN for its work on malicious conduct concerns in the DAGv4 and that this issue should be considered resolved. *Domain Dimensions (22 July 2010)*.

High Security Zone TLD Program—application-based incentives.

A specific evaluation question should be included to provide application-based incentives for applicants to protect the public by adopting the more rigorous protections spelled out in the High Security Zone

TLD Program. Applicants should be awarded one or more optional points for a positive response, or alternatively points could be deducted from the evaluation score of an applicant who declines to take these additional steps to protect the public. *COA (21 July 2010)*.

Analysis of Comments

As stated in various comments, the issues of trademark protection and malicious conduct have some overlap, and while the progress on those issues has been discussed separately, the solutions generated work in tandem. Controls and processes for both are included in the current Applicant Guidebook. The issue of malicious conduct is addressed with nine separate measures designed to mitigate the potential increase in phishing, spam, malware, botnets, and other abusive activities. It is thought that all these measures will work for the protection of rights holders and all registrants.

Mitigation of malicious conduct issues, as they relate to the new gTLD space, was worked through the active participation of multiple expert sources, including the Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs), Intellectual Property Constituency (IPC), and members of the banking/financial, and Internet security communities.

As a result of this work, nine measures were recommended and included in the Applicant Guidebook for the benefit of registrants and users to increase trust in new gTLD zones:

- Vetted registry operators (background checks)
- Demonstrated plan for DNSSEC deployment
- Prohibition of DNS redirection of “wildcarding”
- Removal of orphan glue records to eliminate a tool of spammers and others
- Requirement to maintain thick WHOIS records
- Centralized method of zone-file access
- Documented registry abuse contacts and procedures
- Participation in an expedited registry security request process

Comments requested that ICANN place an emphasis on the accuracy of Whois information and suggested methods of enhancing Whois accuracy. In response to earlier public comment, the proposed registry agreement now contains a requirement for the maintenance of a thick Whois database. ICANN is actively reviewing the new gTLD program and its compliance regimes overall to consider where enhancements can be made to promote Whois accuracy or ease access to Whois information.

Liability for invalid or inaccurate Whois information may receive future consideration for inclusion within amendments to the RAA and is an issue for ICANN’s policymakers. Requirements for removal of malicious domains may address this issue in a more efficient fashion.

Several comments on malicious conduct described: the need for more stringent focus on the overall issue, support and questions for the High Security Zone TLD (“HSTLD”) program, contract enforcement, and suggestions for control activities. See the recently-posted explanatory memorandum on Malicious Conduct and HSTLD Snapshot Summary and Analysis for an additional report on all aspects of the Malicious Conduct Mitigation effort and results. Several changes were made to the Guidebook in relation to and in anticipation of the HSTLD program or one like it. High security designations are

encouraged for TLDs that raise an expectation of security, such as providers of financial services. As the launch of new gTLDs becomes imminent, ICANN is augmenting staffing in compliance, registry liaison, IANA, and other functions to provide a full suite of enforcement and other services to new gTLD registries and for the benefit of DNS users.

Implementation of some built-in mechanisms is underway, such as monitoring the availability of Whois services.

The processes for vetting of registry applicants have been further reviewed. Specific, significant changes have been made in background screening to make that tool more effective in preventing future potential abuse and to provide applicants and others with certain requirements.

Comments requested the development of a rapid domain name suspension process to address abusive domain names that host or support malicious conduct. Currently, the guidebook requires all applicants to establish and maintain a dedicated abuse point of contact responsible for addressing matters requiring expedited attention, and for providing a timely response. Although the specific policies and procedures might vary according to the needs of particular TLDs, all applicants are expected to have a well-developed plan for abuse prevention and mitigation in the TLD to pass the evaluation. Community work on standardizing or coordinating takedown or other mechanisms could take place in the policy space, or informally among TLD operators. In addition, significant work has been done by the IRT and STI (see Trademark sections) to develop a Uniform Rapid Suspension system for the takedown of names that are blatantly abusing trademark rights, where this type of behavior can be addressed.

Background check

Key Points

- The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs.
- The term “terrorism” has been removed from the background check criteria.
- The focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior.

Summary of Comments

Background checks.

It is welcomed that the DAGv4 has added a background check for applicants, where a number of circumstances could disqualify a person or entity from running a new gTLD. *COA (21 July 2010). Hogan Lovells (21 July 2010). R. Tindal (21 July 2010). ABA (22 July 2010). BITS (22 July 2010).*

Instead of a case by case approach, we would prefer a more systematic approach to the background checks given the importance of mitigating the risk of participation in the new gTLD process by criminal actors. *BITS (22 July 2010).*

Section 2.1 details a reasonable background check process regarding individuals and entities applying for any new gTLD. The approach of a “case by case basis depending on the individual’s position of influence on the applying entity and registry operations” should alleviate fears that ICANN will look for any

connection to nefarious conduct, no matter how remote, to bring down a gTLD applicant. The background check language is also appropriate provided that ICANN will not be looking to exclude an applicant for anything but serial intellectual property violations that have been adjudicated in a court of law. We believe that ICANN will be reasonable in this aspect of the applicant review process. *Demand Media (22 July 2010)*.

CADNA welcomes the background check requirement but seeks more information about how high a priority background checks on past intellectual property violations will be. *CADNA (21 July 2010)*.

No basis was provided for the introduction of this additional step in the application process. The least intrusive check is one on the applicant itself in relation to its financial, technical and operational capabilities. If it is necessary to check the applicant's management, this should be limited to active officers, directors and possibly majority shareholders of the applicant. The word "partners" in this context is confusing as the legal meaning is different from the broader, more general meaning in ordinary use. In addition, some of the grounds upon which a background check is to be based appear overly vague or disproportionate to the objectives. While the scale of serious matters such as terrorism and war crimes cannot be denied, how would these affect the deployment of new gTLDs and the operation of the DNS? *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

There is no provision for informing the applicant that it has triggered alarm bells in the course of its background check or even that it has failed because of a negative background check. There is no provision for appeal or review of a decision to disallow the application because of a failed background check. *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

ICANN should remove the background check requirement unless community feedback indicates strong, substantiated and principled support for it. If the community supports a background check, it should be strictly limited to, at most, cases of proven financial irregularity or fraud, and possibly clear-cut proven cases of cybersquatting. *M. Wong (21 July 2010)*. *R. Dammak (July 2010)*.

The background check is inappropriate, prejudicial, and should be deleted. This was not something the GNSO recommended but is something that ICANN staff created. Preventing "terrorism" is widely outside of ICANN's scope and mission and there is no internationally agreed definition of terrorism. This policy will prejudice non-westerners. In addition, including "intellectual property violations" in the same category of harm as "terrorism" seems to be a gift to the intellectual property community that is not grounded in reality, proportionality or community support. *R. Gross (21 July 2010)*. *R. Dammak (22 July 2010)*.

Third party firm conducting background checks.

We are concerned about the standard and approach for selecting the third party firm that will conduct background checks according to the DAGv4. ICANN must select a neutral, authoritative organization as a third party through wide community consultations. An organization under the frame of the UN should be selected to undertake this job. *ISC (21 July 2010)*.

CADNA requests more information about the process of selection of the third party to perform the background check. *CADNA (21 July 2010)*.

Inclusion of the word "terrorism" without standards or definition.

Regarding the DAGv4's Section 1.2.1 "Eligibility" and 2.1 "Background Check" the insertion of the word "terrorism" so arbitrarily as part of the background check on applicants, and without providing any definition or criteria that would be measured against approving or denying an applicant for a new gTLD or IDN gTLD, causes deep personal concern. Background checks in this area of terrorism, as it is presented in the DAGv4 without any definition, are unacceptable to many people, language communities, and faith communities around the world. It is a surprise to see ICANN involving itself in the area of terrorism while its mandate is only being a technical coordinator. Clear and internationally recognized definitions and measures should be included in this section or it should be removed. *A. Al-Zoman (19 July 2010). A. Al-Zoman (21 July 2010).*

ICANN has arbitrarily added Terrorism verification checks to be conducted on all applicants for new gTLDs (including IDN gTLDs) in the DAGv4 with no definitions or standards whatsoever upon which these checks will be done, a clear indication that little thought was given to this matter, if any, or to its grave international implications. This requirement is offensive to many in the international community and some will boycott the ICANN process. If implemented it would clearly indicate that ICANN has gone well beyond its mandate. It suggests that ICANN is still operating in the shadow of the U.S. government, casting damage on the Affirmation of Commitment.

ICANN should urgently address this issue by either:

Option 1—retract "terrorism" as an area of verification checks in the guidebook; or

Option 2—if "terrorism" remains as an area of checks, ICANN must

(A) indicate how it intends to carry out such an evaluation and provide clear definitions of what type of terrorism (e.g., cyber, Islamic, state, etc.);

(B) adoption definitions congruent with international, local community and local jurisdiction accepted laws and standards on terrorism upon which fair and unbiased measurements of applicants can be conducted;

(C) if ICANN staff or "experts" cannot come up with appropriate definitions or protocols that meet the above criteria, ICANN would be better served to post a 30 or 45 day period Request for Comment for community feedback for definitions and advice on protocols, as it does for other issues.

(D) ICANN should provide an explanation as to how and why "terrorism" was added to the DAGv4 in the first place—i.e. on whose request? ICANN should indicate in which policymaking forum this request was made, when and by whom, for "bottom-up", transparency purposes.

If this offense of arbitrarily adding "terrorism" was unintentional, an apology by ICANN with a commitment to correcting it would go a long way to show how magnanimous ICANN can be when realizing it made a mistake. *Multilingual Internet Group (19 July 2010).*

Background check—clear terms needed. The background check section contains ambiguous terms prone to subjective interpretation. This could provide third parties seeking to interfere with, delay or block specific applications with attack vectors. Clear and internationally recognized definitions and measures should be included in this section. *Arab Team (21 July 2010).*

Analysis of Comments

The term “terrorism” has been removed from the Applicant Guidebook. The term was not meant to single out or identify a group of potential applicants; rather, it was meant to provide some guidance on what could be checked and to indicate that ICANN must comply with certain laws.

Several comments welcome the addition of a background screening process, while others question the basis and necessity of such a review given the extensive analysis to be performed by the Evaluation Panels. Other comments are concerned with the definition of terms and the potential that the process could be prejudicial depending on how those terms are interpreted by who is providing the background screening service. These comments have merit and have been carefully considered in redrafting this section of the Applicant Guidebook.

The basis of the background screening was borne from public concern about potential for malicious conduct with the introduction of new gTLDs. There have been specific comments that allowing “bad actors” to own and/or manage TLDs would perpetuate malicious conduct on the Internet. As is explained in the next version of the Applicant Guidebook, the background screening process is part of an overall approach to mitigate such behavior. All Applicants have been and continue to be required to disclose any potential concerns about their background. However, the focus of background screening is now limited to general business diligence, criminal history, and improper domain-name-specific behavior. Specific criteria are provided in the guidebook.

The third-party organization conducting the background screening will check publicly available data to determine if the Applicant has made all disclosures. Gaps between Applicant disclosures versus the third party check may require clarification from the applicant.

ROOT SCALING

Key Points

- ICANN published two studies to inform the root scaling discussion.
 - The *Delegation Rate Scenarios for New gTLDs* <http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf>
 - The *Summary of the Impact of Root Zone Scaling* <http://www.icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf>
- The Delegation Rate study describes a process-imposed limit that the delegation rate of new TLDs will not exceed 1000 new gTLDs per year, regardless of the number of applications.
- The planned delegation rate and other factors contribute to a conclusion that the new gTLD program will not pose root zone stability issues.

Summary of Comments

Limit initial pool to community-based gTLDs and IDN gTLDs. MarkMonitor agrees with the root scaling study that a slow limited release of new gTLDs might be prudent until DNSSEC implementation is completed since there is no indication as to how many gTLDs will be introduced and ICANN has yet to

formally limit the size of the initial pool. The convergence of DNSSEC, IDNs, IPv6 and the new gTLDs could potentially destabilize the root. Given that potential negative effect to security and stability, ICANN should limit the pool of gTLDs (to allow ICANN to evaluate the potential pressure on the root) and significantly limit the initial round to community-based gTLDs (designed for and supported by clearly delineated, organized and pre-existing communities) and IDN gTLDs only. *Mark Monitor (19 July 2010). Red Bull (21 July 2010). BBC (21 July 2010). HSBC (21 July 2010). DuPont (21 July 2010). Carlson (21 July 2010). Comerica (21 July 2010). Sunkist (21 July 2010). Solvay (22 July 2010). LifeScan (22 July 2010). ETS (22 July 2010). ETS (22 July 2010). Liberty Mutual (22 July 2010).*

The root scaling study concluded that more work was needed to fully understand the implications of the introduction of new gTLDs and develop effective responses to these concerns. The Root Scaling Team recommended a staged approach to new gTLD introduction as a way to help manage the risks to the root zone servers. *AT&T (21 July 2010).*

USCIB is eager for ICANN to finish and release the expected root scaling study that will provide insight into important security and stability considerations with respect to introducing a range of both ASCII and non-ASCII domain names and the impact on a single authoritative root. A focus on differentiation could help limit some of the potential negative consequences for a rapid introduction of new gTLDs into the root. *USCIB (21 July 2010).*

We suggest deferring the implementation of new gTLDs until the final root scaling study report is available and any issues it identifies are adequately addressed. *BITS (22 July 2010).*

Analysis of Comments

Comments raised a concern regarding the impact of the new gTLD program on the stability of DNS. Specifically, comments focused on the introduction of “unlimited” new gTLDs to the DNS. It is important to note that the current “unlimited” status for new gTLD applications does not necessarily tie with an immediate and unlimited delegation of those new gTLD applications that are approved and contracted. ICANN has devised an appropriate plan for delegation rates of new gTLDs into the root zone as a component of the overall gTLD program. The plan was created with both the expected and maximum number of applications in mind.

In releasing the two reports related to Root Zone Scaling, ICANN states the proposition that the many of the issues raised have been addressed by:

- metered delegation rates;
- the fact that DNSSEC, IDNs and IPv6 are already deployed; and
- analysis of L-root behavior.

The analysis of the “Delegation Rate Scenarios for New gTLDs” seeks to address the concern that with many new TLDs being delegated, the stability of the root server and distribution system could be in question. It is calculated that the expected rate of new TLDs entering the root in the first round would be in the order of 200 to 300 annually - and not exceeding 1,000 delegations/year even if there were thousands of applications. As a result, no meaningful technical stability issues were identified and advice from the root zone operators indicated that delegation rates of up to 1000 could be accommodated. Based on this analysis, and taking into consideration the results of the studies into the effects of scaling the root summarized in “Summary of the Impact of Root Zone Scaling,” we have no evidence (reason to believe) that the root system will not remain stable. The report also recommends that monitoring of

root management systems as well as communications between the various stakeholders involved in root management should be improved to ensure that changes relating to scaling of the root management systems don't go unnoticed prior to those changes becoming an issue. This is not technically difficult given the relatively low delegation rates, and is currently under consideration.

SECURITY AND STABILITY

Key Points

- Contractual compliance will be staffed to effectively deal with audit and enforcement issues arising from the introduction of new gTLDs.
- Introduction of new gTLDs will be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS.
- Divergent views have been received on whether the High Security Zone Verification Program should be mandatory or voluntary. The program will continue to be pursued by ICANN; standards and program administration will be adopted by an independent agency.

Summary of Comments

Compliance issues. ICANN already has substantial existing critical compliance challenges and per a recent report (KnújOn) ICANN is not devoting enough resources to them. Compliance issues are a serious red flag and specter over any planned expansion of the DNS. Serious questions remain about whether ICANN can effectively deal with security, stability or malicious conduct when it increase the number of registries, registrars and gTLDs operating on a global scale. The DAGv4 provides no assurance that the rollout of new gTLDs will not spawn further criminal and illegal activity or how ICANN will prevent and address these issues. *Verizon (20 July 2010).*

Trust and reliability of the Internet. The success of the Internet is based on its openness and constant adoption to users' needs. Consumers can rely on its availability and have trust in registrars and registries and the constant developments to accommodate users' needs. This achievement should not be put at risk. *dotZON (21 July 2010).*

High Security Zones Verification Program.

This program appears unlikely to materialize and, if it does, to be effective. The HSZ TLD program must be mandatory for all new gTLDs or, at a minimum, ICANN should subtract points from any applicant that does not state its intention to seek HSZ TLD certification. *Microsoft (21 July 2010).*

High security verification should be mandatory for financial services domains. *ABA (22 July 2010). BITS (22 July 2010).*

The HSZ program should remain voluntary so that consumers can make their own assessment of its worth. If there is real consumer value then market forces will drive its broader adoption. *R. Tindal (21 July 2010).*

Analysis of Comments

Compliance issues

With regard to compliance issues, ICANN will continue to aggressively enforce ICANN's registrar and registry contracts in the interest of protecting registrants and encouraging public confidence in the DNS. Additional resources are planned and will be secured to effectively serve the new gTLD registries.

Trust and reliability of the Internet

ICANN acknowledges these comments, and recognizes that the introduction of new gTLDs should be conducted in a manner consistent with ICANN's commitments to preserve the security, stability and resiliency of the DNS. The application process and evaluation of new gTLD proposals is intended to follow a process to ensure that trust and reliability of the Internet's unique identifier system is not put at risk.

High Security Zones Verification Program

ICANN received divergent views on whether the High Security Zone Verification program should be mandatory or voluntary.

In general, and in other sections of the Applicant Guidebook, comments suggested that the HSTLD program should be voluntary and that if there is perceived value in it, the marketplace will evolve to accommodate the demand. The HSTLD program is currently being explored and its viability is under review and consideration. On 22 September 2010, ICANN in coordination with its HSTLD AG issued a Request for Information (RFI) on the HSTLD Program. The purpose of the RFI is to assist the ICANN community in understanding potential frameworks and approaches for evaluating TLD registries against the HSTLD criteria, determine where improvements to draft criteria and the overall program may be necessary to ensure its success, and to assess the viability of the proposed HSTLD Program.

Next Steps:

ICANN and the HSTLD AG agreed there is value in conducting a RFI on the program, and as noted above it was published on 22 September 2010. After the RFI period closes on 23 November 2010 and ICANN and the HSTLD AG have had adequate time to respond to questions and to summarize and analyze the responses, a determination about next steps will be made.

ICANN remains committed to mitigating malicious conduct in new gTLDs and supports the development of the HSTLD concept as a voluntary, independently operated program. Some in the community have taken ICANN Board Resolution 2.8 Mitigating Malicious Conduct¹ as a lack of support for the concept. While the Board said it will not be signing on to be the operator of such a product, it does support its concept just as it has other measures (e.g., URS, prohibition of wildcarding, centralized zone file access, etc.) to mitigate malicious conduct in new gTLDs.

VARIANT MANAGEMENT

¹ Board Resolution is viewable at <http://icann.org/en/minutes/resolutions-25sep10-en.htm#2.8>.

Key Points

- It is understood that script cases and practices vary around the world, and that delegation of variant TLDs is critical to good user experience for a number of Internet users.
- ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME, creation of policy, and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

Summary of Comments

Chinese characters. Variants must be treated fairly in the new gTLD process. The current policy where variants have to be blocked or reserved until there is a proper solution may advantage some variants over others and cause user confusion. In Chinese script strings of simplified and traditional form share the same meaning and are used equally among Chinese Internet users. Block or reservation of either form will deprive certain groups of Chinese users of the right to access the Internet in Chinese scripts. CNNIC appeals to ICANN to consider a proper solution to Chinese characters before launching new gTLDs. It may be that if applicants abide by similar requirements on “.China” that ICANN will approve the applications of the two string requests in a bundle. *CNNIC (21 July 2010).*

Delegation of Variants. Variant TLDs should be supported and delegated to the same TLD holder. Blocking or reserving them will deprive certain user groups of the right to access the Internet in their language using the available input device (e.g., keyboard). *A. Al-Zoman (21 July 2010).*

Analysis of Comments

ICANN agrees that treatment of variant strings should occur according to a fair procedure. The current approach is designed to be uniform and avoid advantaging or disadvantaging any user group as compared to another. It is understood that script cases and practices vary around the world, and that variants are critical to good user experience for a number of Internet users.

It is expected in the long term that variant TLDs will be supported and delegated to the same TLD operator. The task is to define a clear and globally supported understanding of the definition of variant TLDs, and what policies and user expectations can attach to these.

It is noted that IDN ccTLDs involving the simplified and traditional Chinese scripts have been delegated, and it is expected that the experience gained through the IDN ccTLD Fast Track will inform these community discussions going forward and help enable a workable approach for the gTLD namespace.

In authorizing the delegation of these IDN ccTLDs, the Board resolution noted that the methodology to be taken by the IDN ccTLD manager to handle these particular instances of parallel IDN ccTLDs is, in the short-term, the only option available, but there are serious limits to where such an approach is viable in practice, so that it cannot be viewed as a general solution. Consequently, long-term development work should be pursued. The Board directed that “significant analysis and possibly development work should continue on both policy-based and technical elements of a solution for the introduction on a more general basis of strings containing variants as TLDs.” (See <http://www.icann.org/en/minutes/resolutions-22apr10-en.htm>).

ICANN continues to support study and development activities toward a variant management solution for the top level, including testing of DNAME and other mechanisms, so that users around the world will be able to take advantage of increased opportunities in a secure and reliable DNS.

STRING SIMILARITY

Key Points

- Whether exceptions should be made to rule excluding delegation of “confusingly similar” TLD strings is a complex issue requiring additional policy discussion.
- The policy work should examine whether there should be exceptions for “non-detrimental” similarity (e.g., cases of common ownership or in view of context).
- The diversity in the make-up of evaluation Panels will match the anticipated diversity of the new gTLD applications.

Summary of Comments

Section 2.2.1.1. No changes were made to this section. Strings that may be judged similar but in a non-detrimental way should not be eliminated in the initial evaluation. In case that does happen, the opportunity for correcting the possible error could be provided. The focus should be on a good user experience; it is very possible that two strings could be similar but not create confusion and instead provide for a better user experience. *RySG (10 Aug. 2010). VeriSign (22 July 2010).*

Foreign language equivalents (1.1.2.8, 2.2.1). String contention should include foreign language equivalents of applied for names (e.g. “bank” and “banco” should be considered equivalent). *BITS (22 July 2010).*

Review methodology (2.2.1.1.2). I agree that a higher visual similarity score could be indicative of greater difficulty in passing the string similarity review. I support the DAG’s conclusion that “final determination of similarity is entirely up to the Panel’s judgment.” *R. Tindal (21 July 2010).*

String similarity—panelists. Panelists reviewing for string similarity should include both trademark practitioners and personnel experienced in the workings of not-for-profit organizations. *Red Cross (21 July 2010).*

String similarity review should include aural (sound) and commercial impression (meaning) as well as visual similarity. *Red Cross (21 July 2010).*

An extended review should also be available following the String Similarity Review process, at the Applicant’s request. *Red Cross (21 July 2010). V. Petev (Module 2, 21 July 2010).*

“Average, reasonable Internet user”. This term in Section 2.1.1.1.2 should be more clearly defined. *Red Cross (21 July 2010).*

Evaluation criteria for confusingly similar strings--IDNs. A major point ICANN is missing in their current evaluation criteria for confusingly similar strings is that they do not review the TLDs, especially IDNs, in the context they will be used in (e.g., Cyrillic). When reviewing an IDN in context, the evaluation of the string (and its alphabetical differentiation) becomes much easier. *V. Petev (Module 2, 21 July 2010)*,

Analysis of Comments

The proposal to allow for exceptions for "non-detrimental" similarity is certainly worth consideration. Comments have requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that has been found to be confusingly similar constitutes a case of "non-detrimental confusion", for example if the applicant/operator is the same for both strings or if there is an agreement between the involved applicants/operators that provides for improved user experience.

One result of the GNSO idea may be the delegation of variant TLDs – given that variant TLDs are very similar.

Similar strings should not be delegated absent an in depth policy examination of the issues. The suggested modifications raise a complex set of policy issues (similar to those discussed regarding variants). The proposal should not be considered as plain implementation matters.

This is a conservative approach. If appropriate, the outcome of the work listed above can be considered for implementation when completed. Policy work in this area should be encouraged.

The GNSO policy states that strings resulting in user confusion should not be delegated: avoidance of user confusion is a fundamental objective to protect end-user interests and promote a good user experience.

The criteria and requirements for operation of similar TLDs in a “non-detrimental” manner is not obvious or straightforward. The exact criteria and requirements for such a situation to be unequivocally fulfilled have to be defined and need to be agreed by the wider community.

The String Similarity review and the String Confusion objection provisions already protect delegated TLDs against applications featuring confusingly similar strings. To confer a right to delegated TLDs to use such strings themselves is a change in principle and of importance. Such rights can be used to introduce chains of successively similar TLD strings, potentially reaching far away from any direct similarity with the original TLD string. The appropriateness of such consequences, and any limitation to impose, need to be discussed and agreed by the wider community.

The actual operation of "non-detrimentally" confusingly similar strings raises issues regarding user experience and user expectations already identified in discussions about "equivalent" and "variant" strings. Operational requirements to safeguard such aspects need to be developed, introduced and enforced. For example, should they resolve to the same address or not?

If exceptions for "non-detrimentally" confusingly similar strings are granted, there must also be safeguards to guarantee that the necessary conditions remain permanently fulfilled, calling for particular

contractual conditions as well as for compliance measures. These need to be developed and agreed by the wider community. The requirements in this regard would be even more pronounced for any exception granted for strings to be operated by different operators under any particular agreement aimed at improved user experience.

The changes proposed by the GNSO deserve proper consideration and may ultimately prove to be beneficial. However, this is not a foregone conclusion and requires positive outcomes of all the investigations mentioned above. While the necessary investigations are taking place, such strings will not be delegated. In the meantime, the available protection against applications with confusingly similar strings will safeguard both user and operator interests, so there are no obvious justifications for haste in modifying the existing approach.

The requirement for diversity in panel expertise is well taken, especially in view of the ultimate decision power of the panel, and is already a foreseen criterion for the selection of service provider to populate the panel.

As to the requirement for a more precise definition of "average, reasonable Internet user", it deserves to be mentioned that diversity in the panel would include linguistic diversity to ensure familiarity with the scripts involved. This in order to avoid undue findings of confusing similarity, as for example two strings in Chinese may look visually confusingly similar to a Westerner but not be visually confusable at all for a Chinese. The "reasonable person" standard is commonly used and it is thought that adding detail might serve to denigrate the intent.

The requirements to increase the scope of string similarity assessment beyond visual similarity have already been addressed in earlier comment rounds and no new aspects have been put forward to consider. The Guidebook assessment in Initial Evaluation is limited to visual similarity only as a pre-screen for the objection process that covers all types of potential confusion (as detailed in earlier comment analyses and public statements).

STRING CONTENTION

Key Points

- Multiple comments refer to the scoring threshold for community priority evaluation, some arguing in favor of keeping it at 14 out of 16, some favor lowering it to 13.
- Multiple comments propose various changes in the scoring, notably: using a finer scale, extending scoring for community delineation, modifying scoring for nexus and uniqueness, adding points for policy-making/governance structure and adding points for early establishment.
- Some comments address the situation with two or more winning community applications in final contention, proposing alternatives to auction: a) highest scorer wins, b) await voluntary resolution, c) supplementary scoring system.
- One comment proposes a process change in view of a potential outcome of the discussions regarding Vertical Integration.
- One comment claims that legal rights should play a role in contention resolution
- One comment proposes separate treatment for not-for-profit organizations

Summary of Comments

Existing legal rights. Existing legal rights should also be considered when resolving string contention. Where there are legitimate competing rights, a more sophisticated mechanism (than, e.g., an auction) should be adopted for allocating the relevant gTLD which reflects the nature, breadth and longevity of those rights. *BBC (21 July 2010)*

Community priority evaluation—revisit standards.

ICANN staff should revisit the community priority evaluation standard. Previous public comments overwhelmingly sided with the 13-point threshold. ICANN staff has not satisfactorily explained the basis for its insistence on a 14-point threshold, which will be almost impossible for most community applications to achieve. *COA (21 July 2010).*

In addition, to reduce the likelihood that the community priority evaluation process will be nothing more than anteroom to an auction hall, the criteria for a top score on the following evaluation criteria, as set out in DAGv4 Section 4.2.3, should be modified to read as follows (adding the underlined text)”

- Nexus: The string matches the name of the community, is a well known short-form abbreviation of the community name, or is otherwise strongly associated with the community.
- Uniqueness: String has no other significant meaning beyond identifying the community described in the application. (This criterion to be applied in the language associated with the described community, if applicable.) A meaning unrelated to any community would not be considered significant.

COA (21 July 2010).

Community priority evaluation--clarity of revisions. Notable clarity has been provided in DAGv4. *Big Room (21 July 2010). R. Tindal (21 July 2010).*

Community priority evaluation--support for 14 point threshold. I strongly support maintaining that an applicant must score at least 14 points to prevail in a community priority evaluation. Lowering the score can harm registrants. If the scoring threshold is lowered it will be easier for applicants to obtain community status on strings that should be available at the second level to a wide variety of registrants. The scoring only happens when there are two or more applicants for the string; in this situation a high scoring threshold is the best way to protect real communities because it will be more likely that the string is awarded to the applicant who most closely represents the community in question. A low score will allow successful objections to legitimate communities—it will be easier for groups who may not be closely associated with the community to object successfully and block the applicant—i.e. the standards for successful objection are based on the standards required to achieve the 14 point score. *R. Tindal (21 July 2010). Domain Dimensions (22 July 2010). D. Schindler (22 July 2010).*

The community priority evaluation scoring should be set at 13 of 16 points to allow one point for evaluator (subjective/human error). This would be a more fair and equitable approach. The narrow approach currently proposed will undoubtedly lead to a significant number of unfair and unnecessary auctions. *BC (26 July 2010). R. Andruff (Module 4, 21 July 2010).*

Community evaluation priority—clarifications requested. ICANN should more clearly delineate the notion of “clearly delineated community” and the scoring process. An applicant should not be penalized in the process for accidental similarity. If ICANN wants to keep the current scoring system, then eligibility rules should have an extended range allowing for more granularity and/or all registration policies should be examined together. There should be a wider range under community delineation bringing the total to 17 or 18. Under this system that somehow imposes double penalties (delineation and eligibility for non-membership communities, e.g.) and provides for accidental “fails” outside the control of the applicant (lack of “uniqueness” due to some coincidence or similarity in any other language), having the ability to miss a third point is critical even for most reasonable, responsible proposals. *A. Abril i Abril (Module 4, 21 July 2010).*

Community priority evaluation—change the scoring scale to tenths of a point. The evaluation procedure for community priority ratings should not use a gross integer measure that will miss nuances in these difficult and crucial criteria. The scale should be changed to allow for discrimination in terms of tenths of a point instead of whole points. Making this change will make the procedure more sensitive while still providing a bright line between those applications that merit community priority and those that do not. *A. Doria (Module 4, 22 July 2010).*

Community evaluation—Scoring based on accountability and transparency. If a scoring system is used, the largest number of points awarded should be based on the credibility of the TLD governance model with respect to accountability and transparency for community stakeholders. In addition, ICANN cannot handle all the policymaking. Community-based TLDs are precisely the kind where policymaking, policy oversight and policy enforcement must be delegated to the TLD’s own governance model. ICANN must evaluate the viability of delegating authority as the key criterion for recognizing a community-based TLD. *W. Staub (Module 4, 21 July 2010).*

Community evaluation—comparison of contending applications and limits of absolute scoring. If the use of a scoring system cannot be avoided, it is best to add a supplemental scoring mechanism to deal with contending community-based applications which should eliminate contenders that do not deserve to be treated at par (such as cases of blatant gaming). Criteria for comparing the contending community-based applicants between each other would include: relative relevance of: the supporting community institutions and the community (in cases of contention between communities; the relative ability for Internet users outside the community to understand the purpose of the TLD; the degree to which the TLD’s governance model ensures accountability and transparency to the underlying community. *W. Staub (Module 4, 21 July 2010).*

Community-based contending applications—avoiding auctions. Where both contending applications are found to be community-based, instead of an auction making the determination, non-delegation for as long as contention formally persists is a better solution. Applications subject to unresolved contention should remain open until the subsequent gTLD round unless agreement is reached. At that point, each applicant should be allowed to lodge an updated application at no charge. These updated applications would not be evaluated unless a modest re-evaluation fee is paid (e.g. \$5,000 per application). One party can be allowed to pay the re-evaluation fees for the other party as well. The result of re-evaluation may still be no delegation for the time being. *W. Staub (Module 4, 21 July 2010).*

Community evaluation and potential vertical integration exception. If a higher standard or threshold results from a Community-based exception to a general policy on Registry-Registrar Separation for delegated Registry Operators, the application of this standard should be limited to the exception

application, not the string contention outcome resolution. If the vertical integration working group process results in a second use of a Community priority evaluation, then community-based applicants that did not elect it at the time of application should be allowed to elect it at the time of application for exception so that it is not mandatory in fact at application time. *E. Brunner-Williams (Module 4, 21 July 2010)*.

GeoTLDs and Community Priority Evaluation Criteria (4.2.3). One extra point should be given in the Community Priority Evaluation if the organization of a GeoTLD applicant is based on a sound multi-stakeholder community of the GeoName concerned. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*. *dotHamburg (21 July 2010)*.

Multistakeholder governance structure. One extra point should be awarded in the Community Priority Evaluation if the applicant/organization adopts a sound neutral multistakeholder governance structure to ensure fairness and representation of both commercial and non-commercial constituents. Multistakeholder governance is in the best interest of all stakeholders by providing a public service to both the community

Applicants established prior to 26 June 2008 or prior to March 2009. Given the long delays in launching the new gTLD program, and that recently emerged new gTLD applicants may take advantage of it by copying existing concepts and projects, one extra point in the Community Priority Evaluation should be given if organization of an applicant was already established before the approval of the new gTLDs program by the ICANN Board on 26 June 2008 or before the first communicated application window in March 2009. *dotBERLIN (13 July 2010)*. *dotBayern (20 July 2010)*.

Applicants established prior to March 2009. Two maximum points should be allocated in the Community Priority Evaluation section if the applicant/organization was established before the first communicated application window of March 2009 and has conducted a significant communication outreach public campaign that is considered beyond reasonable for the best interests of both the public and awareness of the ICANN gTLD program. Public proof must be provided in these cases to substantiate these claims. This would be a sound method of minimizing gaming and be fair regarding the public interest, transparency, accountability and business ethics. *.MUSIC (20 July 2010)*. *.MUSIC (21 July 2010)*.

Unfair participation in auction for highest scoring application. The highest scoring application in a contention set on the basis of the scoring system set out in the Attachment to Module 2 (or at least an application that scores significantly more than the other application it finds itself in contention with) should prevail. Currently it would seem that in the case of an application scoring very high that is in a contention set with another application scoring just above average that both applicants would ultimately have to participate in an auction. *Hogan Lovells (21 July 2010)*.

Auctions—disadvantage for not-for-profit organizations. The auction procedure will likely put not-for-profit organizations with limited budgets at a distinct disadvantage in acquiring new gTLDs that are desired by two or more parties. One solution is for ICANN to offer a third application category for not-for-profit organizations in addition to standard and community priority applications with consideration given to the not-for-profit's mission when the string is in contention. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Self-resolution (4.1.3). I support the new language that gives greater flexibility to applicants who may be in string contention. *R. Tindal (21 July 2010)*.

Analysis of Comments

Regarding the comments expressing preference for 13 and 14, respectively (three each), as winning threshold on a 16 point scale, it is obvious that interests and opinions diverge. No new arguments for either solution have been raised in this comment round. Some previous concerns, regarding for example the risk of failing due to unfounded obstructionist objections, have been addressed in the explanatory comments in version 4. This discussion has resulted in considerable and intensive discussions with the community. The Guidebook will keep the scoring threshold at 14 out of 16 points.

The comments suggesting modifications in the scoring are addressed below

- To use a finer scale, with decimals instead of integer numbers as proposed in one comment, may appear to facilitate the assessment but goes against the grain of experience, where more granular criteria with fewer scoring steps for each criterion have proven to be more reliable in the sense of being reproducible when used by different panelists. Experienced assessment consultants have advised that we adjust the scoring granularity in the opposite direction, to use a pure binary scale for scoring each criterion. Based on experiences, this is something that may be considered for future rounds. The proposed position for the first round is to keep the scoring unchanged in this respect

- To modify the scoring for nexus (highest score also for "string is otherwise strongly associated with the community") and uniqueness ("meaning unrelated to any community would not be considered significant") as proposed by one comment would be equivalent to a considerable lowering of the winning threshold. These arguments are counterbalanced by other comments that these modifications increase the likelihood that community applications will capture generic words. While these issues are fairly close and either side can be argued, the current Guidebook scoring mechanism seems to strike the right balance between the goals to favor communities during string contention while assuring those communities are well established, identified and supportive of the application.

- To add points for a multi-stakeholder governance structure in general, or regarding policy development in particular, certainly has some merit but would add considerable complexity to the assessment and require additional compliance measures post-delegation. The proposed position for the first round is not to modify the scoring in this way. One consideration to keep in mind is the sTLD approach, which featured such considerations, and was not retained in the New gTLD policy development outcome.

- To add points for "early" (although post-New-gTLD-PDP-conclusion) establishment of applicants seems inappropriate from two perspectives. First, the crucial criterion regarding "pre-existence" is already included. Second, the "pre-existence" criterion relates to the community, not to the applicant per se. The community is the central concept of interest here, while the entity/ies representing the community may change over time for various reasons, without dates for such changes reasonably justifying any differences in scoring. The proposed position is not to modify the scoring in this regard.

The comments regarding alternatives to a forced auction in a case where multiple community applications in a contention set score above the threshold are well taken. In particular, the proposal to allow an extended time for voluntary resolution, as is currently contemplated in the Guidebook, could well serve the winning applicants in such situations, although other applications in the contention set would be on hold awaiting the outcome. The latter would be a drawback in the case where the strings of

the winning applications are not identical (but confusingly similar) and another application is only in direct contention with a winning string that's not the one of the finally and voluntarily selected application. That other application would become eligible for delegation, but have to wait before being able to proceed. The benefit of a voluntary outcome seems to outweigh that risk.

The other alternative proposals put forward, to select the highest scoring application among the winners or to add supplementary criteria in such cases, seem inappropriate since all community applications scoring above the threshold have reached a pre-determined level as validated for preferential treatment and should be considered equal in that respect for any subsequent process step. The proposed position is not to take score differences among the winners into account nor to introduce supplementary criteria.

The comment regarding potential consequences of the outcome of the Vertical Integration discussions is appreciated and will be taken into consideration in the light of the actual outcome of those discussions.

The comment requiring consideration of legal rights has been addressed in conjunction with earlier public comment periods. String contention resolution takes place after all legal rights objections for all applications in a given contention set have been addressed and resolved. It would be illogical to reopen any such claims during the string contention resolution phase. The proposed position is not to introduce any additional consideration of legal rights in string contention resolution.

The comment proposing separate treatment of non-profit organizations as applicants requests a similar preferential handling of such applicants in string contention resolution as provided for community applications. However, there is no policy ground for granting any preferential treatment in string contention situations based on the applicants' legal or organizational structures, might be subject to abuse, and the proposed position is not to modify the process in this regard.

GEOGRAPHICAL NAMES

Key Points

- Much of the treatment of geographic names in the Applicant Guidebook was developed in response to the GAC Principles regarding new gTLDs.
- Geographic terms not defined in the Applicant Guidebook can be protected through the community objection process.
- The definition of country and territory names appearing in the Applicant Guidebook has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community.
- Country and territory names are protected at the second level.

Summary of Comments

Definition.

Geographical names should be defined in a broader sense, and all gTLD strings containing the geographical names listed in the ISO 3166-1 standard should also be considered geographical names. There are special cases in China where provinces, municipalities directly under the Central Government

and autonomous regions all have full name and abbreviation name. The abbreviation name should be handled as the full name consistently. *ISC (21 July 2010)*.

In Section 2.2.1.4.2, it should be added that not only an “exact match” but also a “representation” of a sub-national place is considered a geographical name. E.g., this will solve the issue for NRW (German state that stands for NordrheinWestfalne). *Bayern Connect (21 July 2010)*.

ICA remains concerned that Section 2.1.4 of the DAG concedes unwarranted authority to nations that already control their own ccTLDs by imposing an absolute bar on use of country or territory names at the top level and that applications for capital and other city names as well as sub-national place names (counties, states, provinces, etc.) will require endorsement or non-objection of government entities. ICA is gratified that ICANN has resisted past calls from the GAC to impose similar restrictions on geo names at the second level of new gTLDs and ICA urges continued adherence to that policy. *ICA (21 July 2010)*.

Country or territory names (2.2.1.4.1). I support the new protections for country or territory names and the rationale for their inclusion. *R. Tindal (21 July 2010)*.

City TLDs. Cases of string contention between two different cities of the same name, where both cities have the appropriate letter of non-objection and did not apply as a community applicant, should be clarified in the final guidebook: does it go to negotiations and auction, or would it remain with the parties to work out and if they did not, the name would not be assigned? The same would be true for a city name in contention with a non-city name. If such contention is not resolved through negotiations and auction, small cities with generic names could be used to “game” the system. *Domain Dimensions (22 July 2010)*.

English “short name”—Macedonia and Hellas (Module 2, Annex, p. 36). “Macedonia” must be removed as the record with the class B1 indication of the respective cell under the “separable name” column of the table. There is an ongoing dispute between the Hellenic Republic (Greece) and FYROM, the Former Yugoslav Republic, over the official name of FYROM, which has been discussed for many years in the U.N. without resulting in any conclusion so far. There is no official “short name” for this country and since we believe that the DNS should be kept outside of such sensitive issues, the word “Macedonia” must be removed. “Hellas” should be added next to Greece with the class B1 indication because this is a commonly used “short name” of our country, Hellenic Republic (Greece), which we believe should be equally protected. *P. Papaspiliopoulos (Module 2, 20 July 2010)*.

Analysis of Comments

Should there be a broader definition of geographic names in the Applicant Guidebook?

The exact match of sub-national place names such as states, provinces or territories, listed on the ISO 3166-2 list are afforded the protection of requiring support. There are almost 5000 names (many of which are shared or generic words) on the ISO 3166-2 list, and providing protection for a ‘representation’ or ‘abbreviation’ of the names on the list would multiply the number of names and the complexity of the process many-fold. Abbreviations or representations of names are protected through the community objection process rather than as geographical labels appearing on an authoritative list.

Throughout the process of developing a framework for new gTLDs the Board has sought to ensure a combination of: clarity for applicants; appropriate safeguards for the benefit of the broader community; a clear, predictable and smooth running process. A considerable amount of time has been invested in working through the treatment of geographic names to ensure these objectives are met, and also addresses, to the extent possible, the expectations of the GAC and the community. It is felt that the current definition of geographic names contained in the Applicant Guidebook, combined with the community objection process, provides adequate safeguards for a range of geographic names.

Geographic names were discussed during the GNSO Policy Development Process, and the GNSO Reserved Names Working Group considered that the objection process was adequate to protect geographic names. The Working Group did not find reason to protect geographic names. The GAC expressed concerns that the GNSO proposals did not include provisions reflecting important elements of the GAC principles and did not agree that the objection and dispute resolution procedures were adequate to address their concerns.

Much of the treatment of geographic names in the Applicant Guidebook was developed around many conversations and correspondence with the GAC on this issue that started following the Board's acceptance of the GNSO recommendations on the introduction of new gTLDs in June 2008.

On 2 October 2008, (<http://www.icann.org/correspondence/twomey-to-karklins-02oct08.pdf>) following a teleconference with the GAC on 8 September 2008, the then CEO & President, Paul Twomey, wrote to the GAC explaining proposed principles to guide a procedure for implementing elements of paragraph 2.2. Place names were split into two categories, as follows: 1) sub-national geographical identifiers such as countries, states, provinces; and, 2) city names.

During the teleconference of 8 September 2008, GAC members identified the ISO 3166-2 List, as an option for defining sub-national names. Accordingly, the Guidebook provides protection for all the thousands of names on that list. Also during this call the idea of the GAC creating a list of geographic and geopolitical names was discussed, however, it is understood that the GAC moved away from this suggestion because it would be a resource intensive effort for all governments to undertake.

Implementing protections for regional language or people descriptions was considered difficult because it would be difficult to determine the relevant government or public authority for a string which represents a language or people description as there are generally no recognised established rights for such descriptions.

As described in the 2008 letter, city names were considered challenging because a city name can also be a generic term, or a brand name, and in many cases no city name is unique. Therefore, where it is clear that an applicant intends to use the gTLD for purposes associated with the city name evidence of support, or non-objection is necessary. However, provision is made in the Guidebook to protect sovereign rights by requiring government approval for capital city names in any language, of any country or territory listed in the ISO 3166-1 standard.

Why are there protections for country and territory names at the second level?

The existing protections for country and territory names at the second level were developed as a compromise between the positions of ICANN's policy making bodies. The compromise is that

protections are limited to a definite list of names and not the GAC request for all names with national or geographic significance.

In the new gTLD process, there is limited protection for country and territory names at the second level, that was developed as a result of consultation with the GAC regarding the implementation of paragraph 2.7 of the GAC principles regarding new gTLDs, states:

Applicant registries for new gTLDs should pledge to:

- a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD;
- b) ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLDs.

At the Board's request, Paul Twomey (who was ICANN's CEO and President), wrote to the GAC on 17 March 2009 (<http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf>), requesting the GAC's input on possible options to resolve the outstanding implementation issues regarding the protection of geographic names at the second level. The end result of this request was a letter from the GAC to Paul Twomey, dated 26 May 2009 (<http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf>), which proposed a solution, that was accepted by the Board and ultimately reflected in the draft Registry Agreement developed for new gTLDs.

Are the common names of countries protected in the new gTLD process?

The definition of country and territory names, in the context of the Applicant Guidebook is consistent with the ISO 3166-1 standard and provides protection for the short and long form of a name appearing on the list including translations. Country and territory names will not be approved in the first round of the new gTLD process.

The treatment of country and territory names in version 4 of the Applicant Guidebook was developed specifically to adhere to paragraph 2.2 of the GAC principles on new gTLDs, i.e., the GAC view that governments should not be denied the opportunity to apply for, or support an application for, their respective country or territory name. However, the GAC's clarification of their interpretation of GAC principle 2.2² has resulted in a reconsideration of the treatment of country and territory names in the new gTLD process. This has resulted in a change of approach as reflected in the recently published draft version 4 of the Applicant Guidebook: namely, that country and territory names will not be available for delegation in the first round of the new gTLD application process.

With regard to the definition of country names, the Board has sought to ensure both clarity for applicants, and appropriate safeguards for governments and the broad community. A considerable amount of time has been invested in working through the treatment of country and territory names to ensure it meets these two objectives. Following discussion at the Mexico City meeting, the Board recommended that the Applicant Guidebook be revised in two areas regarding this subject: (1) provide

² “The GAC interprets para 2.2 of the GAC gTLD principles that the strings that are meaningful representation or abbreviation of a country or territory name should be handled through the forthcoming ccTLD PDP, and other geographical strings could be allowed in the gTLD space if in agreement with the relevant government or public authority.”

greater specificity as to what should be regarded as a representation of a country or territory name in the generic space, and (2) provide greater specificity in defining the qualifying support requirements for continent names, with a revised position to be posted for public comment.

The resulting definition for country and territory names is based on ISO 3166-1 and other published lists to provide clarity for potential applicants and the community. It removes the ambiguity created by use of the term ‘meaningful representation.’ Therefore, the definition of country and territory names has not been amended in the recent Guidebook draft and remains consistent with the Board goals and resolution on this issue.

While the revised criteria may have resulted in some changes to what names are afforded protection, there is no change to the original intent to protect all names listed in ISO 3166-1 or a short or long form of those names (and, importantly, translations of them). In addition, the Separable Country Names List was developed to protect common names of countries derived from the ISO 3166-1 list, but not identified as the short name, for example, one such short name is “The Bolivarian Republic of Venezuela” for a country in common usage referred to as “Venezuela”. This level of increased clarity is important to provide process certainty for potential TLD applicants, governments and ccTLD operators – so that it is known which names are provided protections.

We acknowledge the comments from the GAC representative from Greece requesting the removal of Macedonia from the Separable Country Names List due to unresolved issues regarding the use of the name. An amendment has been made to the Separable Country Names List which continues to provide protection for the name “Macedonia” but recognizes that due to the ongoing dispute between the Hellenic Republic (Greece) and the Former Yugoslav Republic of Macedonia over the name, no country will be afforded attribution or rights to the name “Macedonia” until the dispute over the name has been resolved.

While Hellas will not specifically be called out as the commonly used “short name” for the Hellenic Republic (Greece) in the list of separable names, we believe it is provided protection through the ‘translation in any language’ as Greece translates to Hellas in Norwegian.

What process is applied for string contention of ‘city’ names not designated as a community application?

An auction will not take place to resolve contention in the case where there are contending applications for a geographic name as defined in the Applicant Guidebook. In the event that two applications are received for the same geographic string, and the applications are considered complete (ie. they have the requisite government approvals) the applications will be suspended pending resolution by the applicants.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names, the string contention will be settled using the string contention procedures described in Module 4 of the Applicant Guidebook.

Capital city names

Since the approval of the national government is required for capital city names, as defined in the Applicant Guidebook, contention is not expected. In the unlikely event that the national government of France supports two applications for .paris the applicants will be asked to resolve the issue.

Other city names

In other cases where applications for the same city name, but representing two different cities (and most likely in different countries), which both have the documentation of support of non-objection from the respective relevant government or public authority, and the applications are considered complete, the applications would be suspended pending resolution by the applicants.

City versus Generic

Applications for the same name, but one is being used to leverage a city name and has support of the relevant government or public authority; and the other is for generic purposes, they would undergo the “String Contention Procedure” contained in Module 4 of the Applicant Guidebook.

There is no priority given to an application for a city name with documentation of support or non-objection over an application for a generic or brand name with the same name, if both are submitted as standard applications. However, the ‘community’ designation for applications was developed to view such applications more favorably if the applicant can prove, through the community priority evaluation procedure, that it represents a defined community. Applicants intending to use the TLD primarily for purposes associated with the city name are encouraged to apply as a ‘community’ application, understanding that additional criteria applies.

MORALITY AND PUBLIC ORDER (M & PO)

Key Points

- ICANN will accept the Recommendation 6 Cross-Community Working Group recommendations that are not inconsistent with important objectives of the program,
- One suggestion for a new title for the objection (“Limited Public Interest Objection”) has been included in the current version of the Applicant Guidebook.
- ICANN has included several Working Group recommendations and plans additional consultations with the Working Group before and during the Cartagena meeting to achieve agreement in additional areas.

Summary of Comments

M& PO Objections—procedure needs improvement. The procedure proposed by ICANN leaves much to be desired and would likely be inordinately costly. It requires a response and payment of a response filing fee before any “quick look” would occur, and postpone a “look” until any full complement of adjudicators had been empanelled. COA understands that the entire morality and public order objection process is likely to be revisited in light of strong objection from the GAC. This review should include developing a more expeditious and lightweight means of disposing of frivolous objections. *COA (21 July 2010).*

Current M&PO process is highly problematic. ICANN fails to understand the dangers that this provision will create and its impact on fundamental rights and liberties. Historically these issues have been associated with the right of sovereignty. ICANN seeks to assign an independent panel. The ICC is not the right entity for this process. M&PO issues cannot be determined according to business practices or

rationales—they are domains of national states. The criteria ICANN has proposed is also problematic. E.g. how can a domain name registration “incite” anyone to do anything? The only way to determine if a domain name registration incites people to commit an unlawful act would be to also check content. ICANN needs to produce for the wider community examples of names that incite users to commit unlawful acts. A review panel should provide recommendations that the applicant may use before the European Court of Human Rights or the International Criminal Court. Panels will have to be composed according to geography, cultural divergence and will not be associated with any business interests but will represent the interests of states/regions. The ICC is not the appropriate forum but international courts are—they are the bodies we can turn to for such delicate and controversial issues. *K. Komaitis (21 July 2010). Blacknight Solutions (21 July 2010). R. Dammak (22 July 2010).*

Remove M&PO objection absent solution from GAC. ICANN should remove the morality and public order objection from AGBv4 absent a proposed solution being presented to the Board from the ICANN GAC. This would be consistent with ICANN’s bottom-up, community-driven approach and is in line with the Board’s approach to other challenging issues, such as registry-registrar separation. *Big Room (21 July 2010).*

M&PO is out of scope. The ALAC echoes the At-Large Community in our disappointment with the retention in the Draft Application Guidebook V4 of the so-called Morality and Public Order (MAPO) language as part of the preparatory scope for new gTLDs. We reiterate our principled position: Even as we accept that there is no single definition of what is moral, determination of a moral string and a public order encroachment are not within ICANN’s competence and its remit in the Internet governance space. The ALAC’s disappointment is moderated with the knowledge that other support organizations are equally bothered and have proposed a cross-Community group to address and grapple further with this matter. *ALAC (September 2010)*

Delete the M&PO objection. The sooner that ICANN realizes that the only practical course is to throw out the M&PO objection, the sooner it can get on with introducing new gTLDs. The M&PO objection is illegitimate, outside of ICANN’s scope and chilling to free expression. It is strongly opposed by the NCUC. It is likely to expose ICANN to constant litigation. Issues of morality and public order are matters of national law to be decided in national legislatures and national courts. Creating an additional level of M&PO objections only invites arbitrariness, subjectivity and global censorship. ICANN has an obligation to respect the free expression rights of Internet users which are nearly universally guaranteed through various national constitutions and international treaties (e.g. Article 19 of the Universal Declaration of Human Rights). *R. Gross (21 July 2010). R. Dammak (22 July 2010).*

Need for GAC involvement. The M&PO issue threatens to be the major stumbling block to a successful and timely initiation of the new gTLD program. The GAC, with encouragement from the ICANN Board, should participate in a multistakeholder group to find a solution. *Minds + Machines (21 July 2010).*

Need for an M&PO objection. It is unclear that an M&PO objection is needed. A joint AC/SO group has been formed to discuss M&PO issues; any further work should be taken only with reference to the work to be done by that group. *M. Wong (21 July 2010). R. Dammak (July 2010).*

Keep current options. ICANN should stay with the current options in the AGBv4 and not extend the M&PO discussion any further. A M&PO black list won’t solve problems. *dotZON (21 July 2010).*

Legal standards. Compliance with the M&PO should be determined according to both the principles of international law and the laws of each sovereign state. If judged only by principles of international law, it is likely to approve some gTLDs which conflict with laws of some countries, which is unfair to those countries and even damages their national interests. *ISC (21 July 2010).*

ICC adjudication of M&PO objections—limitations. The grounds for an M&PO objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? The same problem exists with ICC adjudicating the community objection. Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010).*

M&PO Objection fee—developing and undeveloped countries. The fee for an M&PO objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010).*

“Denial of service” via duplicative M&PO objections. The lack of standing restriction for M&PO objection opens applicants to the equivalent of a distributed denial of service attack whereby a well-funded opponent or astroturf group could generate multiple complaints, delaying the application and taxing the resources of the decision forum. Along with quick dismissal of “frivolous or abusive” objections, the process should consider a means of speedy dismissal of duplicative objections. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Board role. Since there is no objective standard for what is to be applied, the Board, after appropriate community input, must make what is essentially a political decision about the most suitable M&PO mechanism—e.g., current AGB provisions, some variation of that, or a scaling down/removal of the objection process. I support any reasonable approach by the Board. *R. Tindal (21 July 2010).*

Rapid resolution.

If the current M&PO objection process is problematic to the GAC and others, we need to work together as a community to reach a new resolution very quickly. *Domain Dimensions (22 July 2010).*

The M&PO issue needs to be firewalled from creating further delays in the gTLD program. *J. Frakes (22 July 2010).*

Incitement clause. The incitement clause of the MP&O objection, if it remains in the Guidebook, should be rewritten to include, at least, disability and actual or perceived sexual orientation or gender identity, and political or other opinion, and modified to read: “Incitement to or promotion of discrimination based on race, color, gender, disability, actual or perceived sexual orientation or gender identity, political or other opinion, ethnicity, religion, or national origin.” *A. Doria (Module 3, 22 July 2010). S. Seitz (22 July 2010).*

Analysis of Comments

Since the closure of the public comment forum, recent events have dealt with several issues related to the treatment of the Morality and Public Order recommendation, and thereby addressing many comments above. In August 2010, a cross-community working group was formed with members of the

GNSO, At-Large and GAC communities to provide recommendations on how to improve the implementation of Recommendation 6. Many of the concerns raised in the public comment forum were evaluated and, where appropriate, addressed through this cross-community effort. A Report on Implementation of GNSO New gTLD Recommendation No. 6 (Rec6 Report) was published for [public comment](#) on 22 September 2010, and included several recommendations supported by a consensus of the members of the working group. This Report was [endorsed](#) by ALAC on 1 November 2010.

At its retreat in Trondheim the Board passed the following resolution with regard to the M&PO issue:

The Board acknowledges receipt of the Working Group report. This is a difficult issue, and the work of the community in developing these recommendations is appreciated. The Board has discussed this important issue for the past three years.

The Board agrees that ultimate responsibility for the new gTLD program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

The Board will accept the Working Group recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

The “existing process” as described in the Board resolution is interpreted as an objection process (such as described in versions 2, 3 and 4 of the Applicant Guidebook) that satisfies the following goals: (1) providing a predictable path for applicants; and (2) mitigating risks by having: (i) an independent dispute resolution process; (ii) dispute resolution panels with the appropriate expertise; and (iii) the clearest and most uniform set of standards possible.

The Applicant Guidebook published with this analysis in November 2010 incorporates several recommendations from the Rec6 Report, including:

- A suggested revision of the title of the objection
- Change of references to “principles of international law”
- A note encouraging applicants to pre-identify possible sensitivities related to M&PO
- A procedure for governments to send notifications with regard to national laws to applicants or through the public comment forum
- Inclusion of additional treaties as suggested by the Rec6 Report
- Additional elaboration on terms in the Quick Look Procedure, including the term “manifestly unfounded”

In addition, ICANN has encouraged further discussion and has scheduled a meeting with the cross-community working group to discuss how other recommendations found in the Rec6 Report can be incorporated into the Applicant Guidebook to the extent they are consistent with the existing process. Additional consultations are contemplated in Cartagena with the intent of coming to resolution on the material aspects of the dispute resolution process for this objection at the end of the Cartagena meeting,

Some principles reflected in the Rec6 Report are not included in the Applicant Guidebook as they are contrary to the goals described above. These largely relate to the Board’s desire to rely on the determinations by independent expert panels, and the role of the Independent Objector.

With respect to the use of independent expert panels, it has been suggested that the grounds for a morality and public order objection “contravene the concern, scope and expertise of the International Chamber of Commerce” and that it would be “unfair for a certain international organization in some business areas to perform adjudications”. However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would administer the dispute resolution procedure; it would not “perform adjudications” itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at: <http://www.iccwbo.org/court/expertise/id4379/index.html>.

OBJECTION AND DISPUTE RESOLUTION PROCEDURES

Procedural Aspects

Key Points

- Multiple objections may be consolidated at the discretion of the dispute resolution provider.
- The deadline for filing an objection must be balanced with ensuring there are no unnecessary delays and providing some level of certainty of process for applicants.

Summary of Comments

DRSP access to public comments (1.1.2.7). It would seem appropriate to provide the public comments to DRSPs directly, particularly for applications already subject to active objections. *BITS (22 July 2010)*.

Time for filing objections too short (1.1.2.4).

ICANN set a reasonable period for filing objections by adopting a model similar to what is used for objecting to a new trademark application (e.g., two months). A two week window is too short for filing objections. With such a short timeframe objectors will have to do all the work in advance in preparing an objection, only to find that an application may fail at the initial evaluation stage. There also needs to be a provision for objection after an extended evaluation; currently the two week window for filing an objection will close before the outcome of an extended evaluation is known and there appears to be no opportunity to object to applications which fail initial evaluation but are subsequently successful in the extended evaluation process. *BBC (21 July 2010)*

An additional two weeks to file objections after the Initial Evaluation results are posted would help to address the shortage of adequate time for objecting in the current proposed process, so that a potential objector has a full month following the posting of the complete Initial Evaluation results to review those results and consider whether an objection is needed under all the circumstances. This additional two weeks will not unduly delay the application process. *Coca-Cola (21 July 2010)*.

Consolidation.

If there are two or more applications by a single applicant to which a single objector is objecting on the same grounds, these should be the subject of a single objection. If a single objector has two different grounds to object to an application (e.g., legal rights and community grounds) this should also be a

single objection, not two separate objections administered by different bodies and subject to two objection fees. *BBC (21 July 2010)*

If objections are consolidated before responses are filed, then the Applicant should pay one response filing fee. If objections are consolidated after responses are filed, the Applicant should be entitled to a refund of some of the response fees paid. In the latter case, the refund may not necessarily be all fees in excess of a single response fee if further administrative steps have occurred. *IBM (21 July 2010)*.

The many to one relationship between possible objectors and a single applicant is an inherent scaling problem in the application process that needs to be addressed with time limits and batch costing. The procedures could act as a Denial of Service or Distributed Denial of Service attack against an applicant (e.g. an applicant challenged by many similar objections, with no extension of time while they may be consolidated, or a very large number of similar but non-consolidated objections where it may be impossible for the applicant to respond to all of them, each one requiring a separate response and a separate fee). *A. Doria (Module 3, 22 July 2010)*.

Dispute resolution costs (3.3.7). Clarification is needed as to what costs paid by a prevailing party will be refunded, including whether the costs for the panel are refunded and whether fees for objections and responses (described as nonrefundable in 3.2.2 and 3.2.4) are in fact refundable as appropriate to a prevailing party. *IBM (21 July 2010)*.

Corrections to objection filings (3.2.1). Objectors should be given a brief opportunity to rectify any errors where their objection does not comply with procedural rules, especially if the window for filing is so unreasonably short. *BBC (21 July 2010)*.

Extensions of time (3.3.3). While negotiation and mediation is encouraged, parties should be limited to 30-day extension requests. Trademark proceedings could be used as a model also, where parties are encouraged to put the proceedings on hold in order to facilitate settlement. *BBC (21 July 2010)*.

Full and fair adjudication (3.3.5). Rapidity of resolution should not take priority over full and fair adjudication. The time limits throughout the dispute resolution procedures are very short. *BBC (21 July 2010)*.

Number of Panelists.

Three member panels should be available for all disputes if requested; additional costs could be covered by the party requesting three panelists. The number for both String Confusion and Community disputes is still restricted to one panelist. There is an option for 3 panelists for Legal Rights disputers and a requirement of 3 panelists for a M&PO objection. *RySG (10 Aug. 2010)*. *VeriSign (22 July 2010)*.

By definition we find it hard to understand how a “panel” can consist of only one person. Each panel should consist of at least two individuals. *BITS (22 July 2010)*.

Filing procedures (3.2). The “Rules for Expertise of the International Chamber of Commerce” to be used for the Community Objections appear to be missing from the Attachment to Module 3. *BITS (22 July 2010)*.

Analysis and Proposed Position

It has been suggested that certain deadlines for objection be extended, in order to give potential objectors more time prepare their objections. They argue that the time for objection extends beyond initial evaluation by only 14 days. This is true. However, there are several months to object from the time the application is posted. This is much greater than the suggested time in the comment of two months. While that may require some preparation before one determines if the TLD application has passed evaluation, it must be balanced with need to not delay the process once initial evaluation is complete. Providing for objections beyond extended evaluation would be detrimental to the overall time line of the process.

The entire objection procedure is intended to be fair and has safeguards. Accordingly, the DRSP and/or the Panel have the discretion to extend certain deadlines. See Procedure, Art. 16(d) (possibility of extension of a deadline or suspension of the proceedings upon request of the parties); Art. 17(b) (possibility to grant a time limit for written submissions that is greater than 30 days); Art. 21(a) (possibility to extend the 45-day deadline for the expert determination). Note also that objectors do have an opportunity to correct errors that are found in the DRSP's administrative review of the objection and are given an additional five days to file the corrected objection, pursuant to Article 9(c) of the Procedure.

Several comments addressed issues arising from multiple objections or multiple applications and possible consolidation. As set out in Article 12 of the New gTLD Dispute Resolution Procedure (the "Procedure"), multiple objections may be consolidated at an early stage of the dispute procedure. In the event that a large number of similar objections were filed against a single application (a situation that has been compared to a "denial of service" attack), the objections could be consolidated, pursuant to Article 12. Moreover, multiple objections aimed merely at harassing or overwhelming an applicant might constitute an abuse of the right to object and thereby be subject to dismissal in the "quick look" procedure.

If an objector wishes to object to a single application on more than one of the four available grounds, separate objections must be filed, because there are different procedures for different objections (e.g., legal rights objections will be administered by the WIPO, while community objections will be administered by the ICC International Centre for Expertise). In addition, the qualifications and experience of the experts will relate to the nature of the objection. In addition to the consolidation of multiple objections against the same gTLD, it would be possible to consolidate multiple objections against similar gTLDs. This latter possibility is implicit in Article 12(a) of the Procedure and is explicitly stated in Article 7(d)(i) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Consolidation of multiple objections would normally occur before the Applicant has paid its filing fee(s). The DRSP will have discretion to refund a portion of the amounts paid as filing fees in the case of consolidation occurring later. See, e.g., Article 7(c) of the draft WIPO supplementary rules for gTLD Dispute Resolution.

Some have commented on the dispute resolution panels. The question whether to provide for three-member panels of experts for all dispute procedures has been discussed in the comments relating to previous drafts of the Applicant Guidebook. ICANN continues to favor a rule that would require all parties to agree to three experts for Legal Rights Objections, as provided by Article 13(b)(ii) of the New gTLD Dispute Resolution Procedure (the "Procedure"). For convenience of reference in the Procedure and elsewhere, the term "Panel" refers to one or three members, as appropriate. Further, as panel are

meant to have the appropriate expertise, to the extent any particular organizational structure is relevant to the objection, the dispute resolution provider should take that into consideration, as should the parties, when selecting panel members.

It would not be appropriate to provide public comments to a DRSP directly but the panel will have access to public comments through the TLD Application System and have the discretion to rely on them.

Providing free dispute resolution for governments, as suggested, is not contemplated at this time. The process is based on cost recovery. Relieving the requirement to pay fees by one would result in higher fees to others. How to do that accurately is problematic and the result is discriminatory.

COMMUNITY OBJECTIONS

Key Points

- After extensive review and consideration of public comments, the complete defense has been eliminated.
- However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.
- The Independent Objector may choose (although would not be required) to file an objection upon the request of governments or entities that are unable to afford the costs of the dispute resolution proceedings.

Summary of Comments

Legal rights objection—defenses. As is the case with the community objection, the fact that an objector has not chosen to apply for the same or any other string does not constitute any element of a defense to a legal rights objection. *BBC (21 July 2010)*

Community objections—standing.

The following should be added to Section 3.1.2.4: “Where more than one entity joins together to file a community objection, or where more than one community objection is consolidated pursuant to 3.3.2, the qualifications of the objectors shall be cumulated for purposes of determining standing. Business and trade associations, and membership/affiliate organizations, are eligible to demonstrate standing to file a community objection under the above criteria.” *COA (21 July 2010)*.

The requirement to support and/or endorse a particular community application may create the possibility of conflict of interest, whereby a supporter of one community-priority application could file a community objection against a competing community-priority application to assist the one they support, rather than for legitimate reasons. Therefore, any community institution/member organization that supports a particular community-priority application should not be given standing to file a community-priority objection against any other community-priority application for the same TLD. *Big Room (21 July 2010)*.

Community objection –definition (3.1.2.4). BITS believes that the text defining a community is well written. *BITS (22 July 2010)*.

Community objections—“detriment” standard.

In lieu of the first paragraph under “Detriment”, insert the following in Section 3.4.4: “An objector that satisfies the preceding tests shall be presumed to have established a likelihood of detriment to the rights or legitimate interests of its associated community. However, this presumption may be rebutted by the applicant. Ultimately, for an objector to prevail, the panel must determine that such detriment is likely if the objected-to application were approved. Factors that could be used by a panel in making this determination include, but are not limited to:” *COA (21 July 2010)*.

Community objections—complete defense.

In the same section (3.4.4) provision should also be made for defining the circumstances under which “satisfaction of the standing requirements for filing a Community Objection...by a community-based

applicant is a complete defense to an objection filed on community grounds.” An applicant asserting this defense should be required to affirmatively prove that the community it claims to represent is substantially identical to the community expressing opposition. While it should not be possible for a community-based applicant to assert the complete defense by claiming to represent a community that is not substantially identical to the one expressing the objection, proof of satisfaction of the standing requirements may also provide an element of a defense to the objection even if the complete defense is not available. *COA (21 July 2010)*

ICANN should qualify the complete defense with a “relative representativeness” requirement by which if the complainants are clearly more representative of the intended community than the applicants, the complete defense should not apply and the complaint should be examined on its merits. *A. Abril i Abril (Module 3, 21 July 2010)*.

ICC adjudication—limitations. The grounds for a community objection are in areas that contravene the concern, scope and expertise of the International Chamber of Commerce. Would the neutrality and global representativeness of the ICC be recognized by each country? Adjudications on M&PO and community objections involve a broad range of subjects and are of great significance. It would be unfair for a certain international organization in some business areas to perform adjudications. More representative and neutral organizations should be selected or at least added to complete this job. *ISC (21 July 2010)*.

Objection fee—developing and undeveloped countries. The fee for a community objection is set too high and would stifle the initiative of developing and undeveloped countries. *ISC (21 July 2010)*.

No fee for government objections. ICANN should not impose any fees to individual governments including local governments that intend to submit objections to individual applications. Such objections are based on the public interest and therefore should be exempted from general commercial practices. *JIDNC (21 July 2010)*. *A. Al-Zoman (21 July 2010)*.

Not-for-profit organizations concerns. Participation in dispute resolution procedures during the new gTLD application process would be burdensome on resources of not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. Factors considered by panels deciding legal rights objections should be clarified (e.g., “relevant sector of the public,” recognition of the “sign”, “intent”) and should not provide a “how to” guide for formulating arguments against accusations of infringement. “Experts” appointed to dispute resolution panels should include individuals well versed in the operations and specific needs of not-for-profit organizations. Fees for filing and adjudication of objections should be determined as soon as possible so that not-for-profit organizations will be able to budget adequately in advance for the new gTLD process. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Analysis of Comments

As stated in one of the comments, business and trade associations and other organizations are indeed eligible to demonstrate standing to file a community objection. The Objector is “one or more persons or entities who have filed an objection against a new gTLD for which an application has been submitted”. New gTLD Dispute Resolution Procedure (the “Procedure”), Art. 2(b). Entities that join together to file a single objection could cumulate their qualifications as a single “Objector”. However, it would not be

feasible to cumulate the qualifications for standing of multiple Objectors whose objections may be consolidated. Even when consolidated, multiple objections are considered on their individual merits.

Contrary to one commenter's suggestions, there does not appear to be any conflict of interest in a situation where the supporter of one community application files an objection against a competing community application. Indeed, it would be inappropriate to add a rule that an objector to a gTLD application must not have any interest in any other gTLD application. A person or entity with an interest in one application who objects to another application would still be required to satisfy all of the applicable rules for standing, and meet the standards for an objection.

The question whether the objector who files a community objection must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community has been raised and addressed in connection with previous drafts of the Applicant Guidebook. ICANN does not consider that the satisfaction of other elements of the community objection (community, substantial opposition and targeting, as set out in § 3.4.4) should create a presumption of detriment. The likelihood of detriment is an independent element of the objection that must be proven by the objector. If the objector cannot prove the likelihood of detriment, there does not appear to be any reason why the objector should be entitled to block the applicant's application. Simply not wanting another party to be the applicant or obtain the name is not sufficient to be deemed a detriment.

The complete defense to a community objection (§ 3.4.4 *in fine*) has also been raised and addressed in connection with previous drafts of the Applicant Guidebook. After extensive review and consideration, the complete defense has been eliminated. However, in order to prevail against a defense that an applicant would have had standing to object, objector must prove an elevated level of likely detriment.

The costs that the parties must pay in the dispute resolution proceedings continue to attract comments. It has been suggested that the costs are too high for developing countries and that governments should be excused from paying any costs, since their objections would be based upon the public interest. In considering this issue, it must be recalled that the costs paid by the parties cover the administrative expenses of the DRSPs and the fees and expenses of the experts. These costs must be paid by someone. If certain categories of objectors pay reduced or no fees, some other person or entity would have to pay in their place. In general, it is not unusual for governments to pay their respective shares of the costs of dispute resolution proceedings. In the specific instance of governments or other entities (including non-profit organizations) that may be unable to afford the costs of the dispute resolution proceedings, the Independent Objector may choose (although would not be required) to file an objection upon their request; that function is part of the IO's mandate. Of course, in that circumstance, the IO would remain independent and would be acting generally in the public interest and not on behalf of any particular entity or government. Finally, it should be recalled that the prevailing party will be reimbursed the full amount of the advance payments of costs that it paid during the proceedings, pursuant to Article 14(e) of the New gTLD Dispute Resolution Procedure.

It has been suggested that the grounds for a community objections "contravene the concern, scope and expertise of the International Chamber of Commerce" and that it would be "unfair for a certain international organization in some business areas to perform adjudications". However, it should be recalled in this context that the ICC International Centre for Expertise, as DRSP, would administer the dispute resolution procedure; it would not "perform adjudications" itself. It is the expert panel (appointed by the DRSP) that hears the dispute and issues an expert determination. ICANN considers that the ICC and its International Centre for Expertise, with their extensive experience in administering

various types of international dispute resolution proceedings, are well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at:
<http://www.iccwbo.org/court/expertise/id4379/index.html>.

INDEPENDENT OBJECTOR (IO)

Key Points

- An objection filed by the IO is subject to the same scrutiny by the experts as any other objection.
- The IO's status and rights will be no greater than those of any other objector.

Summary of Comments

IO Accountability. There is a troubling lack of specificity in DAGv4 regarding the accountability of the Independent Objector. E.g. the potentially limitless renewable terms of the IO cause concern. There is no process by any person aggrieved or harmed by the IO's decisions and actions or inactions as the case may be to object or appeal. These concerns are magnified given the IO's mandate to file M&PO objections. At a minimum, specific provisions relating to an appeal and review process for the IO as well as either non-renewable tenure or a maximum number of terms ought to be included in the final applicant guidebook. *M. Wong (21 July 2010). R. Dammak (July 2010).*

Experience. In choosing the one IO, ICANN should consider the candidates' experience with not-for-profit organizations and the way they use the Internet. *Red Cross (21 July 2010).*

Malicious Behavior Vulnerability Objection needed. Some objection mechanism needs to be created to fill a significant, critical safeguard gap in the objection process—dealing with the situation where an application, while meeting baseline standards for successfully passing through evaluation, nonetheless would leave members of the public excessively vulnerable to risks of malicious activities (e.g., a .kids gTLD, where the applicant does not include a registrant vetting process before registration in order to have heightened security procedures for .kids). Because a concern could arise outside of the community context in some cases, it should be possible to raise a concern without having to meet the standards for standing to file a community-based objection. One approach could be to assign this duty to the Independent Objector who would be in a position to evaluate public comments that raise a concern, consult with relevant experts and then launch an objection if needed. Other approaches should also be considered. *COA (21 July 2010).*

Analysis and Proposed Position

Two people comment on IO accountability. There is no question that accountability is extremely important. Thus, it should be remember that objections filed by the IO are heard by an expert panel the same as any other objection. For example, if the IO submits a Community-based objection that is manifestly unfounded or an abuse of the right to object, the objection will be dismissed. An objection filed by the IO is still subject to the same scrutiny by the experts as any other objection. In the dispute resolution proceedings, the IO's status and rights would be no greater than those of any other objector. The IO would not have a privileged position, or wield unchecked power.

ICANN agrees with the suggestion that experience with non-profit organizations could be a useful qualification for the position of IO. This will be a consideration in the tender.

The comment regarding the problem of malicious behaviour refers to actions and misuse of a gTLD that occur post-delegation. To the extent that such misuse of the gTLD could be discerned in the application for the gTLD, it could potentially support an infringement of rights objection. Otherwise, there are other remedies (including, post delegation dispute resolution and criminal prosecution) that are available post-delegation.

POST DELEGATION DISPUTE RESOLUTION PROCEDURE (PDDRP)

General Process Comments

Key Points

- The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliate's) bad acts; it should not hold registries liable for acts of unaffiliated registrants.
- One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.
- Marks protected through the PDDRP, will meet the same test as those protected in URS and Sunrise protection.

Summary of Comments

PDDRP fails to make registry operators accountable.

Registry operators have an inherent responsibility to ethically manage their domains; as it stands, the PDDRP relieves them of that responsibility. If registry operators fail to monitor their registration process, whether due to financial interests or simple negligence, they should be held accountable. *IHG (20 July 2010).*

The PDDRP needs to be revised to make registry operators accountable. The standards section now effectively relieves registry operators of an enormous amount of liability and gives them no incentive to monitor domain names being registered or those already within their registries for infringement. *CADNA (21 July 2010). Microsoft (21 July 2010). NCTA (Module 3, 21 July 2010).*

It is up to ICANN to take responsibility to police bad actor registries. ICANN should not shift this responsibility to users. *Nestle (21 July 2010).*

PDDRP as currently drafted will discourage any actual, widespread use by potential complainants. *Verizon (20 July 2010). CADNA (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010).*

PDDRP and RRDRP should be combined. *Verizon (20 July 2010). CADNA (21 July 2010). AT&T (21 July 2010). INTA Internet Committee (21 July 2010). Rosetta Stone (21 July 2010).*

The PDDRP must apply to all gTLDs. *W. Staub (22 July 2010).*

Registrars not addressed. The PDDRP is not a full remedy because it does not address the bad faith, specific or otherwise, of registrars who inevitably will be involved in illicit activities working in collusion

with registries. This loophole will encourage black hat registries to set up arms-length relationships with registrars and other third parties to engage in bad faith conduct. *Verizon (20 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Rosetta Stone (21 July 2010)*.

The PDDRP is not adequate as currently drafted. ICANN should appoint a third party agency to conduct an annual audit of each registry operator including on-site visits. The accreditation agreements should specifically ban “warehousing” and other bad practices. A registry operator that breaches its obligations should face a heavy fine or a first offense and suspension for a second offense. *MARQUES/ECTA (21 July 2010)*.

Burdensome for not-for-profit organizations. AAMC values the PDDRP as a potentially more affordable and expedient means to resolve conflicts, but it requires improvement. As currently proposed, participation in the PDDRP is likely to be burdensome for not-for-profit organizations, increasing the likelihood that they will be subject to DNS abuses by bad actors. *AAMC (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The PDDRP is premature and should not be adopted. It lacks the same level of multistakeholder process and it lacks mechanisms to ensure that the rights of legitimate registrants will be secured. It could potentially upset the whole registration culture. It raises issues of intermediary liability and directs the registration of domain names towards a more controlled system of content. Free speech and expression could be jeopardized. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Support for PDDRP as drafted in AGBv4. I support the PDDRP as detailed in ABGv4 and strongly endorse the principle that it should only be used against registries that are actively involved in cybersquatting. *R. Tindal (21 July 2010)*. *Domain Dimensions (22 July 2010)*.

Registered and unregistered marks. The PDDRP should operate like the Clearinghouse and make a distinction between registered and unregistered marks. The inclusiveness of the PDDRP as currently proposed poses danger because almost every word is or can be a common law trademark and that would give the trademark community the opportunity to turn against registries for every single word that is part of our vocabularies. *K. Komaitis (21 July 2010)*. *R. Dammak (July 2010)*.

Trademarks should not be required to have undergone “substantive review” to be eligible to be the subject of a PDDRP complaint. Under global trademark law there is no single standard for what constitutes “substantive examination”. For purposes of the PDDRP, a registration that is valid in the eyes of the sovereign nation that granted it should be a valid registration. The PDDRP should be amended to accept trademark registrations from any valid sovereign nation as a basis for a PDDRP complaint. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Analysis of Comments

Once again, thanks to all of those who have commented on the Trademark PDDRP. As can be seen from the differences between the most recent version and prior versions of the PDDRP, the public participation process has been extremely productive. This round of comments is no exception. While the changes to the PDDRP are much less voluminous in the newest version to be posted, they are no less important.

Although not all suggested revisions have or could have been included in the PDDRP, in that some were either or not implementable or were directly at odds with each other thereby requiring some middle ground to be proposed, they have all been carefully considered.

General comments about the PDDRP are highly varied. Some suggest that the PDDRP fails to make registries accountable, that it is premature, that it is burdensome and therefore will not be used. Still another states that the PDDRP strikes a proper balance and is an appropriate level of enforcement against registries because it only holds them accountable to the extent registries are involved themselves in cybersquatting. Some suggest that the PDDRP should make a distinction between registered and unregistered marks, and others assert that there should be no substantive review requirement for marks to be addressed by the PDDRP. Finally, one commenter states that the PDDRP must apply to all gTLDs and another states that it should apply to all registrars.

The Trademark PDDRP should be enforced to hold registries liable for their own (or their affiliates') bad acts; it should not hold registries liable for acts of unaffiliated registrants. If a trademark holder's rights are being infringed, there are other mechanisms already in place, such as the UDRP or judicial proceedings, in which they can seek redress from the direct source of infringement. Further, with the new gTLD Program, the avenues to take against a registrant have expanded to include the Uniform Rapid Suspension System (URS). Thus, the PDDRP is not an exclusive avenue to challenge trademark infringement.

In terms of the marks that can be addressed, the PDDRP does distinguish between registered and unregistered marks. Please see Section 9.2.1 in the latest version of the PDDRP, posted with the Applicant Guidebook in November 2010. Further, as the Board has clarified, in the new gTLD protection mechanisms (see <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>), review for use of a mark in many circumstances is important to help diminish gaming. It makes sense that marks capable of being addressed through the PDDRP, will be equivalent to URS and Sunrise protection.

We again see a comment that, as written, the PDDRP will not be used very much and its effectiveness will be judged by its non-use. As noted in the last round of comment analysis, if this is the result, it may be an indicator of need for evaluation or of success. One implication of non-use is that the trademark holders have one more effective deterrent in place to protect their marks.

Finally, while expansion to existing gTLDs, as well as registrars, may be something to consider in the future, such expansion is not at issue here and will not be considered at this time.

Standards

Key Points

- Willful blindness is not enough to hold a registry liable under the Trademark PDDRP. There must be affirmative conduct on the part of the registry. To hold otherwise will lead to some incorrect results and irrevocable harms.
- The PDDRP was developed to prevent systematic abuse by the registry itself, and the standards are purposely written to do just that.

Summary of Comments

“Willful blindness” standard.

Trademark owners should not be relegated to second-level enforcement tools in a digital age where registration authorities may choose to act as de facto registrants or turn a blind eye while facilitating and profiting from cybersquatting. The PDDRP encourages new gTLD registries to take root in countries with weak legal protection for IP (e.g., nations that lack theories of secondary liability or remedies for cybersquatting). The PDDRP should utilize a “willful blindness” standard and extend to registrars as well (see PDDRP, secs. 6 & 1). *IOC (21 July 2010)*.

The scope of the current PDDRP as limited to affirmative conduct undermines the intended effect of encouraging responsible TLD management and DNS credibility. Stakeholders have called for consideration factors to address the real possibility of willful blindness occurring in the course of management of new domains. *WIPO Center (16 June 2010)*.

The PDDRP, without explanation, fails to reflect a widely held position in the submitted comments regarding willful blindness, a position expressed not only by WIPO and the IPC, but also INTA and MARQUES/ECTA, which collectively represent a significant global share of trademarks. *WIPO Center (21 July 2010)*. *Hogan Lovells (21 July 2010)*. We support WIPO’s call for the PDDRP to be re-engineered. *JONAS (11 July 2010)*. *Com Laude (21 July 2010)*.

The “affirmative conduct” limitation discourages best practices by registries (including those who intentionally design their operations to engage in bad faith activities through passive mechanisms). The “affirmative conduct” definition should be broad enough to include both knowing and intentional bad faith conduct on the part of registries and registrars whether “affirmative” or otherwise. *Verizon (20 July 2010)*. *Rosetta Stone (21 July 2010)*.

The following clarifying definition should be added: “Affirmative conduct” may consist of affirmative steps taken by a registry operator to deliberately shield itself from full or exact knowledge of the nature and extent of infringing activity, after it knows or strongly suspects that infringing activity of the type contemplated by this PDDRP is occurring or is likely to occur. *INTA Internet Committee (21 July 2010)*

“Affirmative conduct” engaged in by the registry operator must be clarified; if the threshold is set too high then the risk is that the PDDRP’s effectiveness will be put in doubt. *C. Speed (21 July 2010)*.

As proposed by WIPO there should be “safe harbor” defenses to protect registry owners who are exposed by registrants. However, the PDDRP must address “willful blindness” if ICANN is serious about protecting consumers and IP owners. *MARQUES/ECTA (21 July 2010)*.

WIPO’s proposed amendments to the PDDRP relating to willful blindness should not be adopted. They are contrary to established laws of jurisdictions that have addressed this issue and are an expansion of international law. ICANN should not be creating dispute processes or even contractual requirements based on how intellectual property owners would like to see the law in the future. It is not for ICANN to pre-empt the state of existing law by incorporating this notion of willful blindness in to the PDDRP. *Neustar (21 July 2010)*.

The PDDRP as proposed does not offer realistic examples of what behavior, if any, may qualify as affirmative conduct by the registry operator. NCTA supports a somewhat less stringent standard than “willful blindness” which would require that the registry have first been put on express notice of abusive registrations. NCTA had previously provided examples that should suffice to make the required showing that a gTLD operator has been acting in bad faith—i.e. a failure to act after being put on express notice of abusive registrations of domain names; and a failure to require complete and accurate Whois information, either on a frequent or a regular basis. Reasonable persons would be hard-pressed to justify excluding, at a minimum, these situations, from those for which registries should take responsibility. *NCTA (Module 3, 21 July 2010)*.

Material harm. The definition of material harm may prove challenging. ICANN should provide information as to the interpretation of material harm. By using this term the PDDRP is recognizing abuse that does not require actual or threats of trademark infringement. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

“Clear and convincing” and bad faith.

The clear and convincing standard higher than that in most civil actions. It is unlikely that complainants, without access to the discovery available in full-blown litigation, will be able to meet this evidentiary standard. The bad faith standard is unreasonably stringent. It is unclear how a complainant could establish “specific” bad faith. This implies that a registry operating with general bad faith intent to profit is free to carry on its illicit activities. Moreover, a complainant must establish a “substantial” pattern of “specific” bad faith. *Verizon (20 July 2010)*. *AAMC (21 July 2010)*. *DuPont (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*. *IBM (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

Pattern and Practices and Joinder.

The language that requires the complainant to prove that a pattern of registering domain names that specifically infringe one of the complainant’s marks should be deleted, revised to lower the threshold for harm to the complaining trademark owner, and/or that the proposal be revised to allow some form of joinder of class action status for aggrieved trademark owners. Under the current provision, despite the degree of abusive conduct, there would be no basis for a PDDRP complaint against a gTLD operator where no one trademark owner has one mark that is specifically affected by abusive registrations. *NCTA (Module 3, 21 July 2010)*.

Given the “substantial pattern” requirement, among other things, ICANN should consider whether the PDDRP would allow for joinder or class action status between aggrieved parties. This would allow parties

to share the cost of the PDDRP and to combine efforts to more efficiently gather and present evidence to the Expert Panel. *IPOA (21 July 2010)*.

Affiliated Entities. To take into account the issues of vertical integration and PDDRP liability, conduct of a registry operator should be defined to include: “Conduct by entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where ‘control’ means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.” *INTA Internet Committee (21 July 2010)*

There is an imbalance between the stringent standard for complainants and the leniency toward registries that is troubling and difficult to justify. *DuPont (21 July 2010)*.

Reference to “infringement.

The described standards should not necessarily involve trademark infringement as is the case for UDRP complaints. Also, since the parties may not be in the same jurisdiction, reference to the concept may raise conflicts of law issues. Instead, reference should be made to the breach of standards or a similar neutral term. *IPOA (21 July 2010)*.

The phrase “in fact infringes the trademark of the complainant” should be added to the sec. 6 second level complaint standard; this ensures that complainant proves actual infringement, as is required for cases of secondary liability in court. This is important because there may be no discovery and there is some uncertainty about the panel/arbitrator. *RySG (21 July 2010)*.

Analysis of Comments

In terms of the standards, there has been much discussion and comment on whether registries should be found liable under the PDDRP for willful blindness to malicious conduct, i.e., the fact that there are infringing names in its registry. As set out in the last in the current version of the Trademark PDDRP proposal, and set forth in the last version of the PDDRP Comment Summary and Analysis:

willful blindness is not and properly should not be included as part of the standard under which the registries will be reviewed. The portion of the PDDRP that can hold a registry liable for infringement at the second level is a large step in providing trademark protections. It must be done carefully. Registries do not have a direct interface to customers, that happens at the registrar level. Registries maintain the database. In any large registry there will be a relatively large number of “infringers,” the registry may be aware of some of them but will also be unaware of others. To hold registries accountable for all instances of infringement would have unknown effects on the ability of the registry to conduct business. A standard to hold them liable for that cannot be implemented understanding all of the effects, including the interplay and renegotiation of agreements between and among, registries, registrars, and ICANN. In the meantime, it is reasonable to hold registries accountable for affirmative conduct with regard to second-level names. That is what this standard does; it hasn’t been done up to now; it is a substantial step.

<http://www.icann.org/en/topics/new-gtlds/pddrp-comment-summary-and-analysis-28may10-en.pdf>

One commenter request further explanation of “material harm.” Material generally relates to having consequence, but it is difficult to provide more explanation in the abstract. It will up to the Expert Panel to determine if something is material to the Complainant.

Some believe that the clear and convincing standard is too high because it is higher than most civil actions. Some also think the bad faith requirement calling for the pattern of registration of infringing domain names within a registry is too limiting because a complainant could not go after the registry for infringement of a single or a few trademarks or just their own marks. While both the requirements for clear and convincing evidence and a bad faith requirements are high, that is how they are intentionally crafted. The PDDRP was developed to prevent systematic abuse and thus the standards are purposely written to do just that. If there is just one or a few infringing names in a registry (or even many), the complaint can use other mechanisms available to it, the UDRP and the URS, as well as the judicial system. The suggestion of allowing joinder is certainly something that can be considered and will be included in discussions with the PDDRP provider(s); however, that will not eliminate the need for proof of a pattern and practice along with systematic registrations of one trademark holder’s names.

One commenter suggested that not only registries, but their affiliated and commonly controlled entities must be required to refrain from conduct that would lead to infringement of trademarks. We agree. This point is well taken and this has been incorporated into the version of the Applicant Guidebook posted in November 2010 with this analysis.

Procedures

Key Points

- ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal
- No member of the evaluation panel shall serve as an appeal panel member

Summary of Comments

Fees and Costs.

The explanation of costs is vague and fails to mention any limit on the cost of PDDRP proceedings. ICANN's passing statement that costs will be reasonable does not mean that they will be. ICANN needs either to implement a maximum cost or provide the parties with more say in how the costs will stack up. Otherwise complainants will have no incentive to use the PDDRP and will look for alternative methods to solve their disputes. *CADNA (21 July 2010)*.

The rules should be altered to provide a cap on estimated costs, and the nature of such costs must be more fully defined. The requirement for a full complainant outlay in the initial stage should be replaced by policies requiring that no payment (beyond the filing fee) be required until after the Threshold Review is completed. *INTA Internet Committee (21 July 2010)*.

IBM agrees that if the complainant is the prevailing party, the registry operator is required to reimburse complainant for all fees incurred, but if the registry operator is the prevailing party, then the registry operator may recover its filing fees. *IBM (21 July 2010)*.

The PDDRP mechanism and its costs unfortunately seemed to have been passed to brand owners. *Hogan Lovells (21 July 2010)*.

Registry Operators should not have to pay to respond; the Registry Operator should only pay if/when it loses an entire PDDRP complaint. *RySG (21 July 2010)*.

Prior notice to registry operator of a potential complaint. We question the need for the proposed 30 day period of prior notice to registry operators by would-be complainants. The length of the notice period makes it likely that the bad faith actions will continue, and mark owners will look more seriously at litigation as the more expedient and effective enforcement route. The 30-day period should either be stricken or, at a minimum, shortened to a term sufficient to provide only notice, as opposed to an advantage, to registry operators. *INTA Internet Committee (21 July 2010)*.

Complaint.

Expected elements of a PDDRP complaint and evidence required to support it should be described in greater detail. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The complaint should include a statement regarding the actual economic and other harms the registrations have caused to the trademark owner. *RySG (21 July 2010)*.

Appeals.

Section 21 reference to URS should be removed. In its place should be PDDRP or alternatively reference to either the URS or PDDRP should be removed altogether. In addition the nature of the appeal is not clear. Presumably, members of the Appeal Panel should not have been involved in the initial proceeding or perhaps other similar proceedings at first instance. There is also no indication of the timing of the appeal, discovery and Appeal Panel decision except for the deadline for the initial appeal. Basic dates should be incorporated into the PDDRP itself. *IPOA (21 July 2010)*.

The registry operator has multiple and possibly redundant avenues of appeal. The registry operator may either appeal the Expert Determination through the provider's process; initiate a separate dispute resolution procedure under the provisions of the Registry Agreement; or both. Neither of these two additional avenues of appeal is necessary. *INTA Internet Committee (21 July 2010)*.

RySG would modify the appeal provision in sec. 21 to provide: Either party shall have a right to seek a de novo appeal of the Expert Determination of liability or recommended remedy based on the existing record within the PDDRP proceeding for a reasonable fee to cover the costs of the appeal. If an appeal is sought, ICANN shall refrain from determining whether to implement a remedy until conclusion of the appeal. *RySG (21 July 2010)*.

New evidence should be allowed to be introduced at appeal stage. Later facts may be highly relevant to any remedy recommended by the Panel. Also because the appeal is de novo, there is no reason to restrict the timing of the evidence. *RySG (21 July 2010)*.

Threshold Review.

INTA Internet Committee supports the threshold review concept but the current proposal is unacceptable in several ways. If the Threshold Review panel determines that the complainant has not met the threshold review criteria, then the provider should state the grounds of the determination. The complainant should be allowed to amend the complaint at the threshold review stage without the need to file an additional filing fee. By contrast, the current process would require forfeiting the filing fee and a second process of procedures which is punitive and a waste of resources. The parties should have the capacity to suspend the Threshold Review process by joint stipulation (e.g., for settlement discussions). *INTA Internet Committee (21 July 2010)*.

Generally, the RySG believes that (1) the Administrative Review and the Threshold Review can be conducted by the same or related parties; and (2) The Threshold Review and the Expert Panel should be separate parties. The rationale for (2) is to avoid the appearance of impropriety and to remove the financial incentive of the Threshold Review automatically approving complaints. *RySG (21 July 2010)*.

The Threshold Review should include considering the factor of whether the Complainant has asserted that there is no current or previous PDDRP for the same asserted facts. RySG would like to avoid multiple review of the same facts and proposes to have joinder of similar complaints. *RySG (21 July 2010)*.

Default.

RySG recommends change of the language of Default (which under the UDRP in practice leads to a finding in favor of the complainant) to Failure to Respond. Failure to Respond will still allow the case to proceed to an Expert Determination on the merits, but without the stigma of a Default. *RySG (21 July 2010)*

Default cases should not be decided on the merits as this will stretch out the process unnecessarily. Registries are sophisticated businesses that can avoid this result simply by filing a response. *NCTA (Module 3, 21 July 2010)*.

Expert panel.

To make consistent with the URS, add that PDDRP panelists within a Provider shall be rotated so as to avoid selection of Providers that are thought to be likely to rule in a certain way. *RySG (21 July 2010)*.

Three member expert panels should be the default rule given the importance and seriousness of PDDRP disputes. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Joinder of complaints against the same registry.

A mechanism should be added that will provide for complainants who file similar complaints against the same registry to request that the matters be joined into a single proceeding. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Reply opportunities for the trademark holders (paragraph 11). ICANN needs to explain why the PDDRP gives the trademark holder two opportunities for a reply. This seems not to follow the paradigms of the URS and UDRP. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Discovery (paragraph 16). Discovery should not be discretionary but should be an option that operates irrespective of panels. *K. Komaitis (21 July 2010)*. *R. Dammak (22 July 2010)*.

Suspension of Proceeding. Parties should be able to jointly stipulate that the PDDRP proceeding be suspended at any point. *INTA Internet Committee (21 July 2010)*.

Analysis of Comments

Several comments have been received relating to procedural aspects of the Trademark PDDRP. Fine-tuning of a newly developed procedure is always appreciated and some are already included in the current version of the PDDRP posted in November 2010 simultaneously with this analysis.

Many have commented on the uncertainty of costs and the payment or refundable nature of fees. While costs at present are somewhat uncertain, that is unavoidable given that this dispute resolution procedure will be based on administrative costs of providers and hourly rates of selected panelists. The fees should be within current standard practices of dispute resolution providers deciding cases with the same amount of complexity. As there is flexibility as to whether one or three panelists will be chosen and given the broad range of possible evidence that could be presented, in any given matter, estimating would be difficult at best. One can look to the broad range of fees and costs estimated for community based or other objections for guidance found in Module 1 of the Applicant Guidebook. With respect to fees, it has now been clarified that registry operators need not pay unless and until the trademark holder is deemed the prevailing party, and all fees will be refunded to the prevailing party.

Some suggest that the elements of a complaint are not sufficiently stated and one group thinks a statement of harms should be required. With respect to the elements of a complaint, there is no suggestion as to what is not sufficient and the elements have been reviewed for sufficiency by experts in

dispute resolution. In agreement with one suggestion, there will be an inclusion to state that the complainant has been harmed, although it will not require the precise level of harm.

In terms of appeals, some suggest:

- more clarity in terms of timing and panelists who may preside over an appeal,
- when ICANN will implement a remedy,
- whether evidence can be presented.
- there are too many avenues of appeal or that they are redundant with the dispute resolution term in the registry agreement.

Revisions will be made to the appeal section of the PPDRP to clarify issues about timing and scope of an appeal, the timing of the imposition of a remedy, as well as which panelists may preside over an appeal. The nature of appeals, however, are not redundant as one commenter suggests. An appeal of the Expert Determination is about the panel statements, while the invocation of dispute resolution via the Registry Agreement is about ICANN actions with respect to imposition of remedies.

With respect to the Threshold review, one group suggests that if Administrative review finds a complaint deficient, that the Complainant should have an opportunity to amend without forfeiting a filing fee. Another group suggests that the Threshold Review Panel and the Expert Panel should not have the same panelists. We agree with both these suggestions.

Allowing for a short time to amend a Complaint for procedural deficiencies seems reasonable and has been included. So too has the indication that no member of the Threshold panel shall serve as an Expert Panel member.

One group suggests changing the term Default to Failure to Respond, to avoid the stigma of the word Default. Another suggests that no determination on the merits should be made if a party defaults. No changes will be made to the default section with respect to these comments. While a failure to respond should be considered a default, the party that failed to respond should still be given the opportunity to prevail on the merits.

One group's suggestion that panelist should be selected on a rotating basis will be incorporated. Two have suggested that a three-member panels should be the default position, but since a three member panels can be requested by either party, the current position seems sufficient and more economical unless one of the parties makes an affirmative request.

Other comments discuss joinder, reply opportunities, discovery, and suspension of the proceedings. Joinder, when appropriate, is always encouraged, but will be left to the Providers to make that determination. If the facts and circumstances are sufficiently similar, it is anticipated that the Provider will have rules in place to address such circumstances. In those cases, those rules should apply, although Providers will be encouraged to consolidate matters to the extent consolidation is appropriate. As for reply opportunities, the trademark holders should have the right to ensure each of their points is heard. In terms of discovery, because the parties are incented to provide as much information as they cans, it should be left to the panel to determine more information is required, but this dispute resolution mechanism should not be an opportunity for parties to conduct discovery for any particular purpose. As for suspension in connection with settlement discussion, there is no reason that, in a post-delegation mechanism, that the panel should not consider a stay pending such discussion. That, however, will be left up to the relevant panels.

Remedies

Key Points

- Panels' Determinations will be given great deference, however, ICANN is in the best position to understand the effectiveness and effect of recommended remedies and will make the final determination.
- While a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not referenced in the Registry Agreement.

Summary of Comments

Advisory nature of panel conclusions.

Widespread use of the PDDRP is seriously undermined given that ICANN can treat panel conclusions as merely advisory with no obligation on ICANN's part to take any action against a registry. If a finding of specific bad intent, including even that established by a *substantial* pattern of misconduct, does not result in serious consequences for the registry operator, what else is required to trigger ICANN taking action? At a minimum, such a finding should trigger immediate action by ICANN against the registry, to provide certainty to all ICANN stakeholders and justify the legitimacy of the PDDRP/RRDRP process. *Verizon (20 July 2010). IPOA (21 July 2010). CADNA (21 July 2010). Rosetta Stone (21 July 2010). BC (26 July 2010). NCTA (Module 3, 21 July 2010).*

Why is ICANN afforded such discretion especially given that ICANN is not a party of the dispute? This raises issues of privity of contract that we have raised with ICANN but to which we have not received any response. *K. Komaitis (21 July 2010). R. Dammak (22 July 2010).*

Decisions by a PDDRP expert panel should be considered final in most cases. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. Otherwise, the Registry Agreement should include a provision that parties must abide by the decision of an expert panel in the case of a PDDRP. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Deletion of domains names. The expert panel adjudicating a PDDRP complaint should have discretion to delete domain name registrations in certain cases (e.g. where the registrant is the registry, or where a relationship can be shown between the registrant and the registry at issue) and thereby prevent the domains in these cases from remaining with the registrar. *AAMC (21 July 2010). INTA Internet Committee (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010). Microsoft (21 July 2010).*

Panel authority. A panel should not be able to influence the adoption of a remedy that a court cannot order or that ICANN cannot implement under the terms of an applicable Registry Agreement. *RySG (21 July 2010).*

Determining Malice. "Malice" is a term which ranges in meaning across UK and US jurisprudence and may not have meaning at all to those in countries without the common law. Further, its definition ranges from actual intent to disregard. RySG strongly recommends defining the term clearly so that its meaning is clear and unequivocal. Also, we advise that in the extraordinary remedy of terminating the

Registry Agreement, the value of the gTLD to the community and the existing registrants be considered and weighed (e.g. revised language: "the clear and unequivocal intent to cause great economic harm to the trademark owner and provided no value to the Internet community or the domain name registrants independent of this intended harm" and that in making its recommendation of the appropriate remedy, the Expert Panel will consider the ongoing harm to the Complainant, as well as the harm the remedies will create for the registry operator and other, unrelated, good faith domain name registrants operating within the gTLD). RySG (21 July 2010).

Challenge to remedy.

Under Sec. 22 the registry operator may challenge ICANN's imposition of a remedy. This means that the initial determination may be subject to both an appeal and a challenge relating to the remedy, both of indeterminate length. This seems unpalatable from the complainant's point of view. IPOA (21 July 2010).

RySG would move the language about ICANN waiting to impose a remedy to the "challenge to remedy" section (sec.22) and requests clarification on how the 10 day period in this section interacts with the 20 day appeal timeframe in sec. 21. RySG (21 July 2010).

RySG suggests the following language added to sec. 22 to create consistency with the provision that the Expert Determination shall be reviewed de novo and so that the registry operator should receive the same protections for alleged violations and claims of termination under the PDDRP that it has for alleged violations of the Registry Agreement: "Any arbitration shall be de novo and determined in accordance with the parties' respective rights and duties under the Registry Agreement. Neither the Expert Determination nor decision of ICANN to implement a remedy shall serve to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement, including any and all provisions providing for notice and an opportunity to cure breaches of the Registry Agreement." RySG (21 July 2010).

Availability of Court or Other Proceedings (sec. 23). For consistency with the UDRP, RySG proposes that Sec. 23 be amended to read:

"Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability. Neither an Expert Determination or other proceedings under the PDDRP shall operate in any way to prejudice or otherwise affect the position of any party to a court proceeding, which shall be conducted independent of the PDDRP and according to the standards of trademark law.

In those cases where a Party provides the Provider with documented proof that a Court action was instituted prior to the filing date of the Complaint in the post-delegation dispute proceeding, the Provider shall suspend or terminate the post-delegation dispute resolution proceeding. In all other cases in which a Court action is instituted before the conclusion of the PDDRP proceedings, the Provider shall determine whether a stay is consistent with the interests of justice, including considering whether there is a possibility of inconsistent findings or results if a stay is not granted, the presence of any third parties in the Court proceeding and the scope of the claims and relief sought in the Court proceeding." RySG (21 July 2010)

Analysis of Comments

The imposition of remedies following an expert determination in a Trademark PDDRP has been the subject of many comments. Indeed, there is a great appreciation for the difficult nature of potential remedies and a concern that legitimate registrants not be harmed in the process. Such concerns are the most important and are taken extremely seriously in the development of the PDDRP available remedies.

Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights, is also the reason why deletion of names is not a remedy, although some suggest it should be. Registrants are not a party to the Trademark PDDRP. The trademark holder can always use the URS or UDRP to prevail in having a domain name suspended or transferred.

The current PDDRP model requires a finding of malice in order to recommend a remedy of termination. Inclusion of malice was an earlier recommendation of the RySG. Another member of that stakeholder group now recommends alternative language ("intent to harm the trademark holder and failure to benefit the Internet Community") now. We elect to retain the original recommendation of the RySG.

Finally, comments have been made suggesting revisions to the language regarding the ability and timing to challenge remedies and availability of court proceedings. Some of the additional language will be adopted and some will not as it is felt it provides too much protection to the registry operator or improperly imposes requirements on courts or arbitration panels. The suggestions involving timing of when ICANN will implement remedies will be incorporated, as will the fact that a remedy is not intended to prejudice the registry appointed arbitrator in an arbitration. Others will not be incorporated. In particular, the fact that a decision on imposition of a remedy will be heard de novo if an arbitration is filed. ICANN is not qualified nor is it appropriate to have ICANN re-argue the Complainant's case in the PDDRP proceeding. Further, while a remedy shall not be inconsistent with those available under the Registry Agreement, there must be flexibility that it can be one not specifically referenced in the Registry Agreement.

REGISTRY RESTRICTIONS DISPUTE RESOLUTION PROCEDURE (RRDRP)

Key Points

- Instituting a RRDRP is not intended to replace ICANN’s contractual compliance responsibilities.
- While an Expert Determination will be given great deference, ICANN must have discretion to impose remedies because ICANN is in the best position to understand whether recommended remedies might harm legitimate registrants in some fashion.

Summary of Comments

Standing.

The RRDRP should be available to any interested party to enforce the requirements agreed to in a community gTLD in its registry agreement. The standards of “defined communities” in Section 5 and “strong association” in Section 6 may preclude legitimate claimants from having standing who are outside these definitions. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

ICANN should delete the standing requirement or adopt the same threshold used for oppositions under the Lanham Act, namely “any person who believes that he would be damaged by” the ultra vires actions of the registry. Section 7 should also be amended to add a requirement that the complaint include a statement of standing. *INTA Internet Committee (21 July 2010)*.

Registry protections. The PDDRP processes and procedures have evolved more than those of the RRDRP. Each of the protections for registries in the PDDRP should also be applied to registries under the RRDRP, including those related to review and appeal of RRDRP decisions. *RySG (21 July 2010)*.

PDDRP and RRDRP should be combined. *Verizon (20 July 2010)*. *CADNA (21 July 2010)*. *AT&T (21 July 2010)*. *INTA Internet Committee (21 July 2010)* *Rosetta Stone (21 July 2010)*.

Evidentiary standard lower than PDDRP. It is unclear why the RRDRP has the lower “preponderance of the evidence” standard—i.e., why is one stakeholder group allowed a reasonable standard of proof for one set of bad faith registry abuses over another stakeholder group with an equally valid set of claims. *Verizon (20 July 2010)*. *AAMC (21 July 2010)*. *Rosetta Stone (21 July 2010)*. *BC (26 July 2010)*.

Use of Experts.

The discretion to add experts to RRDRP proceedings, in addition to the already-appointed expert panel, should be eliminated or greatly curtailed to extraordinary cases pursuant to strict limitations. It is unfair to add testimony from an expert or experts that neither party has solicited nor which neither party will have a chance to cross-examine, and for which the parties must shoulder the unknown expense. The strict limitations under which a panel would have discretion to select an expert would be: a predetermined scale of fees for experts so that parties can assess costs in advance; the panel’s intention to appoint an expert should be communicated to the parties at the earliest possible stage so that parties can lodge objections; and any appointed expert should prepare a report summarizing their conclusions which is provided to the parties in sufficient time to allow them to present contrary arguments and evidence, possibly including a rebuttal from another expert. All of these materials should be part of the

record presented to the panel for its consideration. Further, Section 13 should be revised to provide that disputes under the RRDRP will usually be resolved on written submissions and without appointing experts and that if the panel believes that appointing an expert is appropriate, the panel will not appoint more than one expert without the stipulation of the parties to the proceeding. *INTA Internet Committee (21 July 2010)*.

Remedies.

Decisions by an expert panel should be considered final in most cases, without ICANN setting aside the decision in favor of a different determination. ICANN's discretion to make its own determination on what remedies to impose should be limited to cases where the panel decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

The expert panel adjudicating the RRDRP should have discretion to delete, transfer or suspend domain name registrations in certain cases (e.g., an affiliated registry and registrant). *AAMC (21 July 2010)*. *INTA Internet Committee (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Suspension of accepting new domains as provided in Section 16 should be permitted to include registry operators that acted in bad faith, with gross negligence, with malice, or that are repeat offenders of the agreement restrictions. *INTA Internet Committee (21 July 2010)*.

Fees. The potential expenses and outcomes of the RRDRP are highly unpredictable. Expert panels can appoint experts at their complete discretion and over the parties' objection. There are no caps on expert fees and the potential expenses of the proceeding are highly uncertain. These factors are likely to drive potential complainants away from using the RRDRP and toward litigation. *INTA Internet Committee (21 July 2010)*.

Analysis of Comments

The RRDRP has attracted comments with respect to standing. Some suggest that anyone who can claim harm should have standing, and not just those who are associated with the community. Standing is limited because the nature of the claim is limited to when a registry fails to comply with its own restrictions and there is harm to the community or community member. If, for example, trademark holders believe a domain is infringing its rights, there are several avenues for redress, including the URS, the UDRP and the Trademark PDDRP.

Furthermore, it should be remembered that instituting a RRDRP is not intended to replace ICANN's contractual compliance responsibilities. ICANN will continue to pursue its contractual compliance activities and enforcement for all of its contracted parties. A robust RRDRP will, however, be an additional avenue for protecting the interests of legitimate and eligible registrants within community-based restricted TLDs who otherwise could see their interests in their registrations tarnished by registrations made in violation of the promised restrictions associated with the TLD.

Some think that the RRDRP should be combined with PDDRP, and that the provisions under both should be the same, including the evidentiary standard. While the current versions of each posted in November 2010 with this analysis are now quite similar, there are some distinctions given the nature of the claims and therefore are set out separately. Indeed, because the RRDRP addresses limitations

specifically placed on the registry operator, it makes sense to have a lower evidentiary standard. In practice, it is possible that the same providers will administer both dispute resolution processes.

One group suggested placing some limitations on the ability of a Panel to appoint independent experts. Some of those suggestions are appropriate and will be incorporated into the RRDRP.

The imposition of remedies following an expert determination in a RRDRP has been the subject of comments. Some question why ICANN should have so much discretion to impose remedies recommended in the Expert Determinations. Protection of registrants is precisely the reason for such discretion. The Expert Panel is in place because of its expertise in dispute resolution and fact finding. The Panels' Determinations will be given great deference during the imposition of remedies against the registries. However, ICANN is in the best position to understand whether those recommended remedies might harm legitimate registrants in some fashion. Thus, for the protection of those legitimate registrants, it is important to maintain discretion.

The protection of registrants' rights is also the reason why deletion of names is not a potential recommended remedy in most circumstances, although some suggest it should be. Registrants are not a party to the RRDRP. That said, the suggestion that such a remedy be permitted if the registrants are affiliated with the registry operator is appropriate and will be incorporated.

REGISTRY AGREEMENT

Vertical Integration

Key Points

- The community continues to be significantly divided on the proper approach to vertical integration of registrars and registries;
- The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf>), which sets out several potential approaches to this issue;
- No consensus at the GNSO has been developed on this issue;
- The ICANN board of directors has directed the ICANN staff to remove restrictions on registry-registrar cross ownership, subject to certain safeguards.

Summary of Comments

The 2% figure in the DAGv4 is unreasonable. CORE proposes the following: a general rule limiting cross ownership (and control) between registries and registrars with a 15% limit makes sense. We also propose a presumptive acceptance of greater than 15% cross-ownership (up to 100%) provided that the entity/group does not act as both a registry and registrar/reseller under the condition that they have relatively low market relevance (well below market power standards). There might be a need for an exception to the principle, allowing a registry to act as a registrar for its own TLD and we would propose a mechanism and guidelines for such exceptions (in some cases not just for the vertical separation rule but also for the need to use ICANN-accredited registrars). *A. Abril i Abril (Module 1, 21 July 2010).*

It is worth noting that the DAGv4 language does not prevent ICANN registrars from owning an entity that applies for a TLD as long as not more than 2% of their shares in the applying entity are not “beneficially owned.” If there is no consensus on the cross ownership issue, ICANN has an obligation to approve a position that ranges between the Nairobi resolution (strict separation up to 2%) and the status quo for the majority of existing contracts (strict separation up to 15%). Choosing a position outside that range would represent policy making by the Board without community support. *R. Tindal (21 July 2010).*

ICANN should consider exemptions from the restrictions on registrar cross-ownership as currently discussed in the Vertical Integration Working Group, such as SRSU scenarios, small community TLDs, and orphan registry operators. The proposed 2% threshold for cross-ownership appears unduly low. *eco (21 July 2010).*

Exceptions to the vertical integration policy are needed. It is not fair to mandate no vertical integration especially for non-commercial, registrar-based TLDs. We propose an open market with full competition. Vertical integration protects small registries who serve specific customer groups (like government organizations and public interest organizations). They may focus on perfecting the pre-check rules and procedures for registrants’ equity and authority, rather than fight for their market share. *CONAC (22 July 2010).*

Barring ICANN-accredited registrars from assisting new gTLD applicants or from applying for their own TLD is discriminatory and bad policy. The heavily restrictive language of Article 1.2.1 of Module 1 and Articles 2.9a-c of the proposed new gTLD agreement arbitrarily discriminates against ICANN-accredited registrars in preventing them from providing assistance of any kind to prospective new gTLD applicants. This restriction seems to contradict the goals of the new gTLD program to foster diversity, encourage competition and enhance DNS utility. The language in Article 1.2.1 of Module 1 and in the proposed new gTLD agreement should be amended to delete this prohibition. INDOM (7 July 2010). Key-Systems (21 July 2010). eco (21 July 2010). EuroDNS (22 July 2010). TLDDOT (22 July 2010). A. Abril i Abril (Module 1, 21 July 2010).

Single user or corporate TLD—exception.

There is little need to relax the strict prohibition on common ownership of new gTLD registries and registrars that the ICANN Board adopted in Nairobi. The main significance of the debate on vertical integration concerns single user or corporate TLDs (sometimes referred to as “.brand”) for which different treatment is appropriate. There is no evident reason why TLD registries in this category should be barred from controlling their own accredited registrar; from entering into exclusive arrangements with an independent accredited registrar; or from dispensing with accredited registrars altogether and allocating second level domains as they see fit. Defining the contours of this category is challenging and whether ICANN meets it successfully could have a major impact on the viability of the new gTLD launch. COA (21 July 2010).

Concerns over common ownership of registries and registrars in the open domain market do not apply to private registries (such as a .brand for private use). IBM is pleased that this concern has been noted and ICANN has not foreclosed the issue as to whether one entity may act as both a registry and registrar in all circumstances. IBM (21 July 2010).

At a minimum, the vertical integration issue should be clarified so that individuals who control an accredited registrar for purposes of managing their own domain and who do not offer registrar services to the general public are in no way barred from playing a major role in a new gTLD applicant entity. ICA (21 July 2010).

Not-for-profit organizations—exception. ICANN should offer an exception to the limitations on vertical integration/cross ownership that provide a single registrant TLD or single registrant/single user TLD to meet the needs of not-for-profit organizations that might register a new gTLD strictly to execute a public service mission and not for commercial purposes. Not-for-profits also should not be prohibited from acquiring the services of an ICANN registrar to fulfill registry services, as this will unduly limit the pool of qualified registry service providers for consideration. Red Cross (21 July 2010).

Community-based organizations—exception.

Vertical integration exceptions should be granted to community-based organizations with a structure that ensures that registry data cannot be abused and used to raise prices and make valuable, premium domains unavailable to the public (e.g. organizations that do not require the assistance or the marketing distribution channels of current registrars). Newcomer/new entrants with no prior business in the registrar/registry business and with innovative business models and technology should be allowed to vertically integrate in order to help level the playing field and compete with the likes of VeriSign, Afilias or GoDaddy, who are primed to most benefit from new gTLDs with or without vertical integration. We

strongly oppose any proposal which ensures advancement of the existing large registries and registrars with market power. *.MUSIC (20 July 2010)*.

The DAGv4 “default” position should be amended and exceptions should be put in place to allow for specific categories (e.g. a TLD based on a brand or a specific language community may want to have stronger ties with a specific registrar to ensure its acceptance and growth). *EuroDNS (22 July 2010)*.

A hybrid approach under which a registry can act in a limited fashion as a registrar could be beneficial to community-based gTLDs both in terms of costs and in terms of ability to manage registrants. *BITS (22 July 2010)*.

Some form of vertical integration would be beneficial or even necessary for some of the new gTLD initiatives. Giving new registry operators the opportunity to run an affiliated ICANN accredited registrar, even if restricted to no more than 100,000 names under the TLD, would greatly help them to have exposure to their target audience. Even more relevant strategically is to provide nondiscriminatory access to registry services to all ICANN accredited registrars because they are the key to a successful TLD. The registry operator would use a uniform agreement with all registrars. The registry operator could be evaluated in 1 or two years to assess its performance regarding the provision of equal and nondiscriminatory access to all ICANN accredited registrars so the limits on the number of allowed domains could be increased or completely removed. With this model, the registry operator can design a business model that can help all registrars be successful, while achieving sustainability and economic stability for the TLD. *NIC Mexico (21 July 2010)*.

Vertical integration requirements should be removed. The addition of vertical integration rules to the DAGv4 may have negative consequences on applicants who seek to hire third parties to provide backend registry services. The effective choice becomes extremely limited. To avoid this problem, the requirements on vertical integration should be removed. *A. Al-Zoman (21 July 2010). Arab Team (21 July 2010)*.

Full registry/registrar cross ownership should be allowed and would be beneficial to stimulating growth and innovation, especially in small and specialized TLDs. Cross ownership should not prohibit a registrar from selling domains from a registry in which it holds shares, provided equal access to registration is guaranteed and does not discriminate against other registrars. Some ccTLD registry operators have been acting as registrars for years. New gTLDs will likely reach a market penetration comparable to ccTLDs, especially new geoTLDs. It therefore makes sense to allow similar business models and models of integration in the sales channel. Any potential harms can be more effectively handled through enforcement. Compliance will be monitored through ICANN mechanisms as well as through competitors in the market. By contrast, a quota on ownership limitation is arbitrary and will not in itself prevent any harm. No cap should be implemented on cross ownership between a registry service provider (registry tech provider) and a registrar but similar levels of limitations of control should be required. With strong and flexible rules and a strong and empowered enforcement scheme, the provision of registry services by registrars as well as cross ownership of registries and registrars would pose no greater risk of harmful action or abuse than any other setup. ICANN and its staff need to make a decision to allow greater innovation and freedom of choice and to building a strong compliance framework. The restrictive policies of DAGv4 have served the interests of hardliners and incumbents to refuse any compromise. *Key-Systems (21 July 2010). Blacknight Solutions (21 July 2010). EuroDNS (22 July 2010)*.

The vertical integration language in DAGv4 is unfair, biased, and anticompetitive and potentially violates antitrust and consumer protection laws. ICANN has given no justification for the wholesale exclusion of ICANN accredited registrars from participating in the new gTLD marketplace. *Demand Media (22 July 2010)*.

JN2 proposal support.

In the spirit of reaching consensus on this issue, Neustar urges the Board to adopt the so-called JN2 proposal. It allows registrars and their affiliates to be registry operators provided they agree not to distribute names within a TLD for which they or their affiliates serve as the registry operator. It allows exceptions for single registrant TLDs, community TLDs and orphan TLDs. For the first 18 months, certain restrictions apply toward back-end registry service providers, after which they may petition ICANN for a relaxation of those restrictions. *Neustar (21 July 2010)*.

If the Vertical Integration Working Group does not reach consensus, then regarding Section 2.9 of the registry agreement, Neustar recommends: (1) de minimis exception should be at least 5%, which is consistent with federal securities reporting and provides a clear public method of verifying ownership; and (ii) the beneficial ownership definition lacks critical elements needed to define it to include other indicia of indirect control (these critical elements are currently found in Rule 13-d of the rules under the Securities and Exchange Act of 1934), without which there will be loopholes leading to gaming. *Neustar (21 July 2010)*.

Free Trade Model support. We support the Free Trade model. Cross ownership and vertical integration restrictions are artifacts of 1999 conditions and should be abolished in their entirety short of an actual showing of market dominance by specific players. We are also concerned about the current working group process—i.e., registries and registrars deciding together to shape the competitive landscape is harmful to the Internet, to ICANN and the participants in the group. Competition authorities in the U.S. and Europe are the right entities to examine and control issues of anticompetitive behavior on the Internet. We strongly oppose the Afilias/PIR proposal (aka RACK)—it mainly advances the interests of the proposers. The CAM model, among other problems, is liable to serious unintended consequences, up to and including wholesale governmental intervention in ICANN accreditation processes. We also will not support any proposal that includes an arbitrary percentage threshold of either ownership or control (e.g., JN2), just because it is less bad in other ways, or because the proposers seem less motivated by self-interest. If we are asked to choose between the various proposals other than the Free Trade model, we prefer that outlined in the DAGv4. *Minds + Machines (21 July 2010)*. *.MUSIC (22 July 2010)*.

Clarify the terms “registry services” and “Registry Services” as used in the guidebook. The use of both lower case and upper case for these words is confusing and requires clarification. We believe the upper case “Registry Services” is intended to create a specific definition to the list of “Registry Services” outlined at Question 23 of the Evaluation Criteria and within <http://www.icann.org/en/registries/rsep>. It is not clear if the lower case usage assumes the same meaning. In some sections the usage may be interpreted in a manner which is not ICANN’s actual intent—e.g., Module 1, Restrictions on Registrar Cross-Ownership, point 3 (page 1-18). *AusRegistry (20 July 2010)*.

Analysis of Comments

Vertical integration has been the subject of substantial study and review. The Vertical Integration PDP Working Group has submitted a Revised Initial Report on Vertical Integration Between Registrars and Registries (available at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf>), which sets out several potential approaches to this issue. The GNSO has indicated that no consensus has been reached on this issue. As a result, the ICANN board of directors, following extensive and careful review of input from legal advisors, economic experts and the community has directed the ICANN staff to remove many restrictions on registry-registrar cross ownership in the draft registry agreement being posted as part of AGBv.5.

Although restrictions on cross ownership have been removed, the Board determined that the registry agreement should contain restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against:

- a. misuse of data; or
- b. violations of a registry code of conduct;

The Board also directed that these provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages.

As a result of this directive, the registry agreement will now require that future Registry Operators comply with a Code of Conduct (a suggested form is set forth in new Specification 9), designed to prevent abuses that could result from registry-registrar cross ownership. Violation of this requirement is a breach of the new Registry Agreement.

In addition, ICANN will have the ability to refer issues raised by cross ownership to the relevant competition authorities.

Finally, Specification 1 to the draft registry agreement being posted as part of AGBv.5 has been amended to provide that ICANN will have the ability to cross-ownership issues through the consensus and temporary policy process.

Whois

Key Points

- Searchable Whois is supported by certain members of the community interested in the protection of third party intellectual property rights;
- While such a service may offer some benefits, the potential costs to other community members should be further studied.

Summary of Comments

Support for Searchable Whois. The special arrangement approved by the Board on an explicitly non-precedential basis for the tiny .name registry is basically irrelevant. The registry agreements ICANN recently signed for .asia, .mobi and .post go well beyond what is proposed in DAGv4 and represent

current best practice for gTLD registry agreement. They require fully searchable Whois services at the registry level and for all registrars sponsoring registrations in those domains, and also call for registrars to adhere to a compliance review policy. These reasonable and practical requirements should be carried forward in the base registry agreement for new gTLDs. Given that more accurate Whois data is an essential tool in combating malicious and illegal behavior online, ICANN has provided no cogent reason why it should not take a more proactive role in setting the ground rules for the new gTLD space. *COA (21 July 2010)*. Microsoft strongly supports the proposed requirement for a fully searchable Whois service (Spec. 4, Section 1.8). The benefit would be even greater if registries were required to require their registrars to also provide fully searchable Whois. ICANN must improve Whois compliance efforts; otherwise the searchable Whois requirement is likely to be of less value. *Microsoft (21 July 2010)*.

Opposition to Searchable Whois. Specification 4 contains a new Section 1.8 that is highly problematic. It presents technical, policy, privacy, security, and legal issues for the wider ICANN community. The DAG process is insufficient for understanding those issues and making informed, fact-based decisions about them. The RySG requests that 1.8 be deleted for the following reasons:

1. Policy: By making the service mandatory, ICANN would make gTLD policy unilaterally via the contract process. And it would circumvent a current GNSO policy-making effort. This WHOIS service is currently under review at the GNSO via its “Inventory of WHOIS Service Requirements” effort (<http://gnso.icann.org/issues/whois/whois-service-requirements-draft-final-report-31may10-en.pdf>) The technical experts who reviewed the service via the GNSO process noted that it presented a variety of technical, privacy, and social issues that needed further examination.

2. Technical: it is unknown if such services can be provided within the contract’s WHOIS SLAs. Such a service is not technically easy to provide. To our knowledge, a service of this nature has never been attempted on a large scale. The requirement “without arbitrary limit” means the service must allow extremely large, broad searches, which could swamp or stall the service. They might also require cookie tracking, which is not even possible for port 43 queries.

3. Cost: the service will impose new, significant, and unknown costs on registry operators.

4. Legal: The service is not required to establish bad faith under the UDRP. Many adequate resources and tools exist to do that, and have been used successfully for the past ten years.

5. Technical: Specification 4 deals specifically with Port 43 and Web-based WHOIS. Those may be inappropriate mechanisms to perform such searches.

6. Privacy: the service presents some obvious issues that members of the wider ICANN and Internet community may be concerned about. The privacy issues should be examined carefully, and more attention should be brought to them than the DAG4 affords. The phrase “subject to applicable privacy policies” is confusing, and the RySG does not know what it might mean.

7. Security: The DAG process is insufficient to quantify the possible malicious uses of such a service. The issue deserves greater study.

8. Technical / Security: it is unknown what “control structure” may be sufficient “to reduce the malicious use of the searching capability itself.” It is impossible for Registry Operators to build compliant control solutions since no one seems to have defined the problem.

9. Security: there are other, existing tools that provide cross-identification of domain names during professional investigations of malicious conduct. The proposed WHOIS service is not yet justified on the basis of security because no one knows if the service’s drawbacks outweigh the supposed security benefit.

10. Security: the SSAC has demonstrated that WHOIS is mined by spammers (See SAC023: <http://www.icann.org/en/committees/security/sac023.pdf>) The service above could make this even easier for spammers and other bad actors.

11. Legal and cost: The parenthetical comments in 1.8 DAG4 misunderstand existing contracts. Existing contracts say that such WHOIS access may optionally be provided by “a participating registrar, at the registrar’s expense”— not provided by the registry, or at the registry’s expense, as DAG4 requires. *RySG (21 July 2010)*.

This paragraph poses both substantive and procedural problems. The bracketed language proposes additional requirements for exposure of WHOIS data. The requirement would place unwarranted additional burdens on registries and registrants without corresponding benefits to the community at-large. Bracketed text buried deep in DAGv4 is not the appropriate place to make WHOIS policy. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

Thick Whois should be required by the Registry Agreement, as recommended by the IRT.

The DAGv4 requires registry operators to provide a publicly available WHOIS service but fails to emphasize the importance of providing accurate and accessible registry information. ICANN should educate registries regarding the importance of providing reliable registrant contact information that is available to users in a fair manner. This is particularly important for not-for-profits with limited budgets and resources. *AAMC (21 July 2010)*. *IPOA (21 July 2010)*. *Red Cross (21 July 2010)*. *NPOC-FC (21 July 2010)*.

Thick Whois lookup—inapplicable to government and military. The specification 4, the data disclosure pursuant to a thick Whois model obviously is not applicable to TLDs for government and military use as the security of that data is of great importance and should not be fully disclosed. The best solution is to make some exceptions and make the Whois lookup service available to the public within proper range. *CONAC (22 July 2010)*.

Whois data quality policy disclosure. ICANN should require applicants to disclose their policies for Whois data quality—i.e. spell out how they will require registrars who sponsor registrations in the new gTLD to ensure the accuracy and currency of Whois data that they collect. The best approach is to include Whois data quality requirements in registry agreements with new gTLD operators, but disclosure in the application is a worthwhile fallback. ICANN should be able to use contract compliance tools to pursue registries that misrepresent their plans on critical issues such as improving Whois data quality. *COA (21 July 2010)*.

Analysis of Comments

A requirement to provide searchable Whois data is strongly supported by certain members of the community. However, the RySG has raised a number of technical and legal impediments to the implementation of such a service. The ICANN board of directors has referred this matter to its working group on data/consumer protection, which has not completed its review. For the purposes of the draft registry agreement being posted as part of AGBv.5 contemporaneously with this summary and analysis, the draft requirement has been removed pending further ICANN board direction. Among other options, the working group will consider a proposal that the searchable Whois be retained in the Guidebook as optional – that an added point would be awarded for the commitment to implement this tool; community comment is also invited on this – please refer to the evaluation scoring criteria being posted for public comment as part of AGBv5.

The Whois model in the draft registry agreement is intended to be universally required but exceptions for government and military TLDs might be considered.

Whois requirements are spelled out in the draft registry agreement, and failure to maintain the prescribed records is a breach of the registry agreement entitling ICANN to take action to ensure accuracy. The question of whether to impose additional Whois verification or accuracy obligations on registries would be best addressed through GNSO policy processes, which can be made applicable to all gTLD registrars and registries and not just new gTLD registries.

Rights Protection Mechanisms

Key Points

- Registry-registrar agreements should act to bind registrars to the RPMs contained in the draft registry agreement;
- The draft PDDRP contains procedures for delaying the imposition of ICANN imposed remedies.

Summary of Comments

Section 2.8 Protection of Legal Rights of Third Parties.

1. The RySG notes that while the Registry Operator is required to include the RPMs identified in Specification 7 (including presumably the URS) in their registry-registrar agreements, ICANN should also endeavor to require registrars in their ICANN accreditation agreement to also abide by such RPMs. In addition, Registry Operator shall be entitled to require that registrars in their agreements with registrants require registrants to: (i) also abide by such RPMs (including the URS); (ii) specifically acknowledge that the Registry (and Registrar) has the right to take action with respect to a domain name as provided for under such RPMs and (iii) the Registry shall have no liability to either Registrar, Registrant or any other person for any action taken in accordance with the terms of any RPMs (including in particular the URS).

2. The language requires Registry Operators to “comply with all determinations made by ICANN pursuant to Section 2 of Specification 7.” The RySG notes that a strict reading of this language may imply

that a Registry Operator may be in breach even if it is exercising its right to appeal or review decisions of the PDDRP or RRDRP panels. Therefore it should state: “Subject to any right to appeal or review under the applicable policies, Registry Operator must comply with all determinations and decisions made by ICANN pursuant to Section 2 of Specification 7.”

3. Finally, Specification 7 allows ICANN to amend the RPMs at its discretion. It should be made clear that Specification 7 (and each of the RPMs contained therein) may only be modified through the consensus policy process as it falls within the “picket fence” under Section 1.2.5 of Specification 1. *RySG (21 July 2010)*.

RPMs (5-11). CORE favors pre-launch and post-launch RPMs. These should not prevent the applicant from forming community-based registration eligibility criteria which obviate the necessity of the RPMs ICANN proposes. *E. Brunner-Williams (Module 5, 21 July 2010)*.

Analysis of Comments

The registrar accreditation agreement with ICANN was recently amended following significant input from Internet stakeholders. Further revisions of that agreement can be made through that process and enforcement of new RPMs introduced by the new gTLD implementation will be added to that agenda. In any case, a requirement to comply with RPMs in the registry-registrar agreement is sufficient to bind registrars.

The draft PDDRP contains procedures for delaying the imposition of ICANN-imposed remedies. Agreeing with the RySG comment, the form registry agreement posted with the new version of the Guidebook will be amended to clarify that ICANN imposed remedies are subject to Registry Operator’s rights under the relevant dispute resolution procedure.

Applicants are free to form community-based registration eligibility criteria in accordance with the applicant’s application for the TLD. However, all registry operators will be required to comply at least with ICANN mandated RPMs. For certain community TLDs, this implementation should be straightforward and not onerous due to the registration restrictions in place.

Pricing

Key Points

- The RySG wants flexibility to be able to offer short-term marketing plans;
- Uniform renewal pricing is necessary to prevent predatory pricing, but different pricing models are available with proper disclosure and consent of registrants;
- Hard price caps are not necessary or appropriate for the new gTLD program.

Summary of Comments

Section 2.10 Pricing for Registry Services.

The language contained in the parenthetical that would require 30 days notice in the case of new registrations and 180 days with respect to renewals for the “elimination of any refunds, rebates,

discounts, product tying or other programs which had the effect of reducing the price charged to registrars” would unduly and unnecessarily restrict the ability of registries to engage in seasonal or short-term and targeted marketing programs and/or respond to changes in market conditions with the potential effect of actually reducing the ability of registries to compete on price. The proposed language would not provide new registries with the flexibility in pricing and marketing needed to compete in what is likely to become a crowded marketplace. The 180 day notice requirement when applied to the elimination of refunds, rebates, discounts, product tying or other programs is likely to discourage the introduction of innovative products and services.

Similarly, the requirement that a Registry Operator offer all domain name registration renewals at the same price, unless, the registrant agrees in its registration agreement with a registrar to a higher price at the time of the initial registration also fails to take into account the realities of the marketplace and the true nature of the relationship between Registries, Registrars and Registrants. Registrants enter agreements with Registrars, and the price they pay for a domain name is dependent upon a multitude of factors including term length, number of domains registered, and services purchased that are outside the control of the Registry. Registrars, not Registries, set the price charged and renewal terms to Registrants. Furthermore because of the many different registrar business models, the type of “conspicuous disclosure” of the renewal price contemplated by Section 2.10 is often not practical or realistic, particularly if the price is bundled with other services.

The proposed language would also effectively prohibit Registries from offering marketing programs, refunds, rebates, discounts, product tying or other programs directed at renewing registrants or in any way takes renewal registrations into account. The proposed language could also be deemed to limit the ability to up sell registrants or engage in marketing directed at particular markets.

The RySG recommends that (i) the notice period for the elimination of any refunds, rebates, discounts, product tying or other programs be the same 30 days for both new and renewals of domain registrations; (ii) that language be added to make it clear that nothing in this section prevents a registry from offering rebates, discounts, product tying or other programs of limited duration provided that the duration of such offering rebates, discounts, product tying or other programs is disclosed up front; and (iii) delete the second to last sentence of the section.

In addition, the RYSG repeats its comments from DAG3 which asked in the final sentence, what does “public query-based DNS lookup service” mean? Does that sentence mean that alternative models are not allowed, such as free registration with fees for resolution?

In light of the above, the RySG recommends that the text of Section 2.10 be amended as specifically recommended in RySG’s comments.

RySG (21 July 2010).

ICA appreciates Section 2.10 renewal pricing clarification. ICA appreciates the clarifying language that “registry operator shall offer all domain registration renewals at the same price, unless the registrant agrees in is registration agreement with a registrar to a higher price at the time of initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant.” This will assure that registries cannot tax domain registrants on the economic success of their domains by arbitrarily imposing higher renewal charges. *ICA (21 July 2010).*

Section 2.10—clarification. The phrase “at the same price” is unclear as it has no qualifier (i.e., the same price as what?). The following underlined language should be added to clarify this: “Registry Operator shall offer all domain registration renewals at the same price as the price charged for the initial registration of that name, unless...” *R. Tindal (21 July 2010).*

Price caps should be imposed. To show that ICANN is acting to protect consumers, it is imperative that there be hard price caps embedded in the agreements. Section 2.10 of the base agreement and specifications contains no hard price caps. Registries will be free to charge \$1,000/year per domain or \$1 million/year per domain, for example, to maximize their profits. Because of the “equitable treatment” clause, by not putting in price caps ICANN opens the door for VeriSign and other registry operators to have unlimited price increases. ICANN is not promoting competition but is perpetuating an abusive monopoly –i.e., why is every other technology going down in price, but .com costs are going higher? If ICANN is suggesting that competition will lead to lower prices, there is no good reason that the hard price cap should be any higher than that for .com. *G. Kirikos (1 June 2010).*

Price caps should not be imposed. Imposing price caps will have a detrimental effect on competition and increased diversity of services. Companies that focus on smaller, niche markets like .museum and .pro and which cannot benefit from economies of scale will be unable to exist since they would not be able to cover their costs if they could not charge more than .com. *M. Iqbal (9 June 2010).*

Analysis of Comments

ICANN understands that the current language with respect to special programs that have the effect of reducing the price charged to registrars may be unduly restrictive on registry operators’ ability to conduct short term marketing programs for initial registrations and to respond to fast changing market conditions. ICANN has amended this language in the current draft of the form registry agreement posted with AGBv.5 to address this concern.

The requirement that each renewal registration be offered at the same price as all other renewal registrations is intended to require that all renewal registrations be priced identically. The provision is not meant to require a specific renewal registration be priced at the same price as its initial registration. The intent of this provision is to prohibit discriminatory pricing in the case of successful registrations that cannot easily change names upon renewal. The exception to this provision allows registry operators to operate “premium name” programs that can be renewed at higher prices so long as the registrant agrees to the higher renewal pricing at the time of initial registration and provides documents that evidence that agreement to Registry Operator. It is recognized that the registry operator does not have direct contractual privity with the registrant, but it is intended that this requirement could be satisfied by the registry operator through the registry-registrar agreement. In accordance with the RySG comment, the provision has been clarified to require that if a registry operator wishes to implement a premium pricing program for any of its domains, then it must receive documentation from the registrar (which may be required through the RRA) demonstrating that notice of the premium pricing has been provided to registrants and such registrants have given informed consent to the pricing scheme.

The final sentence of the pricing provision in the form registry agreement posted new Guidebook was modified to make clear that Registry Operator may not charge additional fees for a public query-based DNS lookup service.

After significant discussion and study, it has been determined that price controls would be inappropriate for the new gTLD program. The proposed registry agreement includes price notice provisions, but a general system of price controls would not be workable due to the expected diversity of registry business models and the need for registries to be able adapt their business models to changing environments and competition. Registries should not be restricted from offering a higher level of service or security if that might entail charging a higher price for their services. It is expected that new registries will compete vigorously with each other and with existing registries, both on price and services, to attract new customers and new initial registrations. (The renewal price provisions in the base registry agreement are intended to protect against discriminatory pricing on renewal.) There is no need for a centralized and uniform price control mechanism across all gTLDs, particularly where market power is not an issue. Nor could such a program be effective considering the number of innovative and different business models anticipated. Controls would shackle that innovation. However, if market power were to develop and be abused, then governmental consumer protection and competition authorities will have all powers available to them under law to ensure that consumers and competition are protected. Also, protections have been put in place in response to community comments in order to prevent certain abuses that might occur relating to renewal pricing. For additional discussion please refer to the reports posted at <<http://www.icann.org/en/announcements/announcement-06jun09-en.htm>>.

Other Registry Operator Covenants

Key Points

- ICANN will implement reasonable parameters on its abilities to conduct operational audits;
- Although disfavored by certain members of the registry community, the continuing operations (financial) instrument is a vital tool in ensuring the security and stability of the DNS and the Internet;
- ICANN technical staff has refined the emergency thresholds that could potentially trigger an emergency transition of a registry;
- Registry operator will be expected to cover the costs associated with an emergency transition as it ultimately would be at fault for the registry failure.

Summary of Comments

Section 2.1—the process for adoption of consensus policies is not specified. The second sentence should be changed as follows: “as such policy may in the future be modified in accordance [with] ICANN’s Bylaws applicable to Consensus Policies.” *RySG (21 July 2010).*

Section 2.11—Contractual and Operational Compliance Audits. The RySG accepts that ICANN has the right to conduct contractual and operation audits up to 2 times per year. However, ICANN should understand that these audits are disruptive to normal business operations and they should commit to conducting these audits in a manner that does not disrupt the normal operations of the registry. *RySG (21 July 2010).*

The RySG also notes that 3 business days is way too short of a notice period in that key personnel for registries that must be present during these audits plan their schedules much further in advance than 3

business days. Perhaps at least 5 business days may suffice to ensure that any key personnel are able to make themselves available to ICANN. *RySG (21 July 2010)*.

Continued Operations Instrument – opposition. The requirement for a financial instrument that will guarantee at least 3 years of operation of essential registry services in the event of business failure is an unnecessary drain on the resources of prospective registries already damaged by the long delay of the new gTLD program. The requirement is especially punitive for small registries and will tie up important resources. It will discourage deserving applications and contribute to the failure of others. The goal of protecting registrants can be met by different means. Instead, continuity can be assured through cooperative agreements between registries and/or registry service providers who agree to provide these services in the failed registry. This sort of arrangement, already contemplated by ICANN in its Registry Transition Process document, should be extended to the application evaluation portion of the DAG. ICANN should provide for alternative, non-financial means of guaranteeing registry service continuity, either wholly or in part. *Minds + Machines 21 July 2010*. *NIC Mexico (21 July 2010)*.

Continued Operations Instrument – support. Neustar supports the financial instrument requirement. ICANN has done a comprehensive job to deal with situations where a registry operator is also the back-end registry services provider. A financial instrument is appropriate in such a case since there is no third party to continue the registry operations and therefore ICANN could incur significant costs for transition. The current language does not adequately address the situation where the registry operator does not operate the registry services itself but outsources it to a back end registry services provider. In such cases failure of the registry may not result in loss of critical services if the back-end provider continues operations in the event of an applicant failure. This approach would not require a financial instrument. Neustar notes that ICANN has already addressed the issue of the back-end registry service provider failure by requiring contingency planning and submission of a transition plan. *Neustar (21 July 2010)*.

Section 2.13—Emergency Transition. Taken together, 2.13 and 6.5 say that if a registry operator misses a single escrow deposit, or takes allowed maintenance periods for certain services, ICANN may remove the TLD from the registry Operator’s control. We do not believe this was the intent, but these issues must be fixed so the contract is reasonable and not in conflict with itself. These provisions should be modified for the following reasons:

- DNSSEC: it is unknown what “DNSSEC” means here; the term must be defined. Note that registries are allowed SRS downtime, which means the ability for registrars (registrants) to update keys will occasionally and allowably be offline.
- Data escrow: currently the contract says that missing even one escrow deposit is an emergency and is cause to transition the registry. Such is not an emergency, especially since issues beyond the control of a registry operator (such as Internet transit issues and problems at the escrow provider) may occasionally prohibit the completion of a deposit. The contract should specify that a number of missed deposits in a row should constitute a breach, perhaps at least a week.
- DNS: As per 6.4, registries are allowed to have a DNS name server down for as many as 432 minutes (7.2 hours) per month. Four-hour downtimes would therefore be perfectly allowable. If ICANN is saying that “DNS service” for the TLD should always be 100% available through at least one nameserver, that should be made clear.

In addition, the RySG notes that the requirement that a Registry Operator pay ALL costs incurred is the equivalent of requiring the Registry Operator to write a blank check to ICANN and the designated Emergency Operator. There must be an element of reasonableness, a monetary cap, and an ability for

the Registry Operator to review (and even audit) those expenses as well as an opportunity to dispute the fees. *RySG (21 July 2010)*.

Cost of continuity of operations. Determining the cost for registry continuity requires a discussion of what “functions” are “critical.” Continuity activity is a sufficiently minimal capital reserve element and care should be taken that unnecessary cost is not created. ICANN should make commercially reasonable estimates of the reasonable minimal function cost and publish that for further comment. *E. Brunner-Williams (Module 5, 21 July 2010)*.

Registry operator obligations to a TLD community (Module 5, sec. 2.14—transition to delegation). The requirement that the registry operator operates the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD provides a critical, long-term safeguard for any Community that chooses to delegate authority to a particular TLD operator. *Big Room (21 July 2010)*.

“Relevant community that must be consulted” (p.4, gTLD Registry Transition Process Model). This reference provides assurance that a TLD operator will not change without input from the community under which the current and/or prospective TLD operator would derive authority. *Big Room (21 July 2010)*.

Analysis of Comments

Section 2.1 has been clarified to require that changes to the RSEP process only be made pursuant to ICANN’s Bylaws and the process for adoption of Consensus Policies.

ICANN has implemented reasonable parameters on its abilities to conduct operational audits in the draft registry agreement included in the Guidebook. The parameters seek to balance the desire for effective contractual compliance with the need to provide a predictable operating environment for registry operators.

The continued operations (financial) instrument that is required before a new registry launched operations is a vital tool in ensuring the security and stability of the DNS and the Internet. It will ensure that the financial resources are in place to operate and transition a failed registry. Additional costs imposed on registry operators are outweighed by the benefits to the Internet community and registrants as a whole. The presence of an independent back end registry services provider may not provide adequate safeguards against a failed registry if the services provider lacks the ability to recoup the costs of operating the registry. The continued operations instrument will provide for these costs.

In response to comment, the emergency thresholds that could potentially trigger an emergency transition of a registry have been modified. Revised thresholds are included in the specifications to the draft registry agreement included with this 5th edition of the Guidebook.

Registry operator will be expected to cover the costs associated with an emergency transition, as it is essentially the cause for the registry failure. ICANN recognizes that these costs must be reasonable under the circumstances and that documentation of the costs should be provided to registry operator (both of these issues have been addressed in the draft registry agreement included with the new Guidebook. Because of the wide variety of business models that may be introduced in connection with

new gTLDs and because the size and sophistication of each registry will differ greatly, ICANN is not in a position to make reasonably accurate predictions as to what the costs of transitioning a failed registry may be.

Covenants of ICANN

Key Points

- ICANN will consider any specific proposals to enhance its operational covenants.

Summary of Comments

Article 3—Covenants. The RySG still notes that the covenants in Article 3 are still worded differently and in many cases less favorably to gTLD Registries than the language contained in the proposed ccTLD Fast Track Agreements. Can ICANN please explain why such different wording is warranted? *RySG (21 July 2010)*.

Analysis of Comments

Different agreements require different contractual terms that ICANN believes to be appropriate given the context.

ICANN included the specific language that the RySG requested for the ICANN covenant with respect to the root. If there are additional specific recommendations, ICANN will consider those as well.

Termination

Key Points

- ICANN has implemented the edits to subparagraph (d) regarding termination recommended by the RySG as they provide additional safeguards and therefore promote stability.
- Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement.
- ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

Summary of Comments

ICANN discretion. ICANN should be able to terminate the agreement in appropriate circumstances. *MARQUES/ECTA (21 July 2010)*.

Sec. 4.3 Termination by ICANN.

The RySG appreciates the changes added in Section d, however recommends that the following language be added: “With respect to proceedings described in this subparagraph (d) (i-v) that are involuntary proceedings commenced or instituted against Registry Operator, Registry Operator shall have the opportunity to contest such proceedings, and ICANN’s right to terminate shall not take effect if such proceedings are dismissed within thirty (30) days following Registry Operator’s receipt of notice of their institution.”

The RySG understands why Section e was added, but remains concerned that the language above would supersede the rights to review and/or appeal decisions under the PDDRP. Therefore the RySG requests that ICANN make it clear in the language that this termination would only apply after all reviews and appeals under the PDDRP and this agreement are exhausted. *RySG (21 July 2010)*.

Section 4.4. Termination by Registry Operator. The RySG repeats its comments from v3, as they are still relevant. More specifically, we would like a better understanding of what it would mean to terminate a contract with ICANN for ICANN’s breach, considering that ICANN presently has the sole authority to grant gTLDs. Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? In any event, termination is not a sufficient remedy in the event of a breach by ICANN, as it provides a Registry Operator with no ability to recover any losses. *RySG (21 July 2010)*.

In addition, RySG believes that ICANN should have Service Level Agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions (which are not subject to the limitations of liability) along with a right to be awarded Specific Performance may be the only potential meaningful penalties as opposed to termination by the Registry Operator. *RySG (21 July 2010)*.

Analysis of Comments

ICANN has implemented the edits to subparagraph (d) recommended by the RySG in the draft registry agreement included with the Guidebook.

Registry operator is free to challenge ICANN’s determination to terminate the agreement pursuant to Section 2 of Specification 7 during the 30-day notice period provided by the agreement. The PDDRP also provides that any remedy imposed by ICANN will be stayed in the event that registry operator initiates an arbitration proceeding pursuant to Section 5.2 challenging the PDDRP determination. The draft registry agreement included with the Guidebook will clarify the ICANN’s right to terminate is subject to Registry Operator’s rights under the applicable dispute procedure.

In addition to the right to terminate the agreement in the event of a fundamental and material breach by ICANN that is uncured, registry operator may bring a claim in arbitration for damages. In the event of a termination by registry operator, ICANN would have the right to re-delegate the TLD pursuant to Section 4.5 of the agreement. Registry operator would no longer have the rights to operate the registry in the event of any termination of the agreement. The draft registry agreement included with the Guidebook clarifies that the Registry Operator would lose the right to operate the registry for the TLD in the event of a termination of the agreement or expiration of the term of the agreement.

The ability to challenge, as suggested by the comments, we believe will provide for less disruption and softer landings in cases of termination.

ICANN has requested that the RySG provide more detail on what a Service Level Agreement with ICANN would cover and how it would be enforced.

Re-delegation of TLD

Key Points

- Alternative provisions for a “.brand” TLD have been addressed in the registry agreement to the extent feasible in a manner to provide appropriate protections.

Summary of Comments

Draft Base Registry Agreement—section 4.5 redelegation alternatives.

COA is pleased that ICANN provided an alternative version of section 4.5 under which a TLD cannot be redelegated over the reasonable objection of the original delegate. This provision could be an important safeguard for brand owners who may be interested in experimenting with a .brand registry, since such new TLDs will not be applied for if there is a risk that the TLD might be redelegated to a third party. *COA (21 July 2010).*

The alternative Section 4.5 and the gTLD Registry Transition Processes model are helpful, but further clarity is needed. As written Section 4.5 is not clear whether the registry operator’s ability to reasonably withhold consent applies to ICANN’s transition of the TLD to a successor registry operator or to providing ICANN with the registry data for the TLD. If it is the former, the problem appears to be solved. If it is the latter, it would still be possible for a .brand TLD registry operator to decide to terminate the TLD and, subject to the terms of the registration agreement for its TLD, cancel the second-level registrations. In that event, there would be little useful registry data to transition, but ICANN could still transition the TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. On its face, and subject to the alternative Section 4.5 ambiguity, the gTLD Registry Transition Processes Model would allow ICANN to launch an RFP to transition a .brand TLD to another registry operator where the .brand registry operator decided to terminate operation of the TLD and did not identify a prospective successor. It would be highly undesirable for an RFP process to result in transition of a .brand TLD to another registry operator not affiliated, connected or associated with or sponsored or approved by the brand owner registry operator. If that is not ICANN’s intent, the appropriate clarifications and revisions should be made. *Microsoft (21 July 2010).*

Registry Transition Process Model. Hogan Lovells welcomes introduction of a new Registry Transition Process model which includes provisions for emergency transition in the case of prolonged Registry technical outages. *Hogan Lovells (21 July 2010).*

Analysis of Comments

The alternative Section 4.5 is derived from the .POST registry agreement and was originally contemplated to apply to those TLDs operated by intergovernmental organizations or government entities because it is likely there is no suitable successor operator. This scenario may also be applicable to certain (but not all) community TLDs, TLDs used for infrastructure purposes only, or other types. That

is why the agreement states that the decision to redelegate will be undertaken with discretion. Significant work to identify TLD types or criteria for deciding when delegation is always appropriate or inappropriate did not result in the development of criteria. There is too much uncertainty in anticipated TLD types. ICANN recognizes that delegation of a .brand TLD might not be necessary or appropriate in the event that the registry operator of such a TLD elected to voluntarily wind down the registry. The agreement affords discretion as to whether or not a TLD is re-delegated in order to protect registrants in the TLD and parties that might be negatively affected if a gTLD were to be inappropriately re-delegated or not re-delegated.

Dispute Resolution

Key Points

- ICANN has proposed a compromise with respect to the number of arbitrators in the draft registry agreement included with AGBv.5.

Summary of Comments

Section 5.2 Dispute Resolution—Arbitration. The RySG continues to object to the language on the number of arbitrators insisted on by ICANN. Although ICANN added language to allow 3 arbitrators, it is ONLY if both parties agree. This is not acceptable because it gives ICANN the unilateral right to always insist on 1 arbitrator. This is especially disturbing in light of the fact that ICANN continues to insist on punitive and exemplary damages. Given the seriousness of the remedies, the registry should have the right to sufficient safeguards, including the right to 3 arbitrators if it so elects. *RySG (21 July 2010)*.

Analysis of Comments

As stated during the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has proposed a modified provision in the draft registry agreement included with AGBv.5 that provides for the three arbitrators in the event that ICANN is seeking certain remedies in the arbitration.

Registry Fees

Key Points

- The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of providing services to new gTLDs.
- The costs of the RSEP process will be borne by registry operator in an effort to match benefits to costs, (ICANN may elect to pay a portion of the fee);
- In line with past practice, collection of the registrar fee from registries is necessary in the event that registrars fail to approve the variable accreditation fee; registry operator will be able to recoup the cost of the fee from registrars.

Summary of Comments

Section 6.1 Registry-Level Fees. RySG repeats the comments it made to the v1, v2 and v3 Registry Agreements: “The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share.” *RySG (21 July 2010).*

Section 6.2 Cost recovery for RSEP. RySG urges ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space as detailed in RySG’s earlier comments on versions 1, 2 and 3 of the registry agreement. In addition, the RySG notes that no changes have been made to the amount of the fees recommended for the RSEP panels. We believe the level of fees seems extremely high. What are the individual cost factors that make up this estimate? The RSEP process was implemented several years ago when there was no historical basis that could be used to develop a cost model. There are now a few actual RSEP cases that have been processed. The cost model should be re-evaluated and made more cost effective. *RySG (21 July 2010).*

Section 6.3 Variable Level Registry Fee. RySG repeats is comments regarding v2 and v3 also objects to the notion of registry operators being forced to act as guarantors for registrars, especially in light of ICANN’s role in accrediting these registrars, including vetting and due-diligence regarding financial qualifications of such registrars. At this point in time, registries have no ability to select the registrars they do business with. If ICANN were to revisit the obligation of registries to use all registrars accredited by ICANN that elect to do business in a TLD, then we can revisit this obligation as it would allow the registries to perform due diligence. If ICANN accredits registrars who can’t or won’t pay, this should not become an obligation of registries. RySG repeats the comments it made regarding the v3 Registry Agreement, which suggests additional language: “Registry Operator shall only be required to remit to ICANN the fees described in this Section ...that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a “guarantor” for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator’s failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement.” Finally, as more of the burden of payments to ICANN come from the registries, the registries believe that it should have a similar approval right to the ICANN budget as currently enjoyed by the registrars. *RySG (21 July 2010).*

Different fee models for different types of TLDs. Given the high fees and costs associated with applying for and operating a new gTLD, ICANN should consider setting up different fee models for different types of TLD applications to alleviate the costs on applicants. A sensible fee model will greatly enhance the chance of success for the new gTLD process. *CNNIC (21 July 2010).*

Reduced Not-for-profit organizations. ICANN should reveal and detail its actual costs for reviewing each new gTLD application and consider setting a lower cost pricing structure for not-for-profit organizations that will allow ICANN to recover its costs without imposing additional overhead on the not-for-profit applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees (in objection proceedings fees should be capped, or at least the initial fees that must be paid as a “deposit” on the proceeding). ICANN should consider a two-tiered cost structure to separate commercial uses of the new gTLDs from the informational, educational and lifesaving functions served by not-for-profit organizations. *AAMC (21 July 2010). Red Cross (21 July 2010). NPOC-FC (21 July 2010).*

Reduced fees for small cities, small cultural and linguistic community TLDs.

Special consideration, including reduction of the \$185K application fee and \$25K annual fee, should be given for small cities and small cultural and linguistic communities which do not intend to compete with general commercial TLDs such as .com or new brand TLDs and for whom the current level of fees is not affordable. It is understood that a lower but appropriate application fee is still needed in order to prevent excessive applications. *JIDNC (21 July 2010)*.

Reduced fees for developing country applicants. Special consideration regarding technical requirements and fees for developing country applicants representing cultural, linguistic and geographical communities is appropriate and consistent with the advice of the GAC in its Brussels communication. A. Al-Zoman (21 July 2010). Arab Team (21 July 2010).

Analysis of Comments

The uniform registry fees proposed by ICANN in the registry agreement represent a good faith effort by ICANN to estimate the costs to ICANN of administering the new gTLD program. As such, fee reductions for different types of TLDs are not possible and would result in potential shortfalls in funding for the gTLD program.

The cost for RSEP will be the responsibility of the registry operator seeking to benefit from the proposed new service. Given the potential volume of new gTLDs and the multitude of potential services that could impact the security and stability of the DNS and the Internet, ICANN cannot agree to absorb this cost as there are not the resources available to do so. Alternatively, ICANN could raise fees in other areas but because there would not be a one-to-one match between effort and cost, the increase in fees would probably be set higher than necessary in order to mitigate risk. The current agreement provides the flexibility for ICANN to cover some of the RSEP costs in appropriate situations at its discretion. ICANN will seek to make the RSEP process as cost effective as possible.

The mechanism for the collection of the Variable Level Registry Fee (i.e., registrar fees) is based on all current registry agreements and is necessary in order to ensure that ICANN collects sufficient funds to perform its obligations. In the event that registrars fail to approve this fee, registry operator will be invoiced to cover the fee and may include it as part of the invoiced fees to registrars. Registry operator's registry-registrar agreement should contemplate this possibility and require registrar to agree to the increased fee in the event registrars fail to approve the fee.

Indemnification

Key Points

- With regard to risk sharing among ICANN and its contracted parties, the risks of TLD operation should be borne by registry operator;
- ICANN has agreed to consider certain limitations on registry operator's indemnification obligations.

Summary of Comments

Section 7.1 Indemnification of ICANN. The RySG repeats the concerns expressed in v3, namely, that this indemnification obligation remains uncapped and overbroad. Not only has ICANN ignored the comments made by the RySG, it decided to go the opposite way and add additional overbroad categories of indemnities in favor of ICANN. Not only does ICANN now require the registries to indemnify for everything that arises out of the operation of the registry or the provision of services, it now requires registries to indemnify for everything “arising out of or relating to intellectual property ownership rights with respect to the TLD” and “the delegation of the TLD to Registry Operator.” This violates fundamental fairness, and the notion that indemnification is a risk-transfer mechanism to be used in allocating responsibility for a specific and identified risk of loss. In addition, most of the potential claims relating to or arising out of the delegation of the TLD relate to actions or omission by ICANN and not the Registry Operator. There is no reason for the Registry Operator to be indemnifying ICANN for actions or omissions beyond the control of ICANN. ICANN needs to stand behind its process for the delegation, including everything that is in Applicant Guidebook, dispute processes, etc. None of these were created by, or performed by, the Registry Operator. It is unconscionable to make the Registry Operator indemnify for these types of claims.

Therefore, the RYSG makes the following recommendations:

1. Eliminate the added language in DAG 4 regarding indemnifying for IP claims and claims arising from the delegation of the TLD;
2. Make the indemnity section mutual, limiting the indemnity section to material breaches of representations and warranties, and to gross negligence and willful misconduct of either party.
3. As stated in the RySG comments to v3, delete, “Registry Operator’s operation of the registry for the TLD or Registry Operator’s provision of Registry Services” and replacing it with “Registry Operator’s material breach of any representation or warranty specifically identified as such in the Agreement, or the gross negligence or willful misconduct of Registry Operator, its employees, agents, or contractors in the performance of this Agreement.”
4. As stated in the RySG comments to v3, the RySG requests to insert “reasonable” before “legal fees”.
RySG (21 July 2010).

Regarding Section 7.1(b)-- The RySG repeats its v3 comments, namely, that the RySG advocates that the following sentence be deleted, “For the purposes of reducing Registry Operator’s liability under Section 8.1(a) pursuant to this Section 8.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN’s reasonable satisfaction, such other registry operators’ culpability for such actions or omissions.” There is no way the Registry Operator would know that information or have access to the information to make such a demonstration. *RySG (21 July 2010).*

Analysis of Comments

The risks of operating the TLD are appropriately borne by registry operator. Pursuant to the consultation held with the Temporary Drafting Group on 8 September 2010, ICANN has agreed to consider certain

limitations on registry operator's indemnification obligations in the event of claims related to matters that are completely outside the control of registry operator. ICANN staff has invited the RySG to propose language more precisely defining the exceptions to registry operator's indemnification obligations.

The indemnity limitation provisions introduced in Section 7.1(b) were included in response to comments of the RySG. If a registry operator wishes to avail themselves of this protection, it is appropriate that the registry operator bare the burden of demonstrating the relative culpability. If it is unable to do so, it is appropriate for registry operator to take on the full liability.

Definition of Security and Stability

Key Points

- ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used.

Summary of Comments

Section 7.3 Defined Terms.

In addition, the v3 (now v4) Registry Agreement language seems to come from the Registry Services Evaluation Policy (RSEP) definition of an "effect on security" that is found in all Registry Agreements. The RSEP discusses how new registry services should not negatively impact security, and that new registry services should be compliant with applicable relevant standards. That context is missing in the Guidebook. Without that context, the language has become more expansive and open to interpretation. Both ICANN and the RySG desire that registries function within applicable standards, and that current or future registry services not be the genesis of security problems. *RySG (21 July 2010)*.

Regarding Section 7.3(b) -- The RySG believes this section is over-broad, and conflicts with Specification 6 section 1 ("Standards Compliance"), which refers only to IETF standards.

We also repeat our DAG3 comments: This language is unacceptable: "authoritative and published by a well-established, recognized, and authoritative standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force". ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the Consensus Policy process instead. *RySG (21 July 2010)*.

Moreover, the v3 Registry Agreement definitions misunderstand IETF practices and definitions. The contract language must be revised to adhere to proper terminology. The inclusion of "Standards-Track" [sic] is inappropriate, since only some documents on the "standards track" are authoritative. IETF Internet specifications go through stages of development, testing, and acceptance. Within the Internet Standards process, these stages are called "maturity levels." These maturity levels include "Proposed Standard", "Draft Standard", and "Standard" Specifications.¹ Documents at lower maturity levels are not Internet Standards, do not enjoy enough development or vetting, and registries should not be required to follow them.

Contracted parties should not be required to adhere to IETF Best Practices or “best current practice RFCs”. By definition, best practices are *not mandatory*, and the IETF chose to make them Best Practices for a reason. Nor are IETF BCPs considered technical standards. They tend to deal with processes and procedures rather than protocols -- they represent a consensus of a way to do something because it is recognized that a user experience can be enhanced when there is an agreed-upon way to complete a task. However, interoperability is not usually applicable. As long as the user experiences standards-compliant behavior, ICANN does not need to say more about how that behavior is achieved. *RySG (21 July 2010)*.

Analysis of Comments

ICANN staff has reviewed the use of the defined terms in the agreement and found that they are not inappropriate in the context in which they are used. ICANN must retain the right to act in response to certain threats to security and stability even if those threats are not caused by registry operator or affect systems other than registry operators' systems. ICANN is open to further discussion regarding specific proposed changes to "security and stability" definitions and related provisions, but a wholesale redefinition of stability to focus only on the stability of registry systems would not be appropriate or consistent with other ICANN agreements and policy.

Change in Control of Registry Operator

Key Points

- The new version of the agreement has implemented reasonable parameters for providing consent to proposed change in control transactions.

Summary of Comments

Section 7.5 Change in Control. The RySG repeats its v3 comments, namely, that:

a) In the second sentence, after “organized” insert the text, “in the same legal jurisdiction in which ICANN is currently organized and”. This is in keeping with ICANN’s recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United States “to ensure certainty about ICANN’s registry...agreements.” This is also consistent with ICANN’s promise in Section 8(b) of the Affirmation of Commitments that ICANN “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” RySG is concerned that ICANN’s unwillingness to make the change it requested in its v2 Registry Agreement comments suggests a desire to evade these cited commitments by a re-organization. *RySG (21 July 2010)*.

b) The RySG remains concerned about the impact of this section on securities laws as possibly requiring notification prior to public disclosure. Accordingly, the RySG recommends saving language, potentially as follows: “Under no circumstances shall Registry Operator be required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws.”

In addition, the RySG believes with the additional language inserted, this section has become impractical and not feasible for public companies. There are absolutely no timelines imposed on ICANN, nor are there any real objective standards, which leads to unpredictability and instability. We believe a discussion needs to be had with the legal working group on the Operational and legal aspects of the entire process. We do not disagree that it is appropriate for ICANN to have a consent right, but commercially it needs to be a more stream-lined predictable approach to enable businesses to get loans, approval from shareholders, etc. Most regulators do this within 30 or 60 days. ICANN should adhere to a strict timeline as well. *RySG (21 July 2010)*.

Analysis of Comments

ICANN has revised this provision in the draft of the form registry agreement posted with AGBv.5 to provide that no consent will be required for a reorganization assignment by ICANN only if such reorganization results in a similar entity within ICANN's current jurisdiction.

Potential securities law problems have not been adequately explained by the RySG and the suggested additional sentence is unworkable as many transactions are never required to be disclosed under applicable securities laws.

To provide business model predictability for gTLD registries, ICANN has implemented reasonable parameters for providing consent to proposed change in control transactions, including a 60-day total review period.

Amendment Process

Key Points

- As requested, ICANN will include a wide cross section of the community in future amendment working groups;
- For clarification, the revision of registry level fees is meant to be included within this process.

Summary of Comments

Amendment Working Group composition (registry agreement 7.6(e)(iv)). As all members of the wider GNSO community, particularly registrants, may be affected by amendments to registry agreements, each GNSO stakeholder group should be guaranteed representation in the working group convened to consider amendments. The addition of members beyond registries should not be left to ICANN's discretion. *W. Seltzer (21 July 2010)*. *R. Dammak (July 2010)*.

Section 7.6 Amendments and Waivers.

The RySG is very happy with the changes made in this section and we appreciate all of the work done by ICANN staff in conjunction with the legal working group. The only comments we have would be to add the notion of the determination of fees to pay to ICANN under the agreement as a "Restricted Amendment". We do not believe this is the appropriate process for the determination of how much a Registry Operator pays ICANN. If, however, this is left to the amendment process, then if a request were

made by ICANN to change the fees, then the Registries should have an approval right on ICANN's overall budget. We cannot be subject to a possible amendment of fees, without having any right to get an accounting and approval right over where those fees are spent. *RySG (21 July 2010)*.

Analysis of Comments

ICANN will engage a wide cross-section of the community as part of the working group that will consider uniform amendments to registry agreements. However, it would not be appropriate or necessary for every GNSO stakeholder group to be represented in the group.

The negotiated uniform amendment provision provides ICANN with the ability to make important changes to the agreement without having to negotiate what could be hundreds of contracts separately. Raising fees is a key provision that ICANN intends to be within this process. The provision itself provides multiple safeguards against arbitrary and capricious increases in fees. In order to obtain the approval of registry operators to raise fees, ICANN will inevitably have to demonstrate the need for the those fees and the manner in which they will be spent.

Escrow Specification (Specification 2)

Key Points

- Technical comments have been considered by ICANN technical staff and implemented as appropriate;
- ICANN will not be a party to escrow agreements for new gTLDs;
- Amendments to specification 2 (Data Escrow) must be agreed upon by the escrow agent or an alternative escrow agent must be engaged.

Summary of Comments

Part A --Technical Specifications.

Care must be taken to properly define all terms. For example, "Registry Data", "Registry Database" and "Escrow Records" are never defined. "Deposits" is also not really defined, but is used throughout this Specification 2. In 1.2 reference is made to "full or incremental deposit", but these should follow the capitalized, defined terms.

Part A, 4.8 Detailed File Formats: This is missing the transaction file format for incremental feeds.

Part A, 4.8.1 Domains. #5 says "Registrar Handle for the initial sponsoring registrar". Infinitely reporting a domain's initial sponsoring registrar seems to serve no purpose, and is unduly burdensome.

Part B now says: "Registry Operator will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 no more than once per calendar year." ICANN should not prohibit Registry Operators from auditing their escrow providers more frequently. Registry

Operators are basically held liable for the performance of escrow, and should have the right to look into problems responsibly. The base agreement allows ICANN to audit Registry Operators multiple times per year--ICANN should not prohibit similar diligence by Registry Operators.

Part B, #3 Ownership. A limitation on the "ownership" right must be placed as follows: "for the limited purpose of maintaining operation of the registry." This limitation should apply both during and after the term of the Registry Agreement.

Part B, #5: Copies. Should be amended to read: "... Registry Operator shall bear the expense of such duplication "if the escrow agreement so specifies".

Part B, #6: Release of Deposits. Amend to read: "... or receives one of the following written notices by ICANN, along with evidence that ICANN has so notified Registry Operator in writing," stating that...'

RySG (21 July 2010).

Data Escrow Technical Comments. For the specific reasons outlined in Demand Media's comments, Demand Media believes that use of an Incremental data extract process in the Registry Escrow process will increase complexity, development cost and lead-time to loading data. *Demand Media (22 July 2010).*

Escrow Agent (sec. 1.1). To avoid a significant technical bandwidth burden on the Escrow Agent, this section should state that the Full Deposit will reflect the state of the registry as of time (UTC) on each day as mutually agreed on by Registry Operator, ICANN and Escrow Agent. *Iron Mountain (22 July 2010).*

Deposit transmission mechanism (sec. 2). This section disagrees with Section 4.13(5) of Part A. Iron Mountain recommends that the Specification requires electronic escrow unless approved by ICANN. It is difficult to manage the timing and receipt of deposits which are submitted physically. It is a best practice to reduce the number of touch-points in order to increase speed and security. *Iron Mountain (22 July 2010).*

Escrow deposit format (sec. 4.4.). It appears that ICANN is giving the option to registry operators to submit their escrow deposits in either XML or CSV format. This section is ambiguously worded and needs to more clearly state the option. It is important to state that having multiple file formats can slow down ICANN's or another registry's ability to utilize the escrowed data. *Iron Mountain (22 July 2010).*

Field order in the record (sec. 4.8). Section 4.8 needs to be edited to say that the order in "which fields are presented is the order in which they must be in the respective record." If registry deposits have different data in different order, it is almost impossible to perform automated or partially-automated verification. The more manual any part of the escrow process is, the more expensive it will be to the registry operator. Inconsistent ordering of fields could also cause integration problems if a registry fails and escrow files are given to a new registry to be integrated. *Iron Mountain (22 July 2010).*

Depending on what is truly required to meet the verification requirement discussed in Sec. 7 of both Parts A and B, there needs to be a way to identify which syntax is being used (IPv4 or IPv6). Iron Mountain suggests changing the file type from "NSIP" to "NSIP4" or "NSIP6", depending on the syntax. *Iron Mountain (22 July 2010).*

Algorithm; verification (sec. 4.13). Section 4.13(4) states a “suggested” algorithm for Hashes is SHA256. To promote consistency across registry escrow deposits with quicker utilization, reduced cost and higher quality of verification, Iron Mountain recommends requiring a singular Hash algorithm with SHA256 being preferred. There should also be more detail regarding HASH implementation. Also, in Section 4.13(4) it is not clear exactly what needs to be validated. By not specifying what verification means, how can ICANN ensure consistency across all Escrow Agents? A suggestion for what Verification could be is: the Deposit file will be split into its constituent reports (including the format report prepared by Registry Operator and appended to the Deposit), check its format, count the number of objects of each type, and verify that the data set is internally consistent. This program will compare its results with the results of the Registry-generated format report, and will generate a Deposit format and completeness report. *Iron Mountain (22 July 2010).*

Data Escrow Agreements—ICANN should be a party to every agreement. The current DAG departs from best practice and merely requires ICANN to be named a beneficiary of a registry data escrow agreement. This will prevent ICANN from amending, modifying or terminating the agreement and will lead to tremendous variances among registry data escrow agreements that will ultimately make it difficult for ICANN to ensure that a minimum level of expectations are met and to ensure compliance. If there is one Registry Agreement with ICANN and the registry operator, then it also makes sense and is in the best interest of stability and registrants to have one Escrow Agreement with ICANN, the registry operator and the escrow agent as parties. ICANN should be included as a party to every registry data escrow agreement. *Iron Mountain (22 July 2010).*

In addition:

- It seems imprudent that the escrow agent for the registry operator does not require ICANN approval. Per Specification 2 anyone can be named as the escrow agent.
- Requiring the escrow agent to deliver all the contents in its possession within 24 hours may not be technically feasible depending on volume, location and method of delivery.
- There is no description of how ICANN would like released data delivered –e.g., electronic? On physical media?
- Regarding 7.2 addressing verification procedure failure by the registry operator, there needs to be a more specific timeline for the registry operator to fix issues with its deposits.
- The intent of Section 8 is unclear, but the result is that it holds the escrow agent hostage. It is inappropriate to require the escrow agent to amend its escrow agreement with the registry operator based on any amendment to Specification 2 when the escrow agent is not a party to Specification 2. Ten days is not enough time for the escrow agent to consider whether it is willing to make these changes. If the escrow agent decides not to accept the changes, then ten days is definitely not enough time for the registry operator to find a new escrow agent, contract with them and begin depositing data. *Iron Mountain (22 July 2010).*

Analysis of Comments

All technical comments from the RySG and Iron Mountain were taken into account by ICANN technical staff and are reflected, as appropriate, in the specifications to the draft of the form registry agreement posted with AGBv.5. Specifically, a number of technical requirements have been removed from Specification 2 in favor of a reference to the Domain Name Data Escrow Specification (development still in progress) available at <http://wwwtools.rfc-editorietf.org/rfchtml/rfc5731.txt> draft-arias-noguchi-registry-data-escrow.

For ease of administration, ICANN will not be a direct party to escrow agreements for new gTLDs. ICANN is required to be a named third party beneficiary and as such will have certain rights to enforce the agreements in appropriate circumstances. If the minimum level of protections mandated by the specifications to the registry agreement are not met in the escrow agreements, ICANN can take action against registry operator directly to remedy such deficiencies.

The draft form registry agreement posted with AGBv.5 will include a requirement that ICANN approve the proposed escrow agent and any amendments to the escrow agreement.

Amendments to Specification 2 that registry operator agrees to must be implemented into the escrow agreement. If escrow agent is unwilling to make conforming changes, registry operator will be required to seek an alternative escrow agent or risk being found to be in breach of the registry agreement.

Functional Specifications (Specification 6)

Key Points

- All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement;
- The appointment of an emergency back up registry operator is an important requirement for the continuity and stability of the registry;
- ICANN technical staff has considered all technical comments and implemented appropriate changes.

Summary of Comments

Functional and Performance specifications. All functional performance specifications should be included in the body of the agreement (or specifications) and should not reference a link on the web that may be modified by ICANN. If ICANN insists on a hyperlink it should have a date certain and it should be made clear that any changes must be mutually agreed to by the parties. *RySG (21 July 2010).*

6.2: Registry Services and Continuity

As per the RySG's objection to DAG3, Section 6.2 requires that a registry operator designate a back-up or successor registry operator-- before even beginning operations. This may be an impossible obligation for some registries to meet. It is unclear whether another registry would even promise to serve as a continuity provider, nor is it clear that the successor registry continuity provider would be compensated. Finally, if a registry fails, a reason for such failure could be due to a failed business model of the original registry. In such an event, no one should be forced to continue to operate a failed registry. Finally, requiring registries to back each other up in advance presents some business issues. *RySG (21 July 2010).*

RySG notes that registrars are not obligated to designate back-up or contingency successors. ICANN has a process for providing continuity when registrars fail, involving an EOI and bidding process. *RySG (21 July 2010).*

The RySG believes that Section 6.2's sentence should be replaced with: "Registry Operator shall have a business continuity plan." *RySG (21 July 2010)*.

6.4 Performance Specifications

In general, Section 6.4 continues to contain a variety of critical problems, and RySG did not see that its DAG3 comments were worked into DAG4. Section 6.4's current contents:

- 1) are sometimes confusing,
 - 2) discourage registry stability and security, and
 - 3) depart from proven measurement and reporting practices that have served everyone well in the past.
- These departures from industry practice have been made without explanation. RySG therefore requests that ICANN work on a thorough review of section 6.4. A (non-exhaustive) list of examples is provided below (see our DAG3 public comments for additional). *RySG (21 July 2010)*.

A general problem is that ICANN has created new SLA, measurement, and reporting regimes that do not always work well with the realities of registry operations. In the existing gTLD registry contracts, registries are allowed scheduled and unscheduled downtimes for their various services. Scheduled downtime allowances encourage regular maintenance, which strengthens registry security and stability. The requirement to report unscheduled maintenance is an indicator of unexpected problems and therefore contributes to registry security and stability. *RySG (21 July 2010)*.

As we mentioned in DAG3, the new base agreement does not distinguish between scheduled and unscheduled downtimes, instead lumping them together. And the new agreement allows less total downtime than the existing contracts, which seems overly aggressive. Further, there are no longer any allowances for extended annual downtimes. Those are sometimes needed to comply with new requirements (such as new RFCs), moves to new data centers, etc. Together, these changes may discourage registry security and stability, rather than encouraging them. *RySG (21 July 2010)*.

RySG's Non-exhaustive list of examples of where Specification 6 is confusing, or technically problematic.

DNS name server availability (page 54):

With regard to "DNS name server availability" of "432 min of downtime (99%)": Does this imply that one server with more than 432 minutes of downtime violates the SLA? Or is a server considered unavailable for the month if it had greater than 432 minutes of downtime? Say that a TLD has 10 servers globally dispersed and each had non-overlapping 45 minutes of downtime over a calendar month. Therefore 9 were operational at any point in time. What is the final DNS service availability for the month?

This may have an unintended consequence of favoring a 100 percent anycast solution, so that no single site is unavailable. Best practice currently is to have a combination of anycast and unicast for security and stability purposes, but this SLA may drive to all to anycast.

DNS, WHOIS, and SRS RTT (pages 54-57):

For these, is the registry expected to monitor RTT from the client? This would be confusing, costly, and an unnecessary departure from past proactive. Recommend that this be revised to measure from receipt and response of a query/transaction at the registry's gateway. If truly measured from the client, especially for EPP, the registry SLR is at risk from poorly connected registrars located in geographically regions distant from the registry. The registry has no ability to select registrars and therefore has no control over meeting this SLR. Why not just use the CNNP test for resolution services?

The SLAs conflate port 43 and Web-based WHOIS SLAs. Port 43 and Web are two completely different services. RTT for Web WHOIS is not really applicable and should be deleted.

Measuring EPP parameters (page 57)

Probes should query domain names, *not* IP addresses. The requirement will not allow registry operator to move or upgrade data centers or migration to new IP ranges. Registries require registrars to connect using the EPP domain name. Some IP addresses will be inactive at any point in time, such as those for alternate data centers or disaster recovery sites. This comment may also apply to DNS and WHOIS.

“DNS Update Time” (page 56):

With respect to “all the name servers”, this is likely to result in the unintended consequence: discouraging deployment of DNS servers in developing regions where bandwidth limitations may create update delays. The logical response would be for registry operators to avoid deploying services in certain regions of the world. in order to make sure all servers can be updated within the required time. Is DNSSEC data included in “DNS information”? Seems likely from the context. A delay in updating DNSSEC data may be more probable than other updates. *RySG (21 July 2010)*.

Analysis of Comments

All required specifications will be either in the body of the registry agreement or in the specifications, both of which can only be amended as specified in the Registry Agreement or upon mutual agreement. The referenced link would be to the page on the ICANN website that contains the specification attached to the agreement.

The requirement to appoint a back-up operator has been replaced with the requirement to maintain a business continuity plan.

ICANN technical staff will work with the technical community to ensure that the technical requirements in Section 6.4 comport to current best practice, are technically feasible and will promote security and stability across the DNS and the Internet. Several suggested changes are reflected in Specification 6 to the draft form registry agreement posted with AGBv.5

Miscellaneous/Other

Key Points

- Approval of the ICANN board will not be required for each new gTLD but the Board retains ultimate responsibility and oversight for the program and will consider individual applications in certain, limited circumstances;
- The current form of the agreement contains the requisite flexibility for multiple types of registry operators;

Summary of Comments

Board approval of each registry agreement. The explicit requirement for Board approval of each new registry agreement will add delay and uncertainty to what should be made a routine process. The Board is able to request informational updates and to intervene against a harmful decision without this procedural step. *W. Seltzer (21 July 2010). R. Dammak (July 2010).*

Role of not-for-profits. Language preceding the draft Registry Agreement refers to commercial purposes envisioned for new gTLDs and does not take into account the way in which some new registries may be used, such as to further a not-for-profit mission. *Red Cross (21 July 2010).*

Different forms needed. ICANN should develop agreements that address specific variations of application types rather than pursuing a one-size-fits-all approach. *E. Brunner-Williams (Module 5, 21 July 2010).*

Representation and warranties (sec. 1.3). Subsection (iii) should read: “Registry Operator has duly executed and delivered to ICANN...” The phrase “and the other parties thereto” appears to be a typographical error. *RySG (21 July 2010).*

Analysis of Comments

The ICANN Board has recently resolved that it will approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met, but that the Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

ICANN recognizes that new gTLDs will be used for a variety of purposes including non-commercial purposes.

The current draft of the registry agreement includes certain alternative provisions for different applicants and contains the requisite flexibility to apply to a variety of different types of gTLDs that are operated under differing business plans.

The reference to the “other parties thereto” is intentional and is meant to apply to the third party financial institution or other provider of the continuing operations instrument that will be responsible for funding the registry operations in the event of a registry failure. The draft form registry agreement posted with AGBv.5 will clarify that Registry Operator will be required to deliver a duly executed instrument.

RESPONDENTS

Amadeu Abril i Abril (A. Abril i Abril)
Adobe Systems Incorporated (Adobe Systems)
AFNIC
African ICANN Community
Erick Iriarte Ahon (E.I. Ahon)
Anne Aikman-Scalese (A. Aikman-Scalese)
AIM—the European Brands Association (AIM)

Abdulaziz Al-Zoman (A. Al-Zoman)
American Apparel & Footwear Association (AAFA)
American Bankers Association (ABA)
American Intellectual Property Law Association (AIPLA)
American Red Cross (Red Cross)
Ron Andruff (R. Andruff)
Arab Team
Arla Foods amba (Arla Foods)
Association of American Medical Colleges (AAMC)
At-Large Advisory Committee (ALAC)
AT&T
AusRegistry International Pty Ltd. (AusRegistry)
Bayern Connect
Big Room Inc. (Big Room)
BITS
Blacknight Solutions (Blacknight)
Eberhard Blocher (E. Blocher)
British Broadcasting Corporation (BBC)
Business & Commercial Users Constituency (BC)
Carlson
China Organizational Name Administration (CONAC)
CNNIC
Coalition Against Domain Name Abuse (CADNA)
Coalition for Online Accountability (COA)
Coloplast A/S (Coloplast)
Com Laude
Comerica Incorporated, Comerica Bank, and Comerica Bank & Trust, N.A. (Comerica)
Rafik Dammak (R. Dammak)
Demand Media
Domain Dimensions LLC (Domain Dimensions)
Avri Doria (A. Doria)
dotBayern Top Level Domain (dotBayern)
dotBERLIN Gmbh & Co. (dotBERLIN)
dotHamburg
dotMUSIC (.MUSIC)
dotKoeln Top Level Domain GmbH (dotKoeln)
dotZON GmbH (dotZON)
E.I du Pont de Nemours and Company (DuPont)
eco
Educational Testing Service (ETS)
EnCirca
EuroDNS
Jothan Frakes (J. Frakes)
W.W. Grainger (Grainger)
Robin Gross (R. Gross)
Hogan Lovells
HOTEL Top Level Domain GmbH (HOTEL)
HSBC Holdings plc (HSBC)

INDOM.com (INDOM)
Intellectual Property Constituency (IPC)
Intellectual Property Owners Association (IPOA)
Intercontinental Hotels Group (IHG)
International Anti-Counterfeiting Coalition (IACC)
International Business Machines (IBM)
International Olympic Committee (IOC)
International Trademark Association Internet Committee (INTA Internet Committee)
Internet Commerce Association (ICA)
Internet Society of China (ISC)
Mary Iqbal (M. Iqbal)
Iron Mountain
Marcus Jaeger (M. Jaeger)
Japan Internet Domain Name Council (JIDNC)
Japan Network Information Center (JPNIC)
JONAS
Key-Systems GmbH (Key-Systems)
George Kirikos (G. Kirikos)
Konstantinos Komaitis (K. Komaitis)
LEGO Juris A/S (LEGO)
LEO Pharma A/S (LEO Pharma)
Liberty Mutual Insurance Company (Liberty Mutual)
LifeScan
H. Lundbeck A/S (H. Lundbeck)
MarkMonitor
MARQUES/ECTA
Microsoft Corporation (Microsoft)
Minds + Machines
Damian Mitsch (D. Mitsch)
Motion Picture Association of America, Inc. (MPAA)
Multilingual Internet Group
National Cable & Telecommunications Association (NCTA)
Nestle Group
Neustar, Inc. (Neustar)
News Corporation
NIC Mexico
Nilfisk-Advance A/S (Nilfisk)
Not-for-Profit Organization Constituency Formation Committee (NPOC-FC)
Olezi
Panagiotis Papaspiliopoulos (P. Papaspiliopoulos)
Vassil Petev (V. Petev)
Philip Morris International Management S.A. (PMI)
Piper Aircraft, Inc. (Piper Aircraft)
Red Bull GmbH (Red Bull)
Registries Stakeholder Group (RySG)
Rosetta Stone Ltd. (Rosetta Stone)
Daniel Schindler (D. Schindler)
Scott Seitz (S. Seitz)

Wendy Seltzer (W. Seltzer)
June Seo (J. Seo)
Software and Information Industry Association (SIAA)
Solvay Chemicals Sector (Solvay)
Clare Speed (C. Speed)
Werner Staub
Sunkist Growers, Inc. (Sunkist)
The Coca-Cola Company (Coca-Cola)
United States Council for International Business (USCIB)
VeriSign, Inc. (VeriSign)
Verizon
Vestas Wind Systems A/S (Vestas)
VKR Holding A/S (VKR Holding)
Time Warner Inc. (Time Warner)
Richard Tindal
TLDDOT GmbH (TLDDOT)
Liz Williams (L. Williams)
WIPO Arbitration and Mediation Center (WIPO Center)
Mary Wong (M. Wong)

Reference Material 19.



All Products

Domains

Websites

Hosting & SSL

Get Found

Email & Tools

Support

NEW

Hot Deals

WHOIS search results for:

SPORT.COM

(Registered)

Is this your domain?

GO

Add hosting, email and more

Want to buy this domain?

GO

Get it with our Domain Buy service

Domain Name: SPORT.COM
 Registry Domain ID: 4250409_DOMAIN_COM-VRSN
 Registrar WHOIS Server: whois.godaddy.com
 Registrar URL: http://www.godaddy.com
 Update Date: 2011-12-07T15:54:51Z
 Creation Date: 1994-09-21T04:00:00Z
 Registrar Registration Expiration Date: 2020-05-10T03:28:40Z
 Registrar: GoDaddy.com, LLC
 Registrar IANA ID: 146
 Registrar Abuse Contact Email: **Contact Information Redacted**
 Registrar Abuse Contact Phone:
 Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
 Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
 Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
 Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
 Registry Registrant ID:
 Registrant Name: Registration Private
 Registrant Organization: Domains By Proxy, LLC
 Registrant Street: DomainsByProxy.com
 Registrant Street: **Contact Information Redacted**
 Registrant City: **Contact Information Redacted**
 Registrant State/Province: **Contact Information Redacted**
 Registrant Postal Code: **Contact Information Redacted**
 Registrant Country: United States
 Registrant Phone: **Contact Information Redacted**
 Registrant Phone Ext:
 Registrant Fax: **Contact Information Redacted**
 Registrant Fax Ext:
 Registrant Email: **Contact Information Redacted**
 Registry Admin ID:
 Admin Name: Registration Private
 Admin Organization: Domains By Proxy, LLC
 Admin Street: DomainsByProxy.com
 Admin Street: **Contact Information Redacted**
 Admin City: **Contact Information Redacted**
 Admin State/Province: **Contact Information Redacted**
 Admin Postal Code: **Contact Information Redacted**
 Admin Country: United States
 Admin Phone: **Contact Information Redacted**
 Admin Phone Ext:
 Admin Fax: **Contact Information Redacted**
 Admin Fax Ext:
 Admin Email: **Contact Information Redacted**
 Registry Tech ID:
 Tech Name: Registration Private
 Tech Organization: Domains By Proxy, LLC
 Tech Street: DomainsByProxy.com
 Tech Street: **Contact Information Redacted**
 Tech City: **Contact Information Redacted**
 Tech State/Province: **Contact Information Redacted**
 Tech Postal Code: **Contact Information Redacted**
 Tech Country: United States
 Tech Phone: **Contact Information Redacted**
 Tech Phone Ext:
 Tech Fax: **Contact Information Redacted**
 Tech Fax Ext:
 Tech Email: **Contact Information Redacted**
 Name Server: NS73.DOMAINCONTROL.COM
 Name Server: NS74.DOMAINCONTROL.COM
 DNSSEC: unsigned
 URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
 Last update of WHOIS database: 2015-3-18T13:00:00Z

Domain already taken?

Search

NameMatch Recommendations

GoDaddy.com NameMatch has found similar domain names related to your search. Registering multiple domain names may help protect your online brand and enable you to capture more Web traffic, which you can then direct to your primary domain.

Domains available for new registration:

Similar Premium Domains ?	
<input type="checkbox"/> Professional-Sport.com	€379.38*
<input type="checkbox"/> LadiesSport.com	€1,312.26*
<input type="checkbox"/> CarsSport.com	€2,090.47*

[ADD TO CART](#)

Domains available at Go Daddy Auctions®:

<input type="checkbox"/> tanzsporttrainer.com Ends on: 6/16/2015 1:27:00 PM PDT	€863.81*
<input type="checkbox"/> usedsportequipment.com Ends on: 6/16/2015 10:36:00 AM PDT	€1,945.53*
<input type="checkbox"/> sportandculture.com Ends on: 6/16/2015 9:12:00 AM PDT	€669.26*
<input type="checkbox"/> teletransport.com Ends on: 6/16/2015 9:04:00 AM PDT	€3,587.55*
<input type="checkbox"/> sportchampions.com Ends on: 6/15/2015 7:51:00 PM PDT	€3,684.82*
<input type="checkbox"/> sportjudo.com Ends on: 6/15/2015 7:39:00 PM PDT	€863.81*

[VIEW LISTING](#)

Learn more about

- [Private Registration](#) ?
- [Business Registration](#) ?
- [Deluxe Registration](#) ?
- [Protected Registration](#) ?

*Plus ICANN fee of €0.18 per domain name year

** CA domain names will be registered through Go Daddy Domains Canada, Inc., a CIRA certified registrar

For more information on Whois status codes, please visit <https://www.icann.org/resources/pages/epp-status-codes-2014-06-16-en>

The data contained in GoDaddy.com, LLC's WHOIS database, while believed by the company to be reliable, is provided "as is" with no guarantee or warranties regarding its accuracy. This information is provided for the sole purpose of assisting you in obtaining information about domain name registration records. Any use of this data for any other purpose is expressly forbidden without the prior written permission of GoDaddy.com, LLC. By submitting an inquiry, you agree to these terms of usage and limitations of warranty. In particular, you agree not to use this data to allow, enable, or otherwise make possible, dissemination or collection of this data, in part or in its entirety, for any purpose, such as the transmission of unsolicited advertising and solicitations of any kind, including spam. You further agree not to use this data to enable high volume, automated or robotic electronic processes designed to collect or compile this data for any purpose, including mining this data for your own personal or commercial purposes.

Please note: the registrant of the domain name is specified in the "registrant" section. In most cases, GoDaddy.com, LLC is not the registrant of domain names listed in this database.

[See Underlying Registry Data](#)
[Report Invalid Whois](#)

Search for another domain name in the **WHOIS** database

Enter a domain name to search

Search

NEED HELP? CALL OUR AWARD-WINNING SUPPORT TEAM 24/7 AT (480) 505-8877

About GoDaddy

- About Us
- Contact Us
- News Releases
- Careers
- Corporate Responsibility
- GoDaddy Store
- Legal
- GoDaddy Garage
- Blake's Blog

Support

- Product Support
- Site Suggestions
- Report Abuse

Resources

- Webmail
- WHO S Search
- CANN Confirmation
- Affiliates
- Small Business Center
- Site Map

My Account

- My Account
- My Renewals
- Create Account

Shopping

- Product Catalog
- Find a Domain

Sign up for special offers:

Email Address

SUBMIT

United States - English EUR

Follow Us

Use of this Site is subject to express terms of use. By using this site, you signify that you agree to be bound by these [Universal Terms of Service](#).

[Legal](#) [Privacy Policy](#) [Advertising Preferences](#)

Copyright © 1999 - 2015 GoDaddy Operating Company, LLC. All Rights Reserved.

Reference Material 20.

[Sport.com | Fitness, Yoga a...](#) x
[Most Visited](#) Home Crowell Connect, the a... ICC Introduction to ICANN... 2014 Board Meetings |... Public Comments--O... Independent Review P... Crowell & Moring Sec... e-Services: facturen, v... Citrix Access Gateway GAC Advice | ICANN ... CURIA - Case Informat... ISDS and EU law

Search

RUNNING FITNESS YOGA SLEEP NUTRITION SHOP

Water balance:

hydration tracker with goals and reminders

- Log the drinks you take and see how they affect your hydration
- Calculate your personal daily water intake goal
- Get reminders that guide you towards your goal
- Control the quality of beverages you consume

[more info](#)

Download on the App Store

SPORT.COM

Today's goal 73 oz
 4:21 PM

0 TIPS

Water	Coffee	Tea	Alcohol	Other
Soda	Milk	Energy	Other	
Juice				

1446 18/03/2015

Running and Cycling apps... x
sport.com/running.html

Most Visited Home Crowell Connect the s... Introduction to CANL... 2014 Board Meetings | ... Crowell & Moring Sec... e-Services features, v... City's Access Gateway GAC Advice | CANN... CIPBA - Case informat... ISDS and EU law

SEARCH



SPORTCOM

RUNNING FITNESS SLEEP NUTRITION SHOP


Running Apps

Every time you run, there's a whole lot happening: you cover some distance, you burn calories, and your heart rate increases. So here are the apps that monitor everything and store this data to let you use it later. Pick a Pedometer to accompany you in all your runs, motivate you, show you the way and provide you with all the necessary stats right when you need it.

iPhone/iPod Touch

-  **Moves Tracker**
iPhone/iPod Touch
-  **Pedometer FREE**
iPhone/iPod Touch

Android

-  **Moves Tracker**
Android

Support

4:43 PM 10/25/2015

Best fitness apps for iPhone... x

spot.com/fitness.html

Crowell Connect, the... KC Introduction to ICANN... Public Comments - O... Independent Review P... Crowell & Moring Sec... e-Services Iscturem, v... Citrix Access Gateway @ GAC Advice | ICANN... CURBA - Case Informat... ISO5 and EU law

SEARCH


SPORTCOM

RUNNING FITNESS SLEEP NUTRITION SHOP


Fitness Apps

Deciding to improve your body is one thing, doing it is quite another. Our fitness apps are created to help you improve your body, and make you healthier and more confident. Hundreds of workouts have been professionally designed for these apps by expert trainers to support and encourage your pursuit of a healthy lifestyle. Get an app that will guide you through every workout step by step, one muscle flexion after another until you get your dream body.


iPhone/iPod Touch




Heart Rate
Monitor, measure and track your pulse rate
iPhone/iPod Touch



7 minute workouts
bodyweight training & high intensity exercises
Universal




All-in Fitness:
1200 Exercises, Workouts, Calorie Counter, BMI-calculator & Social Network
iPhone/iPod Touch



Free workouts by Sport.com
iPhone/iPod Touch

iPad



All-in Fitness HD:
1000 Exercises, 100 Workout Plans & Routines, Calorie Calculator
iPad

Support

14:17 18/09/2015

Yoga Apps

Yoga is deeply rooted in the most ancient traditions of India and has mysterious ways of invigorating our bodies, souls and minds. Whether you're making your first steps on the path of healing enlightenment or seeking to continue your practice, feel free to use our collection of yoga apps for all platforms. You'll find accurate guidelines on how to do the most sophisticated yoga poses, photos and videos to help you learn, ready-made yoga programs tailored to different needs and plenty of advice. Try now for an ultimate yoga practice.

iPhone/iPod Touch



Yoga.com: 300 Poses & Video classes Universal

Amazon



All-in Yoga: 300 Poses & Yoga classes Kindle Fire

iPad



Yoga.com: 300 Poses & Video classes Universal

Android



Yoga.com Android

Support

Sleep apps and smart alar... x +

Most Visited Home Crowell Connect, the a... CC Introduction to ICANN... 2014 Board Meetings I... Crowell & Moring Sc... e-Services: factures, v... Citrix Access Gateway GAC Advice | ICANN ... CURIA - Case informat... IOS5 and EU law

Search


SPORTS.COM

RUNNING FITNESS YOGA SLEEP NUTRITION SHOP

Sleep Apps


Millions of people all over the world are using our [Smart Alarm Clock](#) apps! We enjoy being helpful and perpetually upgrading and improving our Alarms to bring you more useful features, so now our alarms can monitor your sleep cycles, record your nightly noises and wake you up using the most precise algorithms and in the least stressful ways! Try our Smart Alarm Clock apps to find out more about your sleep and improve it!

iPhone/iPod Touch




Smart Alarm Clock
iPhone/iPod Touch

Android




Smart Alarm Clock
Google Play


iPad




Smart Alarm Clock for iPad
iPad



Smart Alarm Clock Free
Google Play





Support

14:58 18/03/2015

Nutrition Apps

You can't buy health, but you can gain it. Here are the apps designed to help you look and feel better by counting the calories, suggesting menus that suit your lifestyle and goals, and offering workouts that are essential for keeping fit! Try our apps to get access to an extensive database of healthy, effective and (more importantly) feasible food and activity plans that will get you moving!

Universal



Water balance: hydration tracker with goals and reminders
iPhone/iPad/Touch



Calorie Counter Plus: diets & activities
Universal

COPYRIGHT © 2013 - 2014. SPORT.COM. ALL RIGHTS RESERVED.
SPORT.COM IS OPERATED BY MARKET CONNECT UK LTD, UNITED KINGDOM

[About Us](#) | [Blog](#) | [Support](#) | [All Apps](#) | [Terms of Use](#) | [Privacy](#)

Support

Shop — Sporting Goods, A... x +

https://sport.com/shop/

Most Visited Home Crowell Connect, the a... IOC Introduction to ICANN... 2014 Board Meetings | ... Public Comments - O... Crowell & Moring Sec... e-Services: lecturen, v... Citrix Access Gateway GAC Advice | ICANN... CURIA - Case Informat... ISDS and EU law


SEARCH

SHOP

SPORT.COM

RUNNING FITNESS YOGA SLEEP NUTRITION SHOP


SHOP




★ REVIEWS

SALE

SALE





Smart Sport Cap
 ★★★★★ 6 Reviews
 \$109 \$99

Smart Fitness Visor
 ★★★★★ 5 Reviews
 \$109 \$99

14:38 18/03/2015

Reference Material 21.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/442/ICANN/59

FEDERATION INTERNATIONALE DE BASKETBALL

(SWITZERLAND)

vs/

DOT BASKETBALL LIMITED

(GIBRALTAR)

(consolidated with case No. EXP/503/ICANN/120

FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND) vs/ LITTLE
HOLLOW, LLC (USA))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND)

- V -

DOT BASKETBALL LIMITED (GIBRALTAR)

**INTERNATIONAL CENTRE FOR EXPERTISE
OF THE INTERNATIONAL CHAMBER OF COMMERCE**

EXP/442/ICANN/59

CONSOLIDATED WITH CASE EXP/503/ICANN/120
FEDERATION INTERNATIONALE DE BASKETBALL (SWITZERLAND) v. LITTLE HOLLOW, LLC (USA)

EXPERT DETERMINATION

TABLE OF CONTENTS

1. Introduction	3
2. Proceedings	5
3. Potential Relief	6
4. Place of the Proceedings	6
5. Language of the Proceedings	7
6. Communications	7
7. Standards and Burden of Proof	7
8. Reasoning and Decision	7
9. Costs	22
10. Determination	23

This expert determination is made in expertise proceedings pursuant to Module 3 of the gTLD Applicant Guidebook (“Guidebook”) and its Attachment, the New gTLD Dispute Resolution Procedure (the “Procedure”). These proceedings take place under the International Chamber of Commerce (“ICC”) Rules for Expertise (in force as from 1 January 2003) (the “Rules”), as supplemented by the ICC Practice Note on the Administration of Cases under the Procedure (the “ICC Practice Note”).

1. INTRODUCTION

- 1.1 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has implemented a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Further to this program, parties may apply for new gTLDs in accordance with the terms and conditions set by ICANN. Procedure, article 1(a).
- 1.2 The program includes a dispute resolution procedure for resolving disputes between a party who applies for a new gTLD and a party who objects to the application – namely, the Procedure. *Id.*, article 1(b). The Procedure provides that dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules identified in article 4(b) of the Procedure. *Id.*, article 1(c).
- 1.3 By applying for a new gTLD, an applicant accepts the applicability of the Procedure and the applicable DRSP rules. An objector likewise accepts the applicability of the Procedure and the applicable DRSP rules by filing an objection to an application for a new gTLD. The parties cannot derogate from the Procedure without the express approval of ICANN and cannot derogate from the applicable DRSP rules without the express approval of the relevant DRSP. *Id.*, article 1(d).
- 1.4 There are four types of objections a party may raise against an application for a new gTLD. *Id.*, article 2(e). One of these is known as a “Community Objection”. A Community Objection is an objection that there is substantial opposition to the application from a significant portion of the community to which the string (i.e., the new gTLD) may be explicitly or implicitly targeted. *Id.*, article 2(e)(iv). The Fédération Internationale de Basketball (the “Objector”) has raised this type of objection against the application of dot

Basketball Limited (the “Applicant”) for the new gTLD “.BASKETBALL” (the “Application”).

1.5 Pursuant to articles 3(d) and 4(b)(iv) of the Procedure, Community Objections shall be administered by the ICC International Centre for Expertise (the “Centre”) in accordance with the Rules, as supplemented by the ICC as needed. The ICC Practice Note is such a supplement to the Rules. In the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail. *Id.*, article 4(c). In all cases, the expert shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its case. *Id.*, article 4(e).

1.6 The Objector’s contact details are as follows:

FÉDÉRATION INTERNATIONALE DE BASKETBALL
Attn: Mr. Patrick Koller, Communications Director
Contact Information
Redacted

1.7 The Objector is represented by:

Ms. Kathryn A. Kleiman
Mr. Robert J. Butler
Contact Information Redacted

1.8 The Applicant’s contact details are as follows:

DOT BASKETBALL LIMITED
Attn: Mr. Geir Andreas Rasmussen
Contact
Information
Redacted

1.9 The Applicant is represented by:

Mr. Peter Young
FAMOUS FOUR MEDIA LIMITED
Contact Information Redacted

1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
Contact Information Redacted

1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
Contact Information Redacted

2. PROCEEDINGS

2.1 Below is a summary of the main procedural steps in these proceedings.

2.2 On 13 March 2013, the Objector filed its Community Objection with the Centre (the “Objection”) pursuant to article 7 of the Procedure.

2.3 By letter dated 3 April 2013, the Centre notified the parties that it had conducted an administrative review of the Objection pursuant to article 9(a) of the Procedure and had found the Objection in compliance with articles 5 through 8 of the Procedure. The Centre accordingly registered the Objection for processing in accordance with article 9(b) of the Procedure.

2.4 By letter dated 7 May 2013, the Centre informed the parties that it had decided to consolidate this case with case EXP/503/ICANN/120 pursuant to article 12 of the Procedure.

2.5 On 7 June 2013, the Applicant submitted its response to the Objection (the “Response”) pursuant to article 11 of the Procedure. By letter dated 12 July 2013, the Centre confirmed to the parties that the Response was in accordance with the Procedure and the Rules.

2.6 On 23 August 2013, the Vice-Chairman of the Standing Committee appointed Ms. Kirby as the Expert in the consolidated proceedings pursuant to article 13 of the Procedure, article 9(5) of the Rules and article 3(3) of Appendix I to the Rules.

- 2.7 On 26 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Expert. The Centre clarified that, despite the consolidation of this case with case EXP/503/ICANN/120, the Expert was to render a separate determination for each case.
- 2.8 Article 21(a) of the Procedure, provides that the Centre and the expert shall make reasonable efforts to ensure that the expert renders her decision within 45 days of the “constitution of the Panel”.¹ The Centre considers that the Panel is fully constituted when the expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the expert. In this case, the Panel was constituted on 26 August 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that her determination was rendered no later than 10 October 2013. Procedure, articles 6(e), 6(f).
- 2.9 Further to paragraph 6 of the ICC Practice Note, the parties waived the requirements for the expert mission as set out in article 12(1) of the Rules.
- 2.10 Pursuant to article 21(b) of the Procedure, the Expert submitted her determination in draft form to the Centre for scrutiny as to form before it was signed.

3. POTENTIAL RELIEF

Article 21(d) of the Procedure provides that the remedies available to an applicant or an objector in these proceedings are limited to the success or dismissal of the objection and the refund by the Centre to the prevailing party of its advance payment of costs pursuant to article 14(e) of the Procedure and any relevant provisions of the Rules.

4. PLACE OF THE PROCEEDINGS

Pursuant to article 4(d) of the Procedure, the place of the proceedings is the location of the DRSP – i.e., the Centre – which is located in Paris, France.

¹ All quotations in this determination are set forth “as is”. Any grammatical or typographical errors are in the original documents.

5. LANGUAGE OF THE PROCEEDINGS

English is the language of the proceedings pursuant to article 5(a) of the Procedure. All submissions in these proceedings have been made in English.

6. COMMUNICATIONS

Pursuant to article 6(a) of the Procedure, all communications by the parties, the Expert and the Centre in these proceedings were submitted electronically.

7. STANDARDS AND BURDEN OF PROOF

- 7.1 In determining an objection, the expert shall apply the standards that have been defined by ICANN. Procedure, article 20(a). In this regard, section 3.5 of Module 3 of the Guidebook sets forth “Dispute Resolution Principles (Standards)” for each of the four types of objection that can be raised under the Procedure. The standards applicable to Community Objections are set forth in section 3.5.4 of Module 3 of the Guidebook. In addition, the expert may refer to and base her findings upon the statements and documents submitted and any rules or principles that she determines to be applicable. *Id.*, article 20(b).
- 7.2 The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards. *Id.*, article 20(c).

8. REASONING AND DECISION

- 8.1 This determination is made pursuant to article 21 of the Procedure. Further to paragraph 8 of the ICC Practice Note, the parties are deemed to have agreed that this determination shall be binding upon the parties, as permitted by article 12(3) of the Rules.
- 8.2 Although I have considered all of the allegations, evidence and arguments the parties have submitted to me, I refer in my determination only to those I consider relevant to my reasoning and decisions.

Two-Step Approach

- 8.3 To have its Objection considered, the Objector must have standing. As the first step in making my determination, I accordingly must review the Objection and decide whether the Objector has standing to object. Guidebook, Module 3 § 3.2.2.
- 8.4 To have standing to raise its Community Objection, the Objector must prove that (1) it is an “established institution” and (2) it has an “ongoing relationship with a clearly delineated community”. *Id.* § 3.2.2.4. And the community named by the Objector must be a community “strongly associated” with the new gTLD that is the subject of the Application. *Id.*
- 8.5 If I find that the Objector has standing, my second step is to determine the merits of the Objection in light of the standards set out in section 3.5.4 of Module 3 of the Guidebook applicable to Community Objections. Further to those standards, I am to apply a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, for a Community Objection to be successful, an objector must prove that (1) the community invoked by the objector is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association between the community invoked and the applied-for gTLD”; and (4) the application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Standing

- 8.6 The Objector contends that it has standing to object to the Application for the new gTLD “.BASKETBALL”. According to the Objector, it is the global governing body for basketball and is responsible for the rules of the game and the organization and governance of international championships. Objection at 6. It was established in 1932 as an amateur organization, “but became representative of professional basketball as well in 1989 when NBA [National Basketball Association] players were admitted to the 1992 Olympics for the first time.” *Id.* The Objector considers that its motto, “We Are Basketball”, reflects the “global standing of the organization with respect to the Basketball Community.” *Id.*

8.7 Section 4.1 of the Objector’s statutes provides that the Objector’s mission is to “promote the sport of basketball throughout the world and to lead the basketball movement as recognized by the International Olympic Committee” (“IOC”). The Objector’s General Statutes, Objection, Attachment A. To that end, as the sole competent authority in basketball recognized by the IOC, the Objector does the following:

- Establishes the official rules and other regulations that apply to all international and Olympic basketball competitions, as well as the system of competition;
- Controls and governs the appointment of international referees;
- Regulates the transfer of players from one country to another; and
- Controls and governs all international basketball competitions.

Objection at 6 (citing to the “Quick facts” section of the Objector’s website).

8.8 The Objector contends that there is a “clearly delineated community”, which it calls the “Basketball Community”, that is composed of an “extensive network of basketball organizations, leagues and players under the leadership of [the Objector]” and is “bound together by a singular common interest in the sport of basketball.” *Id.* at 8. These include the Objector’s member federations from 213 countries in Africa, the Americas, Asia, Europe and Oceania. *Id.* at 7. These federations sponsor more than 100 000 clubs involving millions of players. *Id.*; the Objector’s National Federation and National Clubs and Players Data (2003) and National Federation Information (2003), Objection, Attachment D. That the Objector has an ongoing relationship with the Basketball Community is axiomatic. Objection 6-8; *see also* the “FIBA strategy” section of the Objector’s website, Objection, Attachment B. And the Objector considers it obvious that the Basketball Community is strongly associated with the gTLD “.BASKETBALL”. Objection at 11.

8.9 In light of the above, the Objector considers that it is (1) an “established institution” with (2) an “ongoing relationship with a clearly delineated community” – namely, the Basketball Community – that is “strongly associated” with the new gTLD “.BASKETBALL” that is the subject of the Application, and that it therefore has standing to bring its Objection. For the reasons explained below, I agree.

8.10 Section 3.2.2.4 of Module 3 of the Guidebook sets forth a series of non-exclusive factors I may consider in determining whether the Objector is an “established institution”. These

non-exclusive factors are (1) the level of global recognition of the institution; (2) the length of time the institution has been in existence; and (3) public historical evidence of the institution's existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. In all events, however, the institution must not have been established solely in conjunction with the gTLD application process.

- 8.11 That same section also sets forth a series of non-exclusive factors that I may consider in determining whether the Objector has an “ongoing relationship with a clearly delineated community”. These non-exclusive factors are (1) the presence of mechanisms for participation in activities, membership and leadership; (2) an institutional purpose related to the benefit of the associated community; (3) the performance of regular activities that benefit the associated community; and (4) the level of formal boundaries around the community.
- 8.12 In determining whether the Objector has standing, I am to “perform a balancing of the factors listed above, as well as other relevant information”. Guidebook, Module 3 at 3-8. It is not expected that the Objector must satisfy each and every factor considered in order to satisfy the standing requirements. *Id.*
- 8.13 With respect to the Objector's being an “established institution”, I note that the Applicant does not contest that it is. The Objector was established in 1932, many decades before the gTLD application process,² and is the sole competent authority in basketball recognized by the IOC. I accordingly find that it is an “established institution” for purposes of standing.
- 8.14 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the Basketball Community. Though it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what constitutes a “clearly delineated community”. When evaluating the merits of an objection, the Guidebook suggests that I could balance a number of factors to determine whether the community at issue can be considered “clearly delineated”. These factors include, but are not limited to, (1) the level of public recognition of the group as a community at a local or global level;

² The gTLD application process opened for user registration and application submission in January 2012. Guidebook, Module 1 at 1-2.

(2) the level of formal boundaries around the community and what persons or entities are considered to form the community; (3) the length of time the community has been in existence; (4) the global distribution of the community; and (5) the number of people or entities that make up the community. *Id.* § 3.5.4.

- 8.15 The Guidebook does not suggest any factors I could consider when considering what constitutes a “clearly delineated community” for purposes of standing. But there is nothing in the Guidebook that suggests that the words “clearly delineated community” should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. In light of this, I consider that the five factors listed above may be helpful to my analysis of whether the Basketball Community is a “clearly delineated community” for purposes of assessing whether the Objector has standing.
- 8.16 With this approach in mind, I note that the Basketball Community, as defined by the Objector, has existed for decades and brings together under the Objector’s leadership member basketball federations from over 200 countries around the globe. Together, these federations sponsor more than 100 000 basketball clubs involving millions of players in Africa, the Americas, Asia, Europe and Oceania. The Objector’s purpose is to promote basketball throughout the world. As the sole competent authority in basketball recognized by the IOC, the Objector does this through regular activities that benefit the Basketball Community. These include establishing the rules and regulations for international and Olympic basketball competitions, governing the appointment of international referees, regulating the transfer of players from one country to another and governing all international basketball competitions. In light of this, I find that the Basketball Community is a “clearly delineated community” with which the Objector has an “ongoing relationship”.
- 8.17 I also find that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”. Again, although it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what it means for a community to be “strongly associated” with the applied-for gTLD. When evaluating the merits of an objection, the Guidebook suggests several factors I could balance to determine whether there is such a “strong association”. These include, but are not limited to, (1) statements contained in the application; (2) other public statements by the applicant; and (3) associations by the public. *Id.* § 3.5.4. The Guidebook does not suggest any factors I could consider when considering

the term “strongly associated” in the context of standing. But there is nothing in the Guidebook that suggests that the terms “strongly associated” in section 3.2.2.4 and “strong association” in section 3.5.4 should be read to mean materially different things. In light of this, I consider that the three factors listed above may be helpful to my analysis of whether the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”.

- 8.18 In this regard, the factor that strikes me as important in the context of this case is factor (3) – associations by the public. This is because the applied-for gTLD effectively names the community defined by the Objector as the Basketball Community. The Basketball Community does not encompass every person who plays basketball or every basketball-related organization, but it does encompass an extensive network of basketball organizations and leagues under the leadership of the Objector that spans the globe and involves millions of players. In light of this, there is a likely association in the minds of many people between the word “basketball” and the Basketball Community. I consider this association sufficient to support a finding that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”.
- 8.19 I accordingly find that the Objector has standing to bring the Objection at issue here.
- 8.20 Broadly speaking, the Applicant resists this conclusion on three grounds. First, the Applicant argues that the Objector does not have an “ongoing relationship” with an “alleged Basketball community as a whole, but rather with a niche subset of the alleged Basketball community.” Response at 5. As the Applicant puts it, “Anyone can play basketball”. *Id.* There is no requirement that players have any affiliation with the Objector and many do not. *Id.* And there are many people and entities involved with basketball – e.g., retailers, media outlets, fans, the video game industry – that have no relationship with the Objector. *Id.* at 6. According to the Applicant, the Objector cannot have standing unless it has an ongoing relationship with the basketball community as a whole. *Id.* at 5-7; *see also* “FAQ” section of the Objector’s website (stating that, as a “general rule, FIBA has no organisational links with players, player agents or clubs”), Response, Annex 2; list of non-FIBA-member men’s national basketball teams, Response, Annex 5; Acropolis Tournament (described as the “most prestigious non-FIBA organized international basketball competition that is competed between national teams”), Wikipedia.org, Response, Annex 6. I disagree.

- 8.21 There is no requirement in the Guidebook that the community with which the Objector has an ongoing relationship include everyone involved with basketball, and the Objector does not contend that it does. Rather, as noted above (¶ 8.8), the Objector defines the Basketball Community as being an extensive network of basketball organizations, leagues and players under the leadership of the Objector that is bound together by a common interest in basketball. It is this community that is at issue and with which the Objector has an ongoing relationship for purposes of standing.³
- 8.22 Second, and relatedly, the Applicant contends that the Objector has failed “to prove that the alleged community is ‘clearly delineated’”. Response at 7. Specifically, the Applicant states that, while the Objector defines the Basketball Community as its membership, the “global basketball community” is much broader than this and includes a wide range of people and entities that do not necessarily share similar goals, values or interests. *Id.*; Variations of basketball, Wikipedia.org, Response, Annexes 8 and 13; “Other types of basketball” section of the Objector’s website, Response, Annex 9; Basketball Survey at 2 (with 67.4% of people agreeing that the “basketball community includes stakeholders such as manufacturers and media”), Survey Monkey, Response, Annex 12; “Quick facts” section of the Objector’s website (stating that over 450 million people played basketball in 2007), Response, Annex 14. The Applicant estimates that the global basketball community may encompass over 6% of the human race and therefore “just cannot be delineated.” Response at 8. The Objector, the Applicant points out, “focuses its membership on National Federations and therefore represents only a niche subset of the alleged ‘Basketball’ community.” *Id.* at 9. I again disagree.⁴

³ The Applicant also contends that the Objector’s relationship with all of its members or others involved with basketball is not always harmonious. Response at 6; *see also* Mark Woods, *Change – or Miss Out on 2012, Baumann Warns*, 21 September 2010, Response, Annex 3; Anthony Reimer, *FIBA vs North American Rules Comparison*, FIBA Assist Magazine 14 (2005), Response, Annex 4; *FIBA Introduces Controversial Format Changes*, 14 November 2012, Hoopsfix.com, Response, Annex 1. Even if true, however, this is not inconsistent with the Objector’s having an “ongoing relationship” with the Basketball Community, as required for standing.

⁴ I note that the Applicant raises these “clearly delineated community” arguments in section C of its Response, which is labelled “Community Argument”, rather than in section B of its Response, which is labelled “Standing Argument”. It is therefore not entirely clear whether the Applicant raised these arguments to challenge the Objector’s standing. Perhaps the Applicant only intended to raise them in challenging the merits of the Objection. In the face of this ambiguity, I have decided to address these arguments both in the context of standing (*infra* ¶ 8.23) and with respect to the merits of the Objection (*infra* ¶ 8.26).

- 8.23 As a preliminary matter, I note that the Applicant does not seem to contest that the Basketball Community, as defined by the Objector, is a “clearly delineated community” for purposes of standing. Rather, the Applicant seems to be objecting that the Basketball Community does not encompass everyone who is involved with basketball. Again, however, there is no requirement that it do so. The Applicant also appears to be objecting that, if the Objector were to define the Basketball Community as everyone involved with basketball, such a community would not be “clearly delineated”. *See* The Issue of “Closed Generic” gTLDs Applications – The Views of the Independent Objector, Response, Annex 10. While this may be so, it is a purely hypothetical issue that I do not need to reach because the Basketball Community, while large, does not purport to encompass everyone involved with basketball.
- 8.24 Third, the Applicant contends that the Basketball Community is not “strongly associated” with the gTLD “.BASKETBALL”. Response at 11. The Applicant considers any “strong association” between the Basketball Community and the applied-for gTLD “purely ancillary or derivative” because the Applicant has a “broader target” than the Basketball Community defined by the Objector. *Id.*; Application § 18(a), Objection at 12 (providing a link to the public portions of the Application); *see also* Response, Annex 12 at 2. I disagree. While the Applicant’s target may well be far broader than the Basketball Community, there is still a likely association in the minds of many people between the word “basketball” and the Basketball Community that supports a finding that the Basketball Community is “strongly associated” with the gTLD “.BASKETBALL”. *See supra* ¶¶ 8.17-8.18.

Merits

- 8.25 Having found that the Objector has standing, I must now turn to the merits of its Objection. As noted above (¶ 8.5), with respect to Community Objections, the Guidebook sets forth a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, to succeed, the Objector must prove that (1) the community it invokes – the Basketball Community – is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association” between the Basketball Community and the gTLD “.BASKETBALL”; and (4) the Application creates a “likelihood

of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community.

- 8.26 In the context of deciding standing, I have already found that the Basketball Community is a “clearly delineated community” and that there is a “strong association” between the Basketball Community and the gTLD “.BASKETBALL”. *See supra* ¶¶ 8.16-8.18. It therefore remains for me to determine whether the Basketball Community’s opposition to the Application is “substantial” and whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community.
- 8.27 The Objector contends, among other things, that the Basketball Community’s opposition to the Application is “substantial” because the opposition of the Objector alone constitutes “substantial” opposition given the “breadth of its membership and stature in that Community”. Objection at 10. A number of the Objector’s members – including Federación Española de Baloncesto, Fédération Ivoirienne de Basket-ball, Basketball Australia, Swiss Basketball, Canada Basketball, Hellenic Basketball Federation, and USA Basketball – have also filed comments opposing the Application in their own names. *See* letters from the Objector’s members, Objection, Attachment C. Various other basketball-related organizations – such as Euroleague Basketball and the NBA – have likewise filed comments opposing the Application. Letter dated 1 March 2013 from Euroleague Basketball and letter dated 11 March 2013 from the NBA, Objection, Attachment C.
- 8.28 In light of the above, the Objector contends that the Basketball Community’s opposition to the Application is “substantial”. For the reasons set forth below, I agree.
- 8.29 Section 3.5.4 of Module 3 of the Guidebook suggests that I “could balance a number of factors to determine whether there is substantial opposition” by the Basketball Community to the Application. These factors include, but are not limited to, (1) the number of expressions of opposition relative to the composition of the community; (2) the representative nature of the entities expressing opposition; (3) the level of recognized stature or weight among sources of opposition; (4) the historical defence of the community in other contexts; and (5) the costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

- 8.30 The Basketball Community, as defined by the Objector, is an extensive network of basketball organizations, leagues and players under the Objector’s leadership that is bound together by a common interest in basketball. As the leader of the Basketball Community, the Objector represents its interests and speaks on its behalf. Its stature both within and without the Community cannot be gainsaid. *See supra* ¶¶ 8.6-8.8. Under these circumstances, I consider that the Objection in and of itself constitutes “substantial opposition” to the Application by the Basketball Community.
- 8.31 The Applicant opposes this conclusion on the grounds that, even if a substantial portion of the Objector’s members oppose the delegation of “.BASKETBALL” to the Applicant, this opposition is not “substantial opposition” from the community as a whole. Response at 9-10. This is in effect a reiteration of the argument the Applicant raised in connection with the “clearly delineated community” requirement – namely, that the Objection should fail because the Basketball Community does not encompass everyone involved with basketball – an argument I have already rejected and which fares no better here. *See supra* ¶¶ 8.20-8.23. The issue is whether there is “substantial opposition” from the Basketball Community, not from everyone involved with basketball. And for the reasons explained above (¶ 8.30), I find that there is.
- 8.32 The Applicant also contends that there is not “substantial opposition” from the Basketball Community because only a small number of the Objector’s members have submitted letters in their own names supporting the Objection. Response at 9. But as the Objector speaks on behalf of its members, I do not see any need for its members to also submit letters in their names, despite the fact that some have chosen to do so. Similarly, the Applicant also contends that the Objector has failed to put on sufficient evidence of any historical defence of the Basketball Community or the distribution or diversity of any opposition. *Id.* at 10-11. These matters, however, are immaterial to my decision, which is based on the Objection itself. Finally, the Applicant also contends that the Objector has failed to provide sufficient evidence of the stature of those voicing opposition. *Id.* at 11. For the reasons set forth above (¶ 8.30), I disagree.
- 8.33 This brings me to the last element the Objector must prove to succeed on its Objection – namely, that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community. The Objector contends that it does. Specifically, the Objector contends that “control and management of

the .BASKETBALL TLD must be lodged with an entity that will act for the benefit of the Basketball Community, one that is under control of the Basketball Community and embodies its regulations and ethics.” Objection at 11-12; *see also* the Objector’s Code of Ethics, Objection, Attachment F. According to the Objector, applicants “with no connection to or oversight by [the Objector]” – such as the Applicant – “threaten the Basketball Community’s integrity and independence.” Objection at 12. Further, the Objector warns that “[t]hose with incentive, opportunity and motive to engage in activities that will ultimately harm the Basketball Community threaten the world’s respect for the sport.” *Id.*

8.34 The Objector is concerned that the Applicant does not intend to act in the interests of the Basketball Community. The Objector is not reassured by the promises the Applicant makes in the Application to reach out to key stakeholders because Domain Venture Partners (“DVP”), with which the Applicant is affiliated, has not once reached out to the Objector to discuss its TLD policies. If “.BASKETBALL” is delegated to the Applicant, the most the Objector will have is the opportunity to offer advice and potentially influence the way the TLD is run, but it will not have the “oversight, control and enforcement needed by [the Objector] to protect the Basketball Community’s activities”. *Id.*; Application § 18(a) (explaining the Applicant’s intention to establish a “Governance Council” consisting of key stakeholders to advise on how “.BASKETBALL” will be run).

8.35 According to the Objector, the Basketball Community will suffer material, economic and other concrete harm if “.BASKETBALL” is delegated to the Applicant. Objection at 12. This is allegedly because the Applicant will generally allow people to register domain names in “.BASKETBALL” on a “first-come, first-served basis”. *Id.* (quoting from section 18(b) of the Application). According to the Objector, such a policy will “provide inadequate protection of the brands, professional players, officials, sponsors and teams under the [Objector’s] umbrella, both amateur and professional, and lead to severely adverse economic consequences,” including:

- Ambush marketing and the bad faith association of products or services in direct competition with those of official sponsors;
- Scalping of tickets and the fraudulent sale of fake tickets via the Internet;
- Selling unofficial tournament and team merchandise, especially around tournaments; and
- Cybersquatting and domaining.

Id. at 12-13. The Objector contends that “[e]conomic damage to the World Cup and other commercial program losses could range into millions of dollars.” *Id.* at 13. The economic loss attributable to abuse of the gTLD “.BASKETBALL” would undermine the Objector’s mission to promote basketball. *Id.*

- 8.36 The Objector alleges that it is not only the Basketball Community’s commercial programs that will be harmed if “.BASKETBALL” were delegated to the Applicant, but its non-commercial programs as well. *Id.* Many of the Objector’s activities at local and provincial levels are not protected by trademarks, and the Objector contends that the Applicant will provide no protection for “non-trademark identifiers as domain names”. *Id.* The Objector predicts that some of these names “will be auctioned in the pre-registration ‘Landrush Phase’ and sold to the highest bidder regardless of connection to the Basketball Community.” *Id.* The Objector predicts that many more will be registered during “General Availability” by people, including domainers, with no affiliation with the Basketball Community, thereby depriving the Basketball Community of its “most logical and useful identifiers”. *Id.* As a consequence, the Objector foresees that it will lose the “most logical and direct channels in .BASKETBALL to communicate safety information, educate on anti-doping campaigns, and reach out to the youth who represent the future of basketball.” *Id.*
- 8.37 The Objector also believes that the reputation of the Basketball Community and of basketball itself will suffer if “.BASKETBALL” is delegated to the Applicant. *Id.* In this regard, the Objector alleges that Messrs. Iain Roache and Charles Melvin (the CEO and COO of the Applicant) are named individually and together with DVP as defendants in a civil lawsuit pending in the Circuit Court for the Twelfth Judicial Circuit in and for Manatee County, Florida, USA. *Id.* at 14; complaint dated 22 August 2012, Case No. 12 05622, Objection, Attachment G. The Objector states that it understands that the complaint “includes claims of breach of contract, deceptive and unfair trade practices, fraud in the inducement, civil conspiracy, and civil RICO.” *Id.* at 14. The Objector states that it would be a “major concern” to the Basketball Community if “.BASKETBALL” were delegated to an applicant that engaged in the activities alleged in the complaint. According to the Objector, such a situation “would mean that the steward of .BASKETBALL would be acting contrary to the core values of the sport.” *Id.*

- 8.38 The Objector contends that it has a high level of certainty that the damaging events it foresees will come to pass if “.BASKETBALL” is delegated to the Applicant. *Id.* The Objector states that it “already must spend millions of dollars” to protect its commercial programs and millions more in support of its core activities and growth of the sport. *Id.* The delegation of “.BASKETBALL” to the Applicant would make the Objector’s work “inestimably more difficult”, as it would have “no control, oversight and enforcement” and would therefore “be forced to spend far greater amounts of time and resources protecting its commercial programs and core activities, thus undermining its mission and threatening the integrity of [the Objector] together with the Basketball Community it represents.” *Id.*
- 8.39 Finally, the Objector contends that delegating “.BASKETBALL” to the Applicant could lead to an association between that string and gambling. *Id.* Although the Objector is not opposed to gambling per se, its Code of Ethics regulates and limits the relationships of basketball-related entities and gambling interests. *Id.* at 14-15; the Objector’s Code of Ethics §§ 28(d), 30(j), Objection, Attachment F. The Objector also has a contractual arrangement with bwin, a gaming company, that “limits bwin’s rights to associate its betting promotion and offerings with [the Objector’s] marks and competitions and obligates bwin both to adhere to all [the Objector’s] regulations and codes and to inform [the Objector] of any irregular betting patterns they detect.” Objection at 15. The Objector says it is trying to make similar arrangements with other major betting operators. *Id.*
- 8.40 The Objector fears that DVP will not share the Objector’s concerns related to gambling or enforce similar principles in its relationship with gambling interests. The Objector considers its fear well grounded because “DVP, headquartered in Gibraltar, the ‘online gaming capital,’ according to BBC News” is seeking gTLDs related to gambling and sports, like “.BET”, “.CASINO” and “.POKER”, and “.BASKETBALL”, “.RUGBY” and “.FOOTBALL”. *Id.* at 15-16 (quoting Simon Atkinson, *Gibraltar Proves a Winning Bet*, 14 August 2006, BBC News, Objection, Attachment H). According to the Objector, DVP “has the incentive and opportunity to co-mingle activity in all of the TLDs of its registry portfolio as cross-promotion and cross-registration of domain names in co-owned TLDs is a tried and true marketing feature of Registry sales.” Objection at 17. If such a situation were to arise, the Objector “would have absolutely no meaningful oversight” and the “damage to the Basketball Community – were the integrity of the sport to be corrupted by online activity associated with the new .BASKETBALL gTLD – would be immeasurable.” *Id.* The Objector states that its concerns in this regard are particularly high because the “worldwide

operations of the Basketball Community are heavily dependent upon the DNS for its core activities”. *Id.*

8.41 In light of the above, the Objector considers that it has proven that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Basketball Community. For the reasons set out below, I disagree.

8.42 Section 3.5.4 of Module 3 of the Guidebook suggests that I could use several non-exclusive factors in determining whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Basketball Community. These non-exclusive factors are (1) the nature and extent of damage to the reputation of the Basketball Community that would result from the Applicant’s operation of “.BASKETBALL”; (2) evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the Basketball Community or users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests; (3) interference with the core activities of the Basketball Community that would result from the Applicant’s operation of “.BASKETBALL”; (4) dependence of the Basketball Community on the DNS for its core activities; (5) the nature and extent of concrete or economic damage to the Basketball Community that would result from the Applicant’s operation of “.BASKETBALL”; and (6) the level of certainty that the alleged detrimental outcomes would occur. In all events, an allegation of detriment that consists only of an applicant being delegated the gTLD instead of an objector will not be sufficient for a finding of material detriment.

8.43 As a preliminary matter, I note that the Objector has also applied for the gTLD “.BASKETBALL” (*see* Response at 5) and that many of the Objector’s allegations with respect to material detriment speak to the ways in which the Objector considers “.BASKETBALL” would be best operated to serve the interests of the Basketball Community. Indeed, much of the Objection could be read as a submission on why the Objector’s application should be preferred to the Application at issue here. A Community Objection, however, is not the avenue for determining the relative merits of competing gTLD applications, and nothing in the four-part test set out in section 3.5.4 of Module 3 of the Guidebook suggests that it is. The alleged relative merits of the Objector’s application for “.BASKETBALL” are accordingly not material to my determination of the Objection.

- 8.44 What is material to my determination is the Objector's failure to put on evidence proving that the Application creates a likelihood of material detriment to a significant portion of the Basketball Community. Rather, the Objection sets forth a series of speculative allegations with no evidence to support a finding that any material detriment to the Basketball Community would likely come to pass if ".BASKETBALL" were delegated to the Applicant. This is insufficient to meet the Objector's burden of proof on this issue.
- 8.45 Specifically, the Objector contends that the Applicant would operate ".BASKETBALL" in a way that would (1) permit ambush marketing, scalping, the selling of fake tickets and unofficial team merchandise, cybersquatting and domaining, and (2) cause the Basketball Community to lose the most logical channels in ".BASKETBALL" to communicate safety information, educate about anti-doping campaigns and reach out to young people. In support of these allegations, the Objector points to the part of the Application that states that the Applicant would allow people to register domain names in ".BASKETBALL" on a first-come, first-served basis. This is insufficient. The mere fact that the Applicant intends to operate ".BASKETBALL" in an open and liberal manner does not prove that the wrongful conduct the Objector foresees would likely occur and cause the Basketball Community "millions of dollars" in economic damage. *See supra* ¶ 8.35. And the Application – which promises to implement "Abuse Prevention and Mitigation Policies and Procedures" and "Rights Protection Mechanisms" that are extensive and go beyond the safeguards required by ICANN – suggests it would not. Application §§ 18(b), 18(c).
- 8.46 The Objector's allegation that delegation of ".BASKETBALL" to the Applicant would damage the reputation of the Basketball Community is similarly unsubstantiated. Here, the Objector relies on a Florida complaint that brings a variety of claims against DVP and Messrs. Roache and Melvin. A complaint, however, is not evidence, but rather a document containing unsubstantiated allegations that it is the plaintiff's burden to prove. It provides no basis for me to draw any negative inferences about the defendants it names, much less about the Applicant.
- 8.47 The Objector has similarly failed to prove that the Applicant's operation of ".BASKETBALL" would lead to a relationship between online gaming and sports that would damage the reputation of the Basketball Community. Rather, the Objector speculates that this would happen based on the fact that other DVP affiliates have applied for new gTLDs linked to sports and gaming. This is conjecture, not evidence.

8.48 For these reasons, I find the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Basketball Community.

9. COSTS

9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).

9.2 As I have decided to dismiss the Objection, the Applicant is the prevailing party in these proceedings. The Centre shall accordingly refund to the Applicant its advance payment of costs.

10. DETERMINATION

- 10.1 For the reasons set out above, the Expert makes the following determination:
- 10.2 The Objection is dismissed and the Applicant accordingly prevails;
- 10.3 The Centre shall refund to the Applicant its advance payment of costs.

Date: 8 January 2014



Jennifer Kirby
Expert

Reference Material 22.



New gTLD Application Submitted to ICANN by: dot Basketball Limited

String: basketball

Originally Posted: 13 June 2012

Application ID: 1-1199-43437

Applicant Information

1. Full legal name

dot Basketball Limited

2. Address of the principal place of business

Contact
Information
Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

Primary Contact

6(a). Name

Mr. Geir Andreas Rasmussen

6(b). Title

Chief Executive Officer - Famous Four Media Limited

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

Contact Information Redacted

6(f). Email Address

Contact Information Redacted

Secondary Contact

7(a). Name

Mr. Brian Winterfeldt

7(b). Title

Partner - Steptoe & Johnson LLP

7(c). Address**7(d). Phone Number**

Contact Information Redacted

7(e). Fax Number

Contact Information Redacted

7(f). Email Address

Contact Information Redacted

Proof of Legal Establishment**8(a). Legal form of the Applicant**

Limited Liability Company

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

Incorporated under the Gibraltar companies act 1930

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

Domain Venture Partners PCC Limited

9(c). If the applying entity is a joint venture, list all joint venture partners.

Applicant Background

11(a). Name(s) and position(s) of all directors

Domain Management Limited	Director
---------------------------	----------

11(b). Name(s) and position(s) of all officers and partners

Charles Ashley Richard Melvin	Chief Operating Officer
Iain Simon Roache	Chief Executive Officer
Timothy James Ireton	Chief Financial Officer

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Venture Partners PCC Limited	Not Applicable
-------------------------------------	----------------

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

basketball

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the

relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Q16

The Applicant has taken steps to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string (the "String"). The following has been undertaken:

a)The TLD label is valid as specified in relevant technical standards, including: Domain Names: Implementation and Specification (RFC 1035), and Clarifications to the DNS Specification (RFC 2181) and any updates thereto;

b)The TLD label, which is 10 characters long, is well short of the 63 character maximum length;

c) The TLD label is a valid host name, as specified IN: DOD Internet Host Table Specification (RFC 952), Requirements for Internet Hosts – Application and Support (RFC1123), and Application Techniques for Checking and Transformation of Names (RFC 3696), Internationalized Domain Names in Applications (IDNA)(RFCs 5890-5894), and any updates thereto;

d)The TLD label consists entirely of letters (a-z)

The Applicant has evaluated the risks of the TLD experiencing TLD Acceptance issues similar to problems reported in the "Evaluation of the New gTLDs: Policy and Legal Issues" (31/08/2004) which discussed acceptance issues associated with the year 2000 round of new gTLDs with more than three characters (i.e., .aero, .coop, .info, .museum, .name). At that time, only one gTLD, .arpa, which is not widely used outside of limited circles – had four letters. As a result, the new gTLDs had compatibility problems with the software used by Internet infrastructure operators and application providers. Some users have recently been reporting issues with the use of .xxx names in applications such as Twitter and Skype where domain names entered from that TLD are not instantly recognized with a hyperlink as more established gTLDs are.

The Applicant's registry backend services provider, Neustar Inc tested the String for potential rendering or operational problems; none were found.

As the String is not an IDN it does not contain characters that require mixed right-to-left or left-to-right functions. The applicant has familiarized itself with the requirements and components of the IDNA protocol by reviewing the RFCs and background information found on the ICANN IDN Wiki.

The Applicant tested the String using the ICANN SWORD String Similarity Assessment Tool algorithm. The result of this test is 53. The Applicant considers this to be below the level where issues might occur. Should Registrants experience any acceptance issues the Applicant will have a dedicated Operational and Rendering Team ("ORT") on an on-going basis to assist with operational, rendering issues or any other problems that might arise. The ORT will be in place to assist Registrants with any additional problems that may arise out of new TLD that other applicants may be awarded during this process which could lead to unforeseen string confusion now and in the future.

-end-

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

Q18A

Mission and Purpose of .basketball?

The Applicant's mission and purpose is to create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more targeted, secure and stable environment. Its aim is to become the premier online destination for such creators and their wide range of users. The Applicant will create an Internet space whose central function is to provide a platform for creating, producing and disseminating informative, creative and innovative content that is easily recognizable as pertaining to its stakeholder group. The Applicant is acutely aware of the importance of ICANN's mission in coordinating the global Internet's systems of unique identifiers and ensuring their secure and stable operation. The Applicant's core focus is to create a secure, sustainable, and specialized gTLD, thus supporting ICANN's primary goals for this program in promoting consumer trust, consumer choice, competition and innovation.

Why .basketball?

Basketball is one of the most popular sports in the world. With basketball comes equality, integrity and the opportunity of success, and this is something we seek to emulate within this new gTLD. We envisage that this will be a innovative and revolutionary enterprise in which the basketball community will be able to trust and enjoy. Passion is the essence of basketball, and we hope to capture this within .basketball largely using the valuable platform presented by the internet.

Since its inception the internet has revolutionized the way we communicate, empowered hundreds of millions with knowledge and created a platform where global commerce can thrive. However, access to the countless benefits and opportunities which the internet offers can often be hindered when navigating the ever-expanding sea of irrelevant and sometimes malicious content which also exists.

Thus, the aim of .basketball is to create a blank canvas for the online basketball sector set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space for the basketball sector. As the new space is dedicated to those within this affinity group the Applicant will ensure that consumer trust is promoted. Consequently consumer choice will be augmented as there will be a ready marketplace specifically for basketball enterprises to provide their goods and services. All stakeholders within the sector will be able to sample reactions to new ideas, or gather thoughts on the improvements of established ones. This will drive innovation and competition within the basketball sector as there will be new channels available not yet fulfilled by current market offerings. This new environment will cause registrants to seek new and varied ways to separate themselves from the competition.

How will .basketball take shape?

The Applicant believes that the success of the gTLD will be determined largely by the sector's key global stakeholders. These stakeholders will be interested in registering a domain and additionally be motivated to protect their sector from detrimental practices. The Applicant believes that stakeholders should have the opportunity to influence the gTLD and the way it is governed. Accordingly, the Applicant is establishing a Governance

Council ("GC"), consisting of key stakeholders that will serve as an advisory body.

Why Applicant?

The Applicant has substantial combined experience amongst its team in managing global businesses from a financial, legal and operational perspective and an exceptionally strong financial position. The Applicant's Team has previous experience with the entire gTLD life-cycle significantly lowering any launch and ongoing operational risks associated with this application. The Applicant has engaged a world-class Registry services provider to manage the technical infrastructure of the .basketball gTLD. The Applicant is further advised by the leading sector experts in all other areas required to ensure a responsible and successful launch and ongoing management of the gTLD to the benefit of all stakeholders in the ICANN community.

Information for future studies and reviews

The Applicant recognizes the connection of the new gTLD application to the Affirmation of Commitments ("AoC"). To gauge the success of the new gTLD program, the Applicant recognizes that an AoC Review Team will be formed one year after the first delegation. To prepare for this, the ICANN Board resolved the creation of a Working Group to formulate definitions of competition, consumer trust and consumer choice and possible metrics for the future AoC team to consider in its gTLD review. The Applicant understands this effort has not been adopted by the ICANN Board, but many of the proposed metrics may be used to gauge the Applicant's gTLD effectiveness and the gTLD program. The Applicant intends to track costs and benefit metrics to inform future studies and reviews. Proposed definitions are:

- Consumer Trust is defined as the confidence registrants and users have in the consistency of name resolution and the degree of confidence among registrants and users that a TLD Registry operator is fulfilling its proposed purpose and is complying with ICANN policies and applicable national laws.
- Consumer Choice is defined as the range of options available to registrants and users for domain scripts and languages, and for TLDs that offer choices as to the proposed purpose and integrity of their domain name registrants.
- Competition is defined as the quantity, diversity, and the potential for market rivalry of TLDs, TLD Registry operators, and Registrars.

Promoting Competition

Given the proposed definition for competition, the Applicant will attain this by contributing to the quantity and diversity within the Registry Operator space. The Applicant is a new entrant enhancing competition among the providers. The Applicant will promote competition for Registrants by amongst other things:

- Building a healthy growth trend of domain registrations
- Measure migration of content from other TLDs
- Maintain competitive pricing of domains

Promoting consumer trust

.basketball will be developed with consumer trust and satisfaction in mind. After 2 years of operations, the Applicant will conduct a survey to measure consumer trust and consumer satisfaction. This will be used to improve the service. The Applicant will among other things measure the following:

- Service Availability of Critical Registry Systems
- Abuse and Takedown incidents
- Rights protection incidents
- WHOIS data accuracy

Promoting consumer choice

The Applicant intends to promote consumer choice by achieving the following:

- Display of registration requirements and restrictions in the gTLD
- Highly available and geographically diverse Registrar channel
- Effective sunrise and trademark services

Domain names will be available globally, although the Applicant's initial marketing efforts will be predominately directed to potential Registrants represented by the six (6) official languages of the United Nations ("UN Languages"), Arabic, Chinese

(Mandarin), English, French, Russian and Spanish.

After the initial 2 years it is the Applicant's aim that:

- Registrants globally should have access to Registrar services for the gTLD in at least the six UN Languages
- The gTLD is offered by Registrars covering at least 40 Countries and territories globally

Information on the effectiveness of safeguards

The Applicant takes rights protection and abuse prevention and mitigation very seriously and has developed policies accordingly. Amongst others, the Applicant will collect and evaluate data regarding:

- Effectiveness of the Sunrise process in limiting abusive registration practices
 - Effectiveness of the additional Abuse Prevention and Mitigation ("APM") and Rights Protection Mechanisms ("RPM") in limiting abusive registration practices
 - Effectiveness of the mandatory APMs and RPMs
- end-

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Q18b

How do you expect that your proposed gTLD will benefit Registrants, Internet users, and others?

The Applicant's primary intention is to provide a favorable ecosystem for the growth and evolution of the sector. The key to achieving this aim are significant provisions for brand integrity and protection of intellectual property. The Applicant intends to push the boundaries of what can be done through innovative design of the new top level domain, including technologies that capitalize on the sector's needs. A close relationship with the sector's stakeholders is essential to this purpose, and will enable .basketball to grow in response to both Registrant and user needs. The gTLD also contains significant opportunities as a next generation organizational scheme for online content, including provisions for abuse prevention to defend users against malicious registrations. The gTLD has been meticulously designed by a team of industry leaders from an array of different fields. This has enabled the creation of an airtight financial strategy, an inspired technological development plan as well as a close and dynamic relationship with the sector community - all critical needs on the path to the enduring success of the gTLD.

18(b)(i) What is the goal of your proposed gTLD in terms of areas of specialty, service levels, or reputation?

Specialty

The Applicant's key specialty goal is to enable a secure and stable gTLD dedicated to providing global Internet users with a targeted space for subject matter of interest. This gTLD will serve as a home for both Registrants and end-users who feel an affinity with this sector and its associated content. Consequently they will prefer to register domain names, create and post content and seek information in a highly targeted manner.

Allowing users the ability to create a targeted, unique space within the new gTLD will enable them to customize their online offering and presence. The .basketball gTLD will by itself clearly signal the nature and purpose of such websites to Internet users.

The applicant intends to actively promote gTLD specific vertical searching in the gTLD for the benefit of Registrants, end-users and other stakeholders. This specialization through Vertical Search will also benefit Internet users seeking authentic online information and products or services as they will no longer have to wade through content completely unrelated to their desired results.

As the gTLD is sector specific it will provide a better context for second level strings allowing for a much higher number of relevant and more concise domains. This more targeted environment will simplify the user experience across multiple platforms specifically with smartphones and tablets where minimal input is favoured.

Service Levels

The goal of the gTLD Registry is to offer domain name registration services of the highest level, exceeding both ICANN requirements and current sector norms. To achieve these goals, the Applicant has contracted with well established, proven service providers offering the highest possible level of quality in Registry and Registrar services. The expertise of the service providers will ensure that the security and quality of the gTLD will be uncompromised.

The Applicant will further provide the highest level of service to trademark, legal rights owners and second-level domain owners. To achieve this goal the Applicant will be implementing a range of Abuse Prevention and Mitigation policies and procedures. The Applicant is also firmly committed to the protection of Intellectual Property rights and will implement all the mandatory Rights Protection Mechanisms (RPMs) contained in the Applicant Guidebook. Aswell as these The Applicant will further protect the rights of others through the implementation of additional RPMs. The RSP's experience will ensure that the gTLD provides this high level of service to trademark and other legal rights owners to combat abusive and malicious activity within the gTLD.

The Registry will respond to abuse or malicious conduct complaints on a 24/7/365 basis, respond to requests from governmental and quasi-governmental agencies and law enforcement in a timely manner, and promptly abide by decisions and judgments of UDRP and URS panels, in accordance with ICANN consensus policies.

The Applicant will also provide fast and responsive (24/7/365) customer support to both Registrars and end-users in a number of languages to assist with general enquiries as well as complaints of abusive or malicious conduct.

Service Levels related to Registry Backend Services

The Applicant will work with Neustar Inc. (hereinafter "RSP") whose extensive experience spans more than a decade. This will ensure delivery of the protected, trusted, and permanently-running Registry infrastructure necessary to reliably host and operate a gTLD. The Applicant will also work with its Registrars to ensure that consumers receive secure, fast, and reliable domain name registration services with a high-level of customer service.

The global DNS network that will be utilised for the resolution of domains in this gTLD has already been operating for over 10 years. It currently delivers DNS resolution for several TLD customers and provides low latency query responses with a 100% DNS uptime service level agreement.

The Applicant will further leverage the RSP's existing DNSSEC infrastructure, capabilities, and experience to provide a robust and standards compliant implementation that ensures DNSSEC services are always available as part of the DNS.

The Shared Registry System ("SRS") to be used for the Applicant's gTLD is a production-proven, standards-based, highly reliable and high-performance domain name registration and management system that has been designed to operate at the highest performance levels. The Applicant's RSP has been able to meet or exceed their SLA requirements nearly every month since it's inception. Their Registry has achieved a 99.997% success rate in meeting SLAs since 2004.

The Applicant's RSP has extensive experience providing ICANN and RFC-compliant WHOIS services for each of the gTLDs that it operates as a Registry Operator for both gTLDs and

ccTLDs. The RSP's thick WHOIS solution is production proven, highly flexible, and scalable with a track record of 100% availability over the past 10 years.

The Applicant will comply with all the data escrow requirements documented in the Registry Data Escrow ("RyDE") Specification of the Registry Agreement and has a contract in place with Iron Mountain Intellectual Property Management, Inc. ("IM") for RyDE Services. The Applicant and its RSP will in conjunction with Iron Mountain work to ensure that the escrow deposit process is compliant 100% of the time.

Reputation

The Applicant will ensure that the Registry enjoys an excellent reputation through its core focus on creating a secure, sustainable, and specialized gTLD, thus supporting ICANN's primary goals for the new gTLD program in promoting consumer trust, consumer choice, competition and innovation.

The Applicant will strive to become a reputable and successful new gTLD by providing secure, fast and reliable customer service throughout the registration life cycle of all domains in the gTLD.

The Applicant will endeavour to ensure that only non-fraudulent Registrants have domain names in the gTLD via a WHOIS that is searchable, thick and reliable and by being highly responsive to complaints from legal rights owners. The Applicant will further implement an industry leading range of Abuse Prevention and Mitigation policies and procedures as well as RPMs.

The Applicant will provide the financial and operational stability to protect Registrants and ensure the reputation of the Registry. The Applicant has estimated the maximum costs of the critical functions for a three year period by taking the largest single year cost estimate (year 5) and multiplying this by 3. If the calculation used a lower figure the costs estimate would not be at the potential highest amount during the 5 years and the COI instrument would be too small in order to fund the costs of the 5 critical functions for at least 3 years.

The Applicant has decided to commit to providing the highest level of protection to Registrants and Stakeholders by providing ICANN with a COI for the maximum amount as recommended by ICANN in its COI Guidance. This ensures the Registry is reputable, remains conservative and mirrors ICANN's core objectives. In a worst case scenario where the Applicant will not receive any revenue Registrants will be protected not only by the COI, but also by the fact that the Applicant has enough capital to operate for over 3 years.

Question 18(b)(ii) What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation, or innovation?

It is expected that .basketball will provide significant competition for existing and forthcoming gTLDs. The .basketball gTLD will provide a blank canvas of second level domains that will inevitably lead to increased consumer choice and significant innovation from the sector. It will allow Registrants to seek new and varied ways to separate themselves from the competition.

Competition

The Applicant will enhance competition by allowing new Registrants to create new online products and services serving the global marketplace and connecting geographically diverse Registrants and users with a common affinity for the specialized subject matter exemplified by the new gTLD. The new gTLD process and its resulting gTLDs are likely to incentivize top-level domains to improve the security and quality of their online products and services as well as introducing new ones. Thus, this gTLD will benefit consumers by increasing the likelihood of new innovative online products and services. The addition of a new gTLD such as .basketball will also increase competition between existing registries.

The Applicant will promote competition to the benefit of the Registrants by amongst other things:

- Building a healthy growth trend of domain registrations to validate the specialty space
- Promote the migration of sector relevant content from other TLDs
- Maintaining competitive pricing of domains

Differentiation

Currently, there is no gTLD available on the Internet that signifies the specialized products, services, and subject matter encompassed by this gTLD. The gTLD string itself will give a clear indication to website visitors that the site has content relevant to the sector. This will result in the gTLD becoming globally recognizable and viewed as a trusted source of goods, services and information.

Innovation

The gTLD will demonstrate innovation through cutting edge RPMs.

Firstly the Applicant considers the Protection of Intergovernmental Organization ("IGO") names to be very important. The Applicant will use strings registered as second level domains in the .int gTLD as the basis for this protection. To register in the .int domain, the Registrants must be an IGO that meets the requirements found in RFC 1591. The Applicant will reserve these strings and only allow for their future release if an IGO on the "reserve list" wishes to make use of the protected string in the gTLD and provides the Applicant with sufficient documentation.

Finally if a Registrant during sunrise and landrush applies to register a domain name identical to a capital city name of a country or territory listed in the ISO 3166-1 standard it will receive a Capital City Claims ("CCC") notification stating this. Subsequently they will have to reply unconditionally agreeing to comply with requirements to protect the reputation of the capital city and any further terms.

These functions will enhance Internet stability, security and will demonstrate to Registrars, Registrants, and end-users of the Registry that abusive or malicious conduct will not be tolerated. They will further contribute significantly to the integrity of the gTLD enabling an environment where stakeholders can innovate with confidence.

Question 18(b)(iii) What goals does your proposed gTLD have in terms of user experience?

The Applicant's goals for the new gTLD are to provide a trusted, secure, and user friendly environment whereby domain names and content relating to its specific affinity group can flourish.

The Applicant believes that the success of the gTLD will be determined by the sector's key stakeholders globally. The Applicant believes that stakeholders should have the opportunity to influence the gTLD and the way it is governed. Accordingly, the Applicant is establishing a Governance Council ("GC"), to serve as an advisory body.

.basketball will be developed with consumer trust, choice and satisfaction in mind and after the initial 2 years, the Applicant will conduct a survey to analyse the gTLD's success in these areas to help further improve the user experience.

To ensure a high level of service the Applicant will further measure:

- Service Availability Targets for the Critical Registry Functions
- The number of abuse incidents and takedowns
- ICANN Compliance
- Rights protection incidents (i.e. UDRP and URS)

- WHOIS data accuracy

The Applicant intends to promote consumer choice by providing the following:

- Highly available and geographically diverse Registrar distribution channel;
- Effective sunrise and trademark services.

Question 18(b)(iv) Provide a complete description of the applicant's intended registration policies in support of the goals listed above.

Registration Policies

The purpose and goal of the Applicant's policies are to ensure competition, fairness, trust and reliability for Registrars, Registrants, the user community, and other stake holders, while maintaining security and stability for the gTLD.

General Policy

Aside from certain start-up mechanisms, all domain names will generally be registered on a first-come, first-served basis. A Trademark Claims service will be offered for the first 90 days of general registration, with the intent of providing clear notice to potential Registrants of the existing rights of trademark owners with registered trademarks in the Trademark Clearinghouse.

Registration Policies

As per ICANN's requirements, the Applicant will be operating both a Sunrise and Landrush period ahead of general availability for the gTLD.

Governance Council

The Applicant is establishing a the GC, to be comprised of key sector stakeholders that will serve as an advisory body. Each GC will elect its own Board of Directors, which will be responsible for self-governance, the recommendation of sector-specific registration policies, the formulation of guidance on intellectual property and other best practices related to the gTLD.

The Applicant aims to develop an Abuse Prevention and Mitigation Working Group in conjunction with the GC. It will give the Applicant's team advice on abuse preventions and mitigation and how this may effect registration policies. The group will meet to regularly discuss the latest trends in domain name abuse and the most effective way to prevent and remedy them.

Question 18(b)(v) Will your proposed gTLD impose any measures for protecting the privacy or confidential information of Registrants or users? If so, please describe any such measures.

Data and Privacy Policies

The Applicant shall comply with all the Data, WHOIS, and Privacy requirements in the Applicant Guidebook required by ICANN. The Applicant will take all possible steps to maintain the security and privacy of information or data that it may collect in connection with the planned function and usage of names domains, and will remain in compliance with all confidentiality and security regulations in relevant jurisdictions. This data will be held by the Applicant in accordance with the Registry Agreement that the Applicant will execute with ICANN.

The Applicant has further ensured that its suppliers also understand that keeping information secure and private is of crucial importance and will take all available steps to maintain the security and privacy of information collected from the Applicants in the Sunrise, Landrush and General Availability Phases.

Question 18(b) Describe whether and in what ways outreach and communications will help to achieve your projected benefits.

The Applicant plans on making the gTLD the premier gTLD where individuals and organizations can register, build and maintain websites relating to their specific interest area. Thus, communication with the public and development of an outreach campaign are important goals in connection with the gTLD.

During the gTLD evaluation process, the Applicant plans to conduct a two-to-three month communications campaign aimed at reaching sector stakeholders and informing them of the gTLD's mission and the opportunity to participate in the GC. The communication outreach will include email communications to hundreds of leading sector organizations. It will also be accompanied by the launch of a website for communicating information about the gTLD and allowing interested members of the related sector to express interest in serving on the GC. Other communications efforts, including but not limited to, press releases and social media campaigns may all be initiated to raise further awareness regarding the gTLD.

Shortly after completing the evaluation process and being awarded the gTLD, the Applicant will institute marketing and outreach efforts to inform the public about the new gTLD, its launch schedule, and its intended affinity group. The Applicant will use different outreach and communications methods and venues to get the new gTLD mission and message out to the public, including but not limited to the following: online and print press releases, communications with various media outlets, domain name sector groups, mobile apps and various social media platforms. The GC will be used as a further means of outreach and communication to the Internet community.

-end-

18(c). What operating rules will you adopt to eliminate or minimize social costs?

Q18C

What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?

The Applicant fully appreciates the concerns of ICANN, the GAC and other consumer protection authorities about the need to operate new gTLDs in ways that minimize social costs, consumer vulnerabilities as well as other time and financial resource costs. To achieve these goals this gTLD will not only employ the ICANN mandated minimum protections, but will also deploy the following innovative protection measures that will put the gTLD at the forefront of addressing these critical issues:

1) Abuse Prevention and Mitigation Policies and Procedures

The Applicant's core mission and purpose is to create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more targeted, secure and stable environment. To achieve this goal the Applicant will be implementing a range of Abuse Prevention and Mitigation ("APM") policies and procedures.

These Policies and Procedures will include: 1) gTLD APM Plan, 2) Policies and Procedures to Minimize Abusive Registrations, 3) Abuse Point of Contact, 4) Policies for Handling Complaints Regarding the Abuse Policies, 5) Acceptable Use Policy ("AUP"), 6) Proposed Measures for Removal of Orphan Glue Records, 7) Resourcing plans for the initial implementation of, and ongoing maintenance of, the APM initiatives, 8) Registry semi-annual WHOIS verification, 9) Regular monitoring of WHOIS registration data for accuracy and completeness, 10) Registrar WHOIS self-certification, 11) WHOIS data

reminder process, 12) Establishing policies and procedures to ensure Registrar compliance, which may include audits, financial incentives, penalties, or other means, 13) Registrar verification of WHOIS, 14) Abuse Response Process, 15) Policies and procedures that define malicious or abusive behaviour, 16) Service Level Requirements for resolution regarding APM issues, 17) Service Level Requirements for Law enforcement requests regarding APM issues, 18) Coordination of APM efforts with sector Groups and Law Enforcement, 19) Rapid takedown and suspension, 20) Controls to Ensure Proper Access to Domain Functions, 21) Enabling two-factor authentication from Registrants to process update, transfers, and deletion requests, 22) Enabling multiple, unique points of contact to request and/or approve update, transfer, and deletion requests, 23) Enabling the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted, 24) Additional Mechanism for Protection of Capital City Names, 25) Additional Mechanisms to Protect and Reserve IGO Names, 26) Governance Council Structure, 27) Efforts to increase Registrant Security Awareness, 28) Registrant Disqualification, 29) Restrictions on Proxy Registration Services, 30) Registry Lock. (Q28 for detail)

2) Rights Protection Mechanisms

The Applicant is firmly committed to the protection of Intellectual Property rights and to implementing all the mandatory Rights Protection Mechanisms ("RPMs") contained in the Applicant Guidebook and detailed in Specification 7 of the Registry Agreement. Use of domain names that infringe upon the legal rights of others in the gTLD will not be tolerated and preventing abusive registrations is a core objective of the Applicant. The nature of such uses creates security and stability issues for the Registry, Registrars, and Registrants, as well as for users of the Internet in general. The Applicant will minimize time or financial resources costs by preventing abusive registrations and reduce opportunities for behaviours such as phishing or pharming. This will be achieved by implementing comprehensive registration, anti-abuse, and rights protection guidelines as defined in its AUP, as well as innovative additional RPMs such as the Mechanism to Protect IGO Names by blocking second level labels currently present in the .int zone file and the Mechanism for Further Protection of Capital City Names, as described below. In order to identify and address the abusive use of registered names on an ongoing basis, the Applicant will also incorporate and abide by the following RPMs and all other RPMs as specified in Specification 7 of the Registry Agreement and as adopted by the ICANN Board of Directors as ICANN Consensus Policies.

These Rights Protection Mechanisms will among other things include: 1) Trademark Clearinghouse, 2) Applicant's Sunrise Period, 3) Trademark Claims Service, 4) Uniform Domain Name Dispute Resolution Policy, 5) Uniform Rapid Suspension System, 6) Trademark Post-Delegation Dispute Resolution Procedure, 7) Mechanism to protect IGO Names, 8) Mechanism for Further Protection of Capital City Names, 9) Efforts to promote WHOIS Accuracy, 10) Thick Searchable WHOIS, 11) Semi Annual Audits to Ensure Accurate WHOIS, 12) Policies Handling Complaints Regarding Abuse and Rights Issues, 13) Registry Acceptable Use Policy ("AUP"), 14) Monitoring for Malicious Activity. (Q29 for detail)

3) Governance Council Structure

The Applicant believes that sector stakeholders should be afforded the opportunity to influence the manner in which the gTLD is governed. Accordingly, the Applicant will establish a Governance Council (the "GC") comprised of key sector stakeholders that will serve as an advisory body tasked with defining best practice recommendations for the gTLD space. The Applicant believes that the success of the gTLD will be determined largely by the sector's key stakeholders. Not only will these stakeholders have the primary interest in registering domains in the gTLD, but they will also be motivated to protect the sector from practices that would negatively impact the sector overall. The GC exists to provide guidance on matters related to best practices, intellectual property, authentication, certification, and other matters of importance to the sector and it will elect its own Board of Directors, which will be responsible for self-governance, the recommendation of sector-specific policies, and other best practices related to the gTLD.

4) BITS and Coalition for Online Accountability ("COA") Recommendations

The Applicant will further structure its policies around the BITS and COA Recommendations where relevant to this gTLD. The Applicant's goal is to provide a safe and secure experience for consumers. A domain within this gTLD that is owned, operated by or compromised by a malicious party could cause harm to consumers, to the gTLD's reputation and to the reputation of the Internet itself. As such, additional controls are in place relating to the validity of registrations, as well as measures to ensure the correct identity of both Registrants and Registrars relating to changes made within the SRS, and to protecting the integrity of the DNS service as a whole.

The Security Standards Working Group (SSWG) formed by BITS drafted a set of policy recommendations that should be applied to financial TLDs. The policy comprises of a set of 31 recommendations that should be adopted by ICANN in evaluating any applicant of a financial gTLD. The recommendations were posted by BITS in the form of a letter to ICANN at [<http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf>].

The Coalition for Online Accountability have drafted a set of policy recommendations, also endorsed by many other international organizations representing the creative industries, that should be applied to entertainment gTLDs - especially those dependent on copyright protection. The policy comprises of a set of 7 recommendations that should be adopted by ICANN in evaluating any applicant for an entertainment-based gTLD. The recommendations were posted by COA in the form of a letter to ICANN at <http://bit.ly/HuHtmq>.

We welcome the recommendations from BITS and the COA and will strongly consider the recommendations relating to the implementation of this gTLD where considered relevant.

5) Registry Operators Startup Plan

The Applicant proposes to implement the following start-up plan so that the new gTLD is introduced in an orderly, transparent and stable manner. This will safeguard competition, fairness, trust and reliability for Registrants, the User Community, ICANN Accredited Registrars, and other Stakeholders.

The Applicant's startup plan is designed to minimize social costs (e.g., time or financial resources costs, as well as various types of consumer vulnerabilities) by instilling a number of RPMs as well as APMs.

The plan consists of the following multi-phase process that will be executed by the Registry Operator. The timeline for the gTLDs start-up process and associated RPMs in the Applicants gTLD is as follows:

Phase 1 - Sunrise Process:

- Day 1: Sunrise round opens
 - Day 60: Sunrise round Closes
 - Day 61: Sunrise Allocation Including contention resolution mechanisms opens
 - Day 71: Sunrise Allocation contention resolution mechanisms closes
- The following Rights Protection Mechanisms apply:
 - a. Trademark Clearinghouse ("TMCH")
 - b. Sunrise Eligibility Requirements ("SER")
 - c. Sunrise Dispute Resolution Policy ("SDRP")
 - d. Uniform Domain Name Dispute Resolution Policy ("UDRP")
 - e. Uniform Rapid Suspension System ("URS")
 - f. Mechanism for the Protection of IGO Names ("PIN")
 - g. Trademark Claims Service ("TCS") *

Phase 2 - Landrush process:

- Day 72: Landrush opens
- Day 102: Landrush closes
- Day 103: Landrush contention resolution mechanisms opens
- Day 113: Landrush contention resolution mechanisms closes

- The following Rights Protection Mechanisms apply:
 - a. UDRP
 - b. URS
 - c. PIN
 - d. Mechanism for Further Protection of Capital City Names ("CCC")
 - e. TCS *

Phase 3 - General Availability/Registrations:

- Day 114: General availability begins
- The following Rights Protection Mechanisms apply:
 - a. UDRP
 - b. URS
 - c. PIN
 - d. Trademark Post-Delegation Dispute Resolution Procedure ("PDDRP")
 - e. TCS for the 90 days after day 114 *

* To ease the concerns of trademark owners and mitigate the impact of infringing registrations, the Applicant will be implementing the TCS in all three phases of launch. It is important to note that during the General Availability Phase, the TCS will be used for 90 days, 30 days longer than the ICANN mandated minimum.

18(C)(i) How will multiple applications for a particular domain name be resolved, for example, by auction or on a first-come/first-serve basis?

Sunrise and Landrush periods:

During the gTLDs launch period, multiple applications for a particular domain name will be resolved through a Contention Resolution Mechanism ("CRM") involving auctions. These CRMs will apply to the Sunrise and Landrush application phases. The CRMs will be conducted by Sedo GMBH, an experienced provider of domain auction services. The mechanisms offered will involve closed auctions where only specific bidders can participate.

During the Applicants Sunrise process, if there are two or more eligible applicants for one domain name string, then the contention will be resolved by auction. Auctions held during the Sunrise phase ("Sunrise Auctions") will be closed and the only bidders will be eligible applicants according to the gTLDs Sunrise eligibility requirements including the TMCH.

During the Applicants Landrush process, if there are two or more eligible applicants for one domain name string, then the contention will be resolved by auction. Auctions held during the Landrush phase ("Landrush Auctions") will be closed and the only bidders will be eligible applicants according to the gTLDs Landrush eligibility requirements.

General Availability:

After the two initial startup phases of the Registry the allocation of domain names will occur on a first-come first-serve basis, taking into account the registries APM and RPM mechanisms.

18(c)(ii) Explain any cost benefits for registrants you intend to implement (e.g., advantageous pricing, introductory discounts, bulk registration discounts).

Incentive, Marketing and Outreach Programs

The Applicant will implement a number of incentive, marketing assistance, awareness and PR programs to assist the Registrar channel in providing a sector leading experience to

end-users and to provide cost benefits for registrants. The Applicant will work with the global Registrar channel to ensure that the new gTLD offer is clearly visible on registrar sites resulting in an increase in the awareness and in the number of new gTLD registrations. Achieving this visibility requires (1) a clear business case and incentives for registrars to motivate them and (2) mechanisms and assets to make it easy for them to do so.

The Applicant will at the time of launch depending upon market conditions consider incentive programs that will deliver cost benefits to registrants through either the use of advantageous pricing, introductory discounts, bulk registration discounts or other similar methods. The Applicant is aware of Specification 9 - Registry Operator Code of Conduct, and will not directly or indirectly show any preference or provide any special consideration to any Registrar in its marketing efforts.

Example incentive mechanisms the Applicant will provide to the registrars may include:

Marketing Incentives

The Applicant intends to provide expertise, tools and creative assets to the registrars as part of general marketing and co-marketing programs. There is a significant cost saving if the expertise, tools and assets are developed centrally and the costs amortized across the registrar base. Significant cost savings can occur relating to Market Research, Social Customer Relationship Management ("SCRM"), Content Management Systems ("CMS"), Direct Marketing Tools, Marketing Collateral and Analytics Solutions.

The Applicant will employ some or all of the following marketing techniques jointly with registrars globally: (1) Direct Response Print, (2) General Web Marketing, (3) Email campaigns without Incentive, (4) Email with Incentive, (5) Email Marketing - Prospect List, (6) Email Marketing - Sponsored Newsletter, (7) Direct Marketing with Incentive, (8) Web Marketing with Incentive, (9) Viral Marketing (Social, Video, Micro-sites), (10) Develop User Interface Improvement best practices, (11) Develop Search Engine Optimization best practices, (12) Email Marketing - Registrar List

As an example of a marketing initiative, the Applicant will forward leads to the Registrars "buy" pages as an incentive via the means of Pay-Per-Click ("PPC") search marketing. The Applicant will run multiple PPC campaigns targeting gTLD Registrants and point these to landing pages on the Registrar's websites. Conversions are directly trackable from all PPC campaigns and keywords with a high Click-Through-Rate ("CTR") or conversions will also be leveraged for SEO best practice purposes.

PR and Awareness Incentives:

In addition to the core outreach to the Registrar Channel, the Applicant will engage in a wider outreach to build awareness of the new gTLD with customers, end-users and other stakeholders. The Applicant will engage with a number of high profile individuals associated with the gTLD and will seek to reach end consumers through webcasts, podcasts, traditional broadcast TV as well as radio.

Provision of customer retention toolkits to Registrars:

The Applicant will use propensity modelling to build retention marketing programs to minimize churn whilst building renewal sustainability. The Applicant will develop econometric models designed to measure the likelihood of a customer segment to purchase a product or offer bundle, at a certain point in the relationship lifecycle. They are used to predict the best time, and the best combination of products, to offer to customers who match a certain profile. They are especially effective where there are large numbers of customers and reliable data can be gathered. The Applicant expects that registration volume in the gTLD will provide sufficient data for this modelling.

Measure, benchmark and improve the customer experience:

The Applicant will engage in a program to develop best practice policies related to the customer experience at differing levels of the channel. This will include the entire

ecosystem from Registry through Registrar to Resellers and finally end-users. One key metric might be, for example, to reduce the number of clicks to make a purchase equivalent to the most customer friendly e-commerce sites in the world.

The Applicant might, for example, provide website performance tracking tools to registrars, which would benchmark current performance and provide insights into customers' needs and behaviour at the point of purchase.

The Applicant will engage in a Social Customer Relationship Management Program to monitor social media feedback to questions, concerns or other issues. The Applicant will further seek to measure marketing communication expenditure and activity.

Other initiatives that will be considered by the Applicant in its outreach efforts:

- (a) Customized Vertical Search App for major mobile platforms.
- (b) Designated Twitter channel for the stakeholder community.
- (c) Social Media outreach through Facebook and other social media solutions.

Translation into other languages:

At present, the Applicant plans to translate marketing collateral and other content that it considers to have geographically diverse appeal in to the 6 official UN languages, namely Arabic, Chinese (Mandarin), English, French, Russian and Spanish.

18(c)(iii) Note that the Registry Agreement requires that registrars be offered the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Additionally, the Registry Agreement requires advance written notice of price increases. Do you intend to make contractual commitments to registrants regarding the magnitude of price escalation? If so, please describe your plans.

The Applicant will follow the lifecycle and business rules found in the majority of gTLDs today. Our back-end operator has in excess of ten years of experience managing numerous gTLDs that utilize standard and unique business rules and lifecycles.

Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, the registration term for registered names may not exceed ten (10) years. Further the renewal of registered names may be made in one (1) year increments for up to a maximum of ten (10) years. For the avoidance of doubt, renewal of registered names may not extend their registration period beyond ten (10) years from the time of the renewal.

The Applicant plans to review domain name registration rates on an annual basis and will make a determination at that time regarding adjustments, depending upon market factors. Thus, at this time, the Applicant does not plan to make specific guarantees regarding pricing increases.

The Applicant will provide ICANN and each ICANN accredited registrar that has executed the registry-registrar agreement for the gTLD advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars, unless such refunds, rebates, discounts, product tying or other programs are of a limited duration that is clearly and conspicuously disclosed to the registrar when offered) that complies with the requirements as outlined in the New gTLD Registry Agreement.

-end-

Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

Geographic Names

21(a). Is the application for a geographic name?

No

Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

Q22

Introduction

The Applicant is aware of the substantial amount of work and effort that has gone into developing policy to address the issue of the reservation and release of geographic names under new gTLDs, including the valuable input from ICANN's Governmental Advisory Committee ("GAC"), the Generic Names Supporting Organisation Reserved Names Working Group, Registry Operators and from elsewhere within the ICANN community.

The Applicant is aware of and understands the requirements set forth in the 11 January 2012 version of the New gTLD Applicant Guidebook (New gTLD Applicant Guidebook) and the GAC advice for protection of geographic names and will implement appropriate measures to ensure that it complies in all respects with ICANN policies and rules regarding both the reservation and release of geographic names at the second level (or other levels).

In addition to this, the Applicant proposes to implement an additional mechanism for the protection of capital city names at the second level that exceeds the requirements in the New gTLD Applicant Guidebook. See description of Capital City Claim service described below.

Reservation of Geographic Names

The initial GAC advice on the protection of geographic names is contained in the GAC document "Principles Regarding New gTLDs" which was presented by the GAC on 28 March 2007. Section 2.7(a) of this document states that new gTLD applicants should "adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD".

Specification 5 of the New gTLD Registry Agreement provides further clarity and details the Schedule of Reserved Names at the Second Level (or other levels) in gTLD Registries, whereby the Registry Operator undertakes to reserve certain domain names and prevent them from being registered, delegated or used.

Section 2 of Specification 5 of the New gTLD Registry Agreement requires that all two character labels are initially reserved. This is to avoid conflicts and confusion with existing ccTLD extensions.

Section 5 of Specification 5 of the New gTLD Registry Agreement is more comprehensive and states that:

"5. Country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:

5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU ;

5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names".

In order to meet these requirements regarding country and territory names, the applicant will maintain and regularly update copies of the aforementioned internationally recognized lists. All labels appearing on those lists, and on any list promulgated or recognized by ICANN for reservation in the future, assuming the corresponding string is unregistered, The Applicant will afford the same protections to new states or cities as they are formed.

The Applicant will reserve all labels appearing on the above referenced lists from time to time, and prevent registration, delegation or use of such names in accordance with ICANN requirements and as described above. In order to ensure that this is implemented correctly, all such labels will be reserved in the name of the applicant in order to prevent their delegation and use.

Release of Reserved Geographic Names

Specification 5 of the New gTLD Registry Agreement also contains provisions for the release of country and territory names on the basis that agreement is reached with "the applicable government(s), provided, further, that Registry Operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN".

As such the applicant's proposed policy for the release of such reserved terms is cognisant of the review and approval process from the GAC and ICANN.

Based upon a review of the available literature, documentation and guidance, the applicant proposes the following policy to ICANN and the GAC for the potential release of reserved terms under the TLD:

- i) Further to the successful evaluation and delegation of the TLD all of the aforementioned labels, as specified under Section 5 of Specification 5 of the New gTLD Registry Agreement will be reserved and thus unavailable for registration during each stage of the launch process including, but not limited to the Sunrise period, the Landrush period through to General registrations.
- ii) At any stage during the launch process through to General registrations and beyond, the aforementioned reserved names may only be assigned to the relevant Government or public authority. In such situation they would be assigned using the following process:
 - a) The corresponding Government or public authority submits a request to the GAC seeking the assignment of the reserved name to themselves and provides the details of the proposed registrant entity for the domain name registration.
 - b) The GAC will validate it and authenticate the request to establish that is a genuine bona fide request.
 - c) Once this has been established by the GAC, the request for delegation will be forwarded to the applicant to request the assignment of the domain name. Simultaneously the GAC will also notify ICANN of the GAC approval of the request for the assignment of the domain name.
 - d) The applicant will issue a unique authorisation code to the proposed registrant entity.
 - e) The proposed registrant entity will then be able to request the assignment of the domain name to themselves using the authorisation code with an ICANN accredited registrar for the applicant TLD.

In addition to the above, the applicant will also adhere to and implement ICANN policy with regards to the reservation and release of such terms as and when required.

Additional Mechanism for Further Protection of Capital City Names

In parallel with the Landrush Period defined in the answer to question 18, the applicant will implement a Capital City Claim ("CCC") service whereby additional protection will be granted to the capital city names of a country or territory listed in the ISO 3166-1 standard. The CCC process is described below:

a) Any prospective domain name registrant applying to register a domain name identical to the capital city name of a country or territory listed in the ISO 3166-1 standard will automatically receive from the Applicant a CCC notification highlighting the fact that the applied-for domain name corresponds to a capital city name of a country or territory listed in the ISO 3166-1 standard.

b) A potential domain name registrant receiving a CCC notification will have to send a response to the Applicant whereby it will unconditionally comply with the requirements as to representations and warranties required by the Applicant.

c) Unconditional acceptance of the representations and warranties set out in the CCC notification will be a material requirement for a prospective registrant to be eligible to register the domain name in question should said prospective registrant be successful in the Landrush period.

d) Upon registration during the Landrush period of a domain name identical to a capital city name of a country or territory listed in the ISO 3166-1 standard, the Applicant will send a notification listing the names in writing to the GAC Chair.
(see Q28 for more detail)

-end-

Registry Services

23. Provide name and full description of all the Registry Services to be provided.

Q23

23.1 Introduction

The Applicant has elected to partner with Neustar, Inc to provide back-end services for the TLD registry. In making this decision, the Applicant recognized that Neustar already possesses a production-proven registry system that can be quickly deployed and smoothly operated over its robust, flexible, and scalable world-class infrastructure. The existing registry services will be leveraged for the TLD registry. The following section describes the registry services to be provided.

23.2 Standard Technical and Business Components

Neustar will provide the highest level of service while delivering a secure, stable and comprehensive registry platform. The Applicant will use Neustar's Registry Services platform to deploy the TLD registry, by providing the following Registry Services (none of these services are offered in a manner that is unique to this TLD):

- Registry-Registrar Shared Registration Service (SRS)
- Extensible Provisioning Protocol (EPP)
- Domain Name System (DNS)
- WHOIS
- DNSSEC
- Data Escrow

- Dissemination of Zone Files using Dynamic Updates
- Access to Bulk Zone Files
- Dynamic WHOIS Updates
- IPv6 Support
- Rights Protection Mechanisms
- Internationalized Domain Names (IDN).

The following is a description of each of the services.

SRS

Neustar's secure and stable SRS is a production-proven, standards-based, highly reliable, and high-performance domain name registration and management system. The SRS includes an EPP interface for receiving data from registrars for the purpose of provisioning and managing domain names and name servers. The response to Question 24 provides specific SRS information.

EPP

The TLD registry will use the Extensible Provisioning Protocol (EPP) for the provisioning of domain names. The EPP implementation will be fully compliant with all RFCs. Registrars are provided with access via an EPP API and an EPP based Web GUI. With more than 10 gTLD, ccTLD, and private TLDs implementations, Neustar has extensive experience building EPP-based registries. Additional discussion on the EPP approach is presented in the response to Question 25.

DNS

The Applicant will leverage Neustar's world-class DNS network of geographically distributed nameserver sites to provide the highest level of DNS service. The service utilizes "Anycast" routing technology, and supports both IPv4 and IPv6. The DNS network is highly proven, and currently provides service to over 20 TLDs and thousands of enterprise companies. Additional information on the DNS solution is presented in the response to Questions 35.

WHOIS

Neustar's existing standard WHOIS solution will be used for the TLD. The service provides supports for near real-time dynamic updates. The design and construction is agnostic with regard to data display policy and is flexible enough to accommodate any data model. In addition, a searchable WHOIS service that complies with all ICANN requirements will be provided. The following WHOIS options will be provided:

Standard WHOIS (Port 43)

Standard WHOIS (Web)

Searchable WHOIS (Web)

DNSSEC

An RFC compliant DNSSEC implementation will be provided using existing DNSSEC capabilities. Neustar is an experienced provider of DNSSEC services, and currently manages signed zones for three large top level domains: .biz, .us, and .co. Registrars are provided with the ability to submit and manage DS records using EPP, or through a web GUI. Additional information on DNSSEC, including the management of security extensions is found in the response to Question 43.

Data Escrow

Data escrow will be performed in compliance with all ICANN requirements in conjunction with an approved data escrow provider. The data escrow service will:

- Protect against data loss
- Follow industry best practices
- Ensure easy, accurate, and timely retrieval and restore capability in the event of a hardware failure
- Minimizes the impact of software or business failure.

Additional information on the Data Escrow service is provided in the response to Question 38.

Dissemination of Zone Files using Dynamic Updates

Dissemination of zone files will be provided through a dynamic, near real-time process. Updates will be performed within the specified performance levels. The proven technology ensures that updates pushed to all nodes within a few minutes of the changes being received by the SRS. Additional information on the DNS updates may be found in the response to Question 35.

Access to Bulk Zone Files

The Applicant will provide third party access to the bulk zone file in accordance with specification 4, Section 2 of the Registry Agreement. Credentialing and dissemination of the zone files will be facilitated through the Central Zone Data Access Provider.

Dynamic WHOIS Updates

Updates to records in the WHOIS database will be provided via dynamic, near real-time updates. Guaranteed delivery message oriented middleware is used to ensure each individual WHOIS server is refreshed with dynamic updates. This component ensures that all WHOIS servers are kept current as changes occur in the SRS, while also decoupling WHOIS from the SRS. Additional information on WHOIS updates is presented in response to Question 26.

IPv6 Support

The TLD registry will provide IPv6 support in the following registry services: SRS, WHOIS, and DNS/DNSSEC. In addition, the registry supports the provisioning of IPv6 AAAA records. A detailed description on IPv6 is presented in the response to Question 36.

Required Rights Protection Mechanisms

The Applicant, will provide all ICANN required Rights Mechanisms, including:

- Trademark Claims Service
- Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)
- Registration Restriction Dispute Resolution Procedure (RRDRP)
- UDRP
- URS
- Sunrise service.

More information is presented in the response to Question 29.

Internationalized Domain Names (IDN)

IDN registrations are provided in full compliance with the IDNA protocol. Neustar possesses extensive experience offering IDN registrations in numerous TLDs, and its IDN implementation uses advanced technology to accommodate the unique bundling needs of certain languages. Character mappings are easily constructed to block out characters that may be deemed as confusing to users. A detailed description of the IDN implementation is presented in response to Question 44.

23.3 Unique Services

The Applicant will not be offering services that are unique to this TLD.

23.4 Security or Stability Concerns

All services offered are standard registry services that have no known security or stability concerns. Neustar has demonstrated a strong track record of security and stability within the industry.

-end-

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

Q24

24.1 Introduction

The Applicant has partnered with Neustar, Inc, an experienced TLD registry operator, for the operation of the TLD Registry. The Applicant is confident that the plan in place for the operation of a robust and reliable Shared Registration System (SRS) as currently provided by Neustar will satisfy the criterion established by ICANN.

Neustar built its SRS from the ground up as an EPP based platform and has been operating it reliably and at scale since 2001. The software currently provides registry services to five TLDs (.BIZ, .US, TEL, .CO and .TRAVEL) and is used to provide gateway services to the .CN and .TW registries. Neustar's state of the art registry has a proven track record of being secure, stable, and robust. It manages more than 6 million domains, and has over 300 registrars connected today.

The following describes a detailed plan for a robust and reliable SRS that meets all ICANN requirements including compliance with Specifications 6 and 10.

24.2 The Plan for Operation of a Robust and Reliable SRS

High-level SRS System Description

The SRS to be used for TLD will leverage a production-proven, standards-based, highly reliable and high-performance domain name registration and management system that fully meets or exceeds the requirements as identified in the new gTLD Application Guidebook.

The SRS is the central component of any registry implementation and its quality, reliability and capabilities are essential to the overall stability of the TLD. Neustar has a documented history of deploying SRS implementations with proven and verifiable performance, reliability and availability. The SRS adheres to all industry standards and protocols. By leveraging an existing SRS platform, The Applicant is mitigating the significant risks and costs associated with the development of a new system. Highlights of the SRS include:

- State-of-the-art, production proven multi-layer design-
- Ability to rapidly and easily scale from low to high volume as a TLD grows
- Fully redundant architecture at two sites
- Support for IDN registrations in compliance with all standards
- Use by over 300 Registrars
- EPP connectivity over IPv6
- Performance being measured using 100% of all production transactions (not sampling).

SRS Systems, Software, Hardware, and Interoperability

The systems and software that the registry operates on are a critical element to providing a high quality of service. If the systems are of poor quality, if they are difficult to maintain and operate, or if the registry personnel are unfamiliar with them, the registry will be prone to outages. Neustar has a decade of experience operating registry infrastructure to extremely high service level requirements. The infrastructure is designed using best of breed systems and software. Much of the application software that performs registry-specific operations was developed by the current engineering team and as a result the team is intimately familiar with its operations.

The architecture is highly scalable and provides the same high level of availability and performance as volumes increase. It combines load balancing technology with scalable server technology to provide a cost effective and efficient method for scaling.

The Registry is able to limit the ability of any one registrar from adversely impacting other registrars by consuming too many resources due to excessive EPP transactions. The system uses network layer 2 level packet shaping to limit the number of simultaneous connections registrars can open to the protocol layer.

All interaction with the Registry is recorded in log files. Log files are generated at each layer of the system. These log files record at a minimum:

- The IP address of the client
- Timestamp

- Transaction Details
- Processing Time.

In addition to logging of each and every transaction with the SRS Neustar maintains audit records, in the database, of all transformational transactions. These audit records allow the Registry, in support of the applicant, to produce a complete history of changes for any domain name.

SRS Design

The SRS incorporates a multi-layer architecture that is designed to mitigate risks and easily scale as volumes increase. The three layers of the SRS are:

- Protocol Layer
- Business Policy Layer
- Database.

Each of the layers is described below.

Protocol Layer

The first layer is the protocol layer, which includes the EPP interface to registrars. It consists of a high availability farm of load-balanced EPP servers. The servers are designed to be fast processors of transactions. The servers perform basic validations and then feed information to the business policy engines as described below. The protocol layer is horizontally scalable as dictated by volume.

The EPP servers authenticate against a series of security controls before granting service, as follows:

- The registrar's host exchanges keys to initiate a TLS handshake session with the EPP server.
- The registrar's host must provide credentials to determine proper access levels.
- The registrar's IP address must be preregistered in the network firewalls and traffic-shapers.

Business Policy Layer

The Business Policy Layer is the "brain" of the registry system. Within this layer, the policy engine servers perform rules-based processing as defined through configurable attributes. This process takes individual transactions, applies various validation and policy rules, persists data and dispatches notification through the central database in order to publish to various external systems. External systems fed by the Business Policy Layer include backend processes such as dynamic update of DNS, WHOIS and Billing.

Similar to the EPP protocol farm, the SRS consists of a farm of application servers within this layer. This design ensures that there is sufficient capacity to process every transaction in a manner that meets or exceeds all service level requirements. Some registries couple the business logic layer directly in the protocol layer or within the database. This architecture limits the ability to scale the registry. Using a decoupled architecture enables the load to be distributed among farms of inexpensive servers that can be scaled up or down as demand changes.

The SRS today processes over 30 million EPP transactions daily.

Database

The database is the third core component of the SRS. The primary function of the SRS database is to provide highly reliable, persistent storage for all registry information required for domain registration services. The database is highly secure, with access limited to transactions from authenticated registrars, trusted application-server processes, and highly restricted access by the registry database administrators. A full description of the database can be found in response to Question 33.

Figure 24-1 depicts the overall SRS architecture including network components.

Number of Servers

As depicted in the SRS architecture diagram above Neustar operates a high availability architecture where at each level of the stack there are no single points of failures. Each of the network level devices run with dual pairs as do the databases. For the TLD registry, the SRS will operate with 8 protocol servers and 6 policy engine servers. These expand horizontally as volume increases due to additional TLDs, increased load, and

through organic growth. In addition to the SRS servers described above, there are multiple backend servers for services such as DNS and WHOIS. These are discussed in detail within those respective response sections.

Description of Interconnectivity with Other Registry Systems

The core SRS service interfaces with other external systems via Neustar's external systems layer. The services that the SRS interfaces with include:

- WHOIS
- DNS
- Billing
- Data Warehouse (Reporting and Data Escrow).

Other external interfaces may be deployed to meet the unique needs of a TLD. At this time there are no additional interfaces planned for TLD.

The SRS includes an "external notifier" concept in its business policy engine as a message dispatcher. This design allows time-consuming backend processing to be decoupled from critical online registrar transactions. Using an external notifier solution, the registry can utilize "control levers" that allow it to tune or to disable processes to ensure optimal performance at all times. For example, during the early minutes of a TLD launch, when unusually high volumes of transactions are expected, the registry can elect to suspend processing of one or more back end systems in order to ensure that greater processing power is available to handle the increased load requirements. This proven architecture has been used with numerous TLD launches, some of which have involved the processing of over tens of millions of transactions in the opening hours. The following are the standard three external notifiers used the SRS:

WHOIS External Notifier

The WHOIS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on WHOIS. It is important to note that, while the WHOIS external notifier feeds the WHOIS system, it intentionally does not have visibility into the actual contents of the WHOIS system. The WHOIS external notifier serves just as a tool to send a signal to the WHOIS system that a change is ready to occur. The WHOIS system possesses the intelligence and data visibility to know exactly what needs to change in WHOIS. See response to Question 26 for greater detail.

DNS External Notifier

The DNS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on DNS. Like the WHOIS external notifier, the DNS external notifier does not have visibility into the actual contents of the DNS zones. The work items that are generated by the notifier indicate to the dynamic DNS update sub-system that a change occurred that may impact DNS. That DNS system has the ability to decide what actual changes must be propagated out to the DNS constellation. See response to Question 35 for greater detail.

Billing External Notifier

The billing external notifier is responsible for sending all billable transactions to the downstream financial systems for billing and collection. This external notifier contains the necessary logic to determine what types of transactions are billable. The financial systems use this information to apply appropriate debits and credits based on registrar.

Data Warehouse

The data warehouse is responsible for managing reporting services, including registrar reports, business intelligence dashboards, and the processing of data escrow files. The Reporting Database is used to create both internal and external reports, primarily to support registrar billing and contractual reporting requirement. The data warehouse databases are updated on a daily basis with full copies of the production SRS data.

Frequency of Synchronization between Servers

The external notifiers discussed above perform updates in near real-time, well within the prescribed service level requirements. As transactions from registrars update the core SRS, update notifications are pushed to the external systems such as DNS and WHOIS. These updates are typically live in the external system within 2-3 minutes.

Synchronization Scheme (e.g., hot standby, cold standby)
Neustar operates two hot databases within the data center that is operating in primary mode. These two databases are kept in sync via synchronous replication. Additionally, there are two databases in the secondary data center. These databases are updated real time through asynchronous replication. This model allows for high performance while also ensuring protection of data. See response to Question 33 for greater detail.

Compliance with Specification 6 Section 1.2

The SRS implementation for TLD is fully compliant with Specification 6, including section 1.2. EPP Standards are described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. Extensible Provisioning Protocol or EPP is defined by a core set of RFCs that standardize the interface that make up the registry-registrar model. The SRS interface supports EPP 1.0 as defined in the following RFCs shown in Table 24-1.

Additional information on the EPP implementation and compliance with RFCs can be found in the response to Question 25.

Compliance with Specification 10

Specification 10 of the New TLD Agreement defines the performance specifications of the TLD, including service level requirements related to DNS, RDDS (WHOIS), and EPP. The requirements include both availability and transaction response time measurements. As an experienced registry operator, Neustar has a long and verifiable track record of providing registry services that consistently exceed the performance specifications stipulated in ICANN agreements. This same high level of service will be provided for the TLD Registry. The following section describes Neustar's experience and its capabilities to meet the requirements in the new agreement.

To properly measure the technical performance and progress of TLDs, Neustar collects data on key essential operating metrics. These measurements are key indicators of the performance and health of the registry. Neustar's current .biz SLA commitments are among the most stringent in the industry today, and exceed the requirements for new TLDs. Table 24-2 compares the current SRS performance levels compared to the requirements for new TLDs, and clearly demonstrates the ability of the SRS to exceed those requirements.

Their ability to commit and meet such high performance standards is a direct result of their philosophy towards operational excellence. See response to Question 31 for a full description of their philosophy for building and managing for performance.

24.3 Resourcing Plans

The development, customization, and on-going support of the SRS are the responsibility of a combination of technical and operational teams, including:

- Development/Engineering
- Database Administration
- Systems Administration
- Network Engineering.

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will be involved in the design and testing. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably.

The necessary resources will be pulled from the pool of operational resources described in detail in the response to Question 31. Neustar's SRS implementation is very mature, and has been in production for over 10 years. As such, very little new development related to the SRS will be required for the implementation of the TLD registry. The following resources are available from those teams:

Development/Engineering - 19 employees
Database Administration - 10 employees
Systems Administration - 24 employees
Network Engineering - 5 employees

The resources are more than adequate to support the SRS needs of all the TLDs operated by

Neustar, including the TLD registry.
-end-

25. Extensible Provisioning Protocol (EPP)

Q25

25.1 Introduction

The Applicant's back-end registry operator, Neustar, has over 10 years of experience operating EPP based registries.

They deployed one of the first EPP registries in 2001 with the launch of .biz. In 2004, they were the first gTLD to implement EPP 1.0. Over the last ten years Neustar has implemented numerous extensions to meet various unique TLD requirements. Neustar will leverage its extensive experience to ensure that the Applicant is provided with an unparalleled EPP based registry. The following discussion explains the EPP interface which will be used for the TLD registry.

This interface exists within the protocol farm layer as described in Question 24 and is depicted in Figure 25-1.

25.2 EPP Interface

Registrars are provided with two different interfaces for interacting with the registry. Both are EPP based, and both contain all the functionality necessary to provision and manage domain names. The primary mechanism is an EPP interface to connect directly with the registry. This is the interface registrars will use for most of their interactions with the registry.

However, an alternative web GUI (Registry Administration Tool) that can also be used to perform EPP transactions will be provided. The primary use of the Registry Administration Tool is for performing administrative or customer support tasks.

The main features of the EPP implementation are:

- Standards Compliance: The EPP XML interface is compliant to the EPP RFCs. As future EPP RFCs are published or existing RFCs are updated, Neustar makes changes to the implementation keeping in mind of any backward compatibility issues.
- Scalability: The system is deployed keeping in mind that it may be required to grow and shrink the footprint of the Registry system for a particular TLD.
- Fault-tolerance: The EPP servers are deployed in two geographically separate data centers to provide for quick failover capability in case of a major outage in a particular data center. The EPP servers adhere to strict availability requirements defined in the SLAs.
- Configurability: The EPP extensions are built in a way that they can be easily configured to turn on or off for a particular TLD.
- Extensibility: The software is built ground up using object oriented design. This allows for easy extensibility of the software without risking the possibility of the change rippling through the whole application.
- Auditable: The system stores detailed information about EPP transactions from provisioning to DNS and WHOIS publishing. In case of a dispute regarding a name registration, the Registry can provide comprehensive audit information on EPP transactions.
- Security: The system provides IP address based access control, client credential-based authorization test, digital certificate exchange, and connection limiting to the protocol layer.

25.3 Compliance with RFCs and Specifications

The registry-registrar model is described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. As shown in Table 25-1, EPP is defined by the core set of RFCs that standardize the interface that registrars use to provision domains with the SRS. As a core component of the SRS architecture, the implementation is fully compliant with all EPP RFCs.

Neustar ensures compliance with all RFCs through a variety of processes and procedures.

Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to EPP. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

Neustar has a long history of providing exceptional service that exceeds all performance specifications. The SRS and EPP interface have been designed to exceed the EPP specifications defined in Specification 10 of the Registry Agreement and profiled in Table 25-2. Evidence of Neustar's ability to perform at these levels can be found in the .biz monthly progress reports found on the ICANN website.

EPP Toolkits

Toolkits, under open source licensing, are freely provided to registrars for interfacing with the SRS. Both Java and C++ toolkits will be provided, along with the accompanying documentation. The Registrar Tool Kit (RTK) is a software development kit (SDK) that supports the development of a registrar software system for registering domain names in the registry using EPP. The SDK consists of software and documentation as described below.

The software consists of working Java and C++ EPP common APIs and samples that implement the EPP core functions and EPP extensions used to communicate between the registry and registrar. The RTK illustrates how XML requests (registration events) can be assembled and forwarded to the registry for processing. The software provides the registrar with the basis for a reference implementation that conforms to the EPP registry-registrar protocol. The software component of the SDK also includes XML schema definition files for all Registry EPP objects and EPP object extensions. The RTK also includes a "dummy" server to aid in the testing of EPP clients.

The accompanying documentation describes the EPP software package hierarchy, the object data model, and the defined objects and methods (including calling parameter lists and expected response behavior). New versions of the RTK are made available from time to time to provide support for additional features as they become available and support for other platforms and languages.

25.3 Proprietary EPP Extensions

The TLD registry will not include proprietary EPP extensions. Neustar has implemented various EPP extensions for both internal and external use in other TLD registries. These extensions use the standard EPP extension framework described in RFC 5730. Table 25-3 provides a list of extensions developed for other TLDs. Should the TLD registry require an EPP extension at some point in the future, the extension will be implemented in compliance with all RFC specifications including RFC 3735.

The full EPP schema to be used in the TLD registry is attached in the document titled "EPP Schema."

25.4 Resourcing Plans

The development and support of EPP is largely the responsibility of the Development/Engineering and Quality Assurance teams. As an experience registry operator with a fully developed EPP solution, on-going support is largely limited to periodic updates to the standard and the implementation of TLD specific extensions.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Development/Engineering - 19 employees

Quality Assurance - 7 employees.

These resources are more than adequate to support any EPP modification needs of the TLD registry.

-end-

26. Whois

Q26

26.1 Introduction

The Applicant recognizes the importance of an accurate, reliable, and up-to-date WHOIS database to governments, law enforcement, intellectual property holders and the public as a whole and is firmly committed to complying with all of the applicable WHOIS specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement. The Applicant's back-end registry services provider, Neustar, has extensive experience providing ICANN and RFC-compliant WHOIS services for each of the TLDs that it operates both as a Registry Operator for gTLDs, ccTLDs and back-end registry services provider. As one of the first "thick" registry operators in the gTLD space, Neustar's WHOIS service has been designed from the ground up to display as much information as required by a TLD and respond to a very stringent availability and performance requirement.

Some of the key features of the solution include:

- Fully compliant with all relevant RFCs including 3912
- Production proven, highly flexible, and scalable with a track record of 100% availability over the past 10 years
- Exceeds current and proposed performance specifications
- Supports dynamic updates with the capability of doing bulk updates
- Geographically distributed sites to provide greater stability and performance
- In addition, the thick-WHOIS solution also provides for additional search capabilities and mechanisms to mitigate potential forms of abuse as discussed below.(e.g., IDN, registrant data).

26.2 Software Components

The WHOIS architecture comprises the following components:

- An in-memory database local to each WHOIS node: To provide for the performance needs, the WHOIS data is served from an in-memory database indexed by searchable keys.
- Redundant servers: To provide for redundancy, the WHOIS updates are propagated to a cluster of WHOIS servers that maintain an independent copy of the database.
- Attack resistant: To ensure that the WHOIS system cannot be abused using malicious queries or DOS attacks, the WHOIS server is only allowed to query the local database and rate limits on queries based on IPs and IP ranges can be readily applied.
- Accuracy auditor: To ensure the accuracy of the information served by the WHOIS servers, a daily audit is done between the SRS information and the WHOIS responses for the domain names which are updated during the last 24-hour period. Any discrepancies are resolved proactively.
- Modular design: The WHOIS system allows for filtering and translation of data elements between the SRS and the WHOIS database to allow for customizations.
- Scalable architecture: The WHOIS system is scalable and has a very small footprint. Depending on the query volume, the deployment size can grow and shrink quickly.
- Flexible: It is flexible enough to accommodate thin, thick, or modified thick models and can accommodate any future ICANN policy, such as different information display levels based on user categorization
- SRS master database: The SRS database is the main persistent store of the Registry information. The Update Agent computes what WHOIS updates need to be pushed out. A publish-subscribe mechanism then takes these incremental updates and pushes to all the WHOIS slaves that answer queries.

26.3 Compliance with RFC and Specifications 4 and 10

Neustar has been running thick-WHOIS Services for over 10+ years in full compliance with RFC 3912 and with Specifications 4 and 10 of the Registry Agreement. RFC 3912 is a simple text based protocol over TCP that describes the interaction between the server and client on port 43. Neustar built a home-grown solution for this service. It processes millions of WHOIS queries per day.

Table 26-1 describes Neustar's compliance with Specifications 4 and 10.

Neustar ensures compliance with all RFCs through a variety of processes and procedures.

Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to WHOIS. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

26.4 High-level WHOIS System Description

26.4.1 WHOIS Service (port 43)

The WHOIS service is responsible for handling port 43 queries. Our WHOIS is optimized for speed using an in-memory database and master-slave architecture between the SRS and WHOIS slaves. The WHOIS service also has built-in support for IDN. If the domain name being queried is an IDN, the returned results include the language of the domain name, the domain name's UTF-8 encoded representation along with the Unicode code page.

26.4.2 Web Page for WHOIS queries

In addition to the WHOIS Service on port 43, Neustar provides a web based WHOIS application. It is an intuitive and easy to use application for the general public to use. WHOIS web application provides all of the features available in the port 43 WHOIS. This includes full and partial search on:

- Domain names
- Nameservers
- Registrant, Technical and Administrative Contacts
- Registrars

It also provides features not available on the port 43 service. These include:

1. Redemption Grace Period calculation: Based on the registry's policy, domains in pendingDelete can be restorable or scheduled for release depending on the date/time the domain went into pendingDelete. For these domains, the web based WHOIS displays "Restorable" or "Scheduled for Release" to clearly show this additional status to the user.
2. Extensive support for international domain names (IDN)
3. Ability to perform WHOIS lookups on the actual Unicode IDN
4. Display of the actual Unicode IDN in addition to the ACE-encoded name
5. A Unicode to Punycode and Punycode to Unicode translator
6. An extensive FAQ
7. A list of upcoming domain deletions

26.5 IT and Infrastructure Resources

As described above the WHOIS architecture uses a workflow that decouples the update process from the SRS. This ensures SRS performance is not adversely affected by the load requirements of dynamic updates. It is also decoupled from the WHOIS lookup agent to ensure the WHOIS service is always available and performing well for users. Each of Neustar's geographically diverse WHOIS sites use:

- Firewalls, to protect this sensitive data
- Dedicated servers for MQ Series, to ensure guaranteed delivery of WHOIS updates
- Packetshaper for source IP address-based bandwidth limiting
- Load balancers to distribute query load
- Multiple WHOIS servers for maximizing the performance of WHOIS service.

The WHOIS service uses HP BL 460C servers, each with 2 X Quad Core CPU and a 64GB of RAM. The existing infrastructure has 6 servers, but is designed to be easily scaled with additional servers should it be needed.

Figure 26-1 depicts the different components of the WHOIS architecture.

26.6 Interconnectivity with Other Registry System

As described in Question 24 about the SRS and further in response to Question 31, "Technical Overview", when an update is made by a registrar that impacts WHOIS data, a trigger is sent to the WHOIS system by the external notifier layer. The update agent processes these updates, transforms the data if necessary and then uses messaging oriented middleware to publish all updates to each WHOIS slave. The local update agent accepts the update and applies it to the local in-memory database. A separate auditor compares the data in WHOIS and the SRS daily and monthly to ensure accuracy of the published data.

26.7 Frequency of Synchronization between Servers Updates from the SRS, through the external notifiers, to the constellation of independent WHOIS slaves happens in real-time via an asynchronous publish/subscribe messaging architecture. The updates are guaranteed to be updated in each slave within the required SLA of 95% = 60 minutes. Please note that Neustar's current architecture is built towards the stricter SLAs (95% = 15 minutes) of .BIZ. The vast majority of updates tend to happen within 2-3 minutes.

26.8 Provision for Searchable WHOIS Capabilities

Neustar will create a new web-based service to address the new search features based on requirements specified in Specification 4 Section 1.8. The application will include precautions to avoid abuse and will enable users to search the WHOIS directory using any one or more of the following fields:

- Domain name
- Registrar ID
- Contacts and registrant's name
- Contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.)
- Name server name and name server IP address
- The system will also allow search using non-Latin character sets which are compliant with IDNA specification.

The user will choose one or more search criteria, combine them by Boolean operators (AND, OR, NOT) and provide partial or exact match regular expressions for each of the criterion name-value pairs. The domain names matching the search criteria will be returned to the user.

Figure 26-2 shows an architectural depiction of the new service.

To mitigate the risk of this powerful search service being abused by unscrupulous data miners, a layer of security will be built around the query engine which will allow the registry to identify rogue activities and then take appropriate measures. Potential abuses include, but are not limited to:

- Data Mining
- Unauthorized Access
- Excessive Querying
- Denial of Service Attacks

To mitigate the abuses noted above, Neustar will implement any or all of these mechanisms as appropriate:

- Username-password based authentication
- Certificate based authentication
- Data encryption
- CAPTCHA mechanism to prevent robo invocation of Web query
- Fee-based advanced query capabilities for premium customers.

The searchable WHOIS application will adhere to all privacy laws and policies of the Applicant's registry.

26.9 Resourcing Plans

As with the SRS, the development, customization, and on-going support of the WHOIS service is the responsibility of a combination of technical and operational teams. The primary groups responsible for managing the service include:

- Development/Engineering - 19 employees
- Database Administration - 10 employees
- Systems Administration - 24 employees
- Network Engineering - 5 employees

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will also be involved. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably. The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. Neustar's WHOIS implementation is very mature, and has been in production for over 10 years. As such, very little new development will be required to support the implementation of the

Applicant's registry. The resources are more than adequate to support the WHOIS needs of all the TLDs operated by Neustar, including the Applicant's registry.

-end-

27. Registration Life Cycle

Q27

27.1 Registration Life Cycle

Introduction

The Applicant will follow the lifecycle and business rules found in the majority of gTLDs today. Our back-end operator, Neustar, has over ten years of experience managing numerous TLDs that utilize standard and unique business rules and lifecycles. This section describes the business rules, registration states, and the overall domain lifecycle that will be used for the TLD.

Domain Lifecycle - Description

The registry will use the EPP 1.0 standard for provisioning domain names, contacts and hosts. Each domain record is comprised of three registry object types: domain, contacts, and hosts

Domains, contacts and hosts may be assigned various EPP defined statuses indicating either a particular state or restriction placed on the object. Some statuses may be applied by the Registrar; other statuses may only be applied by the Registry. Statuses are an integral part of the domain lifecycle and serve the dual purpose of indicating the particular state of the domain and indicating any restrictions placed on the domain. The EPP standard defines 17 statuses, however only 14 of these statuses will be used in the Applicant's registry per the defined TLD business rules.

The following is a brief description of each of the statuses. Server statuses may only be applied by the Registry, and client statuses may be applied by the Registrar.

- OK - Default status applied by the Registry.
- Inactive - Default status applied by the Registry if the domain has less than 2 nameservers.
- PendingCreate - Status applied by the Registry upon processing a successful Create command, and indicates further action is pending. This status will not be used in the TLD registry.
- PendingTransfer - Status applied by the Registry upon processing a successful Transfer request command, and indicates further action is pending.
- PendingDelete - Status applied by the Registry upon processing a successful Delete command that does not result in the immediate deletion of the domain, and indicates further action is pending.
- PendingRenew - Status applied by the Registry upon processing a successful Renew command that does not result in the immediate renewal of the domain, and indicates further action is pending. This status will not be used in the Applicant's registry.
- PendingUpdate - Status applied by the Registry if an additional action is expected to complete the update, and indicates further action is pending. This status will not be used in the TLD registry.
- Hold - Removes the domain from the DNS zone.
- UpdateProhibited - Prevents the object from being modified by an Update command.
- TransferProhibited - Prevents the object from being transferred to another Registrar by the Transfer command.
- RenewProhibited - Prevents a domain from being renewed by a Renew command.
- DeleteProhibited - Prevents the object from being deleted by a Delete command.

The lifecycle of a domain begins with the registration of the domain. All registrations must follow the EPP standard, as well as the specific business rules described in the response to Question 18 above. Upon registration a domain will either be in an active or inactive state. Domains in an active state are delegated and have their delegation information published to the zone. Inactive domains either have no delegation information or their delegation information is not published in the zone. Following the initial registration of a domain, one of five actions may occur during its lifecycle:

- Domain may be updated
- Domain may be deleted, either within or after the add-grace period

- Domain may be renewed at anytime during the term
- Domain may be auto-renewed by the Registry
- Domain may be transferred to another registrar.

Each of these actions may result in a change in domain state. This is described in more detail in the following section. Every domain must eventually be renewed, auto-renewed, transferred, or deleted. A registrar may apply EPP statuses described above to prevent specific actions such as updates, renewals, transfers, or deletions.

27.1.1 Registration States

Domain Lifecycle - Registration States

- As described above the Applicant's registry will implement a standard domain lifecycle found in most gTLD registries today. There are five possible domain states:

- Active
- Inactive
- Locked
- Pending Transfer
- Pending Delete.

All domains are always in either an Active or Inactive state, and throughout the course of the lifecycle may also be in a Locked, Pending Transfer, and Pending Delete state. Specific conditions such as applied EPP policies and registry business rules will determine whether a domain can be transitioned between states. Additionally, within each state, domains may be subject to various timed events such as grace periods, and notification periods.

Active State

The active state is the normal state of a domain and indicates that delegation data has been provided and the delegation information is published in the zone. A domain in an Active state may also be in the Locked or Pending Transfer states.

Inactive State

The Inactive state indicates that a domain has not been delegated or that the delegation data has not been published to the zone. A domain in an Inactive state may also be in the Locked or Pending Transfer states. By default all domain in the Pending Delete state are also in the Inactive state.

Locked State

The Locked state indicates that certain specified EPP transactions may not be performed to the domain. A domain is considered to be in a Locked state if at least one restriction has been placed on the domain; however up to eight restrictions may be applied simultaneously. Domains in the Locked state will also be in the Active or Inactive, and under certain conditions may also be in the Pending Transfer or Pending Delete states.

Pending Transfer State

The Pending Transfer state indicates a condition in which there has been a request to transfer the domain from one registrar to another. The domain is placed in the Pending Transfer state for a period of time to allow the current (losing) registrar to approve (ack) or reject (nack) the transfer request. Registrars may only nack requests for reasons specified in the Inter-Registrar Transfer Policy.

Pending Delete State

The Pending Delete State occurs when a Delete command has been sent to the Registry after the first 5 days (120 hours) of registration. The Pending Delete period is 35-days during which the first 30-days the name enters the Redemption Grace Period (RGP) and the last 5-days guarantee that the domain will be purged from the Registry Database and available to public pool for registration on a first come, first serve basis.

27.1.2 Typical Registration Lifecycle Activities

Domain Creation Process

The creation (registration) of domain names is the fundamental registry operation. All other operations are designed to support or compliment a domain creation. The following steps occur when a domain is created.

1. Contact objects are created in the SRS database. The same contact object may be used for each contact type, or they may all be different. If the contacts already exist in the database this step may be skipped.
2. Nameservers are created in the SRS database. Nameservers are not required to complete the registration process; however any domain with less than 2 name servers will not be resolvable.
3. The domain is created using the each of the objects created in the previous steps. In addition, the term and any client statuses may be assigned at the time of creation. The actual number of EPP transactions needed to complete the registration of a domain name can be as few as one and as many as 40. The latter assumes seven distinct contacts and 13 nameservers, with Check and Create commands submitted for each object.

Update Process

Registry objects may be updated (modified) using the EPP Modify operation. The Update transaction updates the attributes of the object.

For example, the Update operation on a domain name will only allow the following attributes to be updated:

- Domain statuses
- Registrant ID
- Administrative Contact ID
- Billing Contact ID
- Technical Contact ID
- Nameservers
- AuthInfo
- Additional Registrar provided fields.

The Update operation will not modify the details of the contacts. Rather it may be used to associate a different contact object (using the Contact ID) to the domain name. To update the details of the contact object the Update transaction must be applied to the contact itself. For example, if an existing registrant wished to update the postal address, the Registrar would use the Update command to modify the contact object, and not the domain object.

Renew Process

The term of a domain may be extended using the EPP Renew operation. ICANN policy in general establishes the maximum term of a domain name to be 10 years, and the Applicant will not deviating from this policy. A domain may be renewed / extended at any point time, even immediately following the initial registration. The only stipulation is that the overall term of the domain name may not exceed 10 years. If a Renew operation is performed with a term value will extend the domain beyond the 10 year limit, the Registry will reject the transaction entirely.

Transfer Process

The EPP Transfer command is used for several domain transfer related operations:

- Initiate a domain transfer
- Cancel a domain transfer
- Approve a domain transfer
- Reject a domain transfer.

To transfer a domain from one Registrar to another the following process is followed:

1. The gaining (new) Registrar submits a Transfer command, which includes the AuthInfo code of the domain name.
2. If the AuthInfo code is valid and the domain is not in a status that does not allow transfers the domain is placed into pendingTransfer status
3. A poll message notifying the losing Registrar of the pending transfer is sent to the Registrar's message queue
4. The domain remains in pendingTransfer status for up to 120 hours, or until the losing (current) Registrar Acks (approves) or Nack (rejects) the transfer request
5. If the losing Registrar has not Acked or Nacked the transfer request within the 120 hour timeframe, the Registry auto-approves the transfer
6. The requesting Registrar may cancel the original request up until the transfer has been completed.

A transfer adds an additional year to the term of the domain. In the event that a transfer will cause the domain to exceed the 10 year maximum term, the Registry will add

a partial term up to the 10 year limit. Unlike with the Renew operation, the Registry will not reject a transfer operation.

Deletion Process

A domain may be deleted from the SRS using the EPP Delete operation. The Delete operation will result in either the domain being immediately removed from the database or the domain being placed in pendingDelete status. The outcome is dependent on when the domain is deleted. If the domain is deleted within the first five days (120 hours) of registration, the domain is immediately removed from the database. A deletion at any other time will result in the domain being placed in pendingDelete status and entering the Redemption Grace Period (RGP). Additionally, domains that are deleted within five days (120) hours of any billable (add, renew, transfer) transaction may be deleted for credit.

27.1.3 Applicable Time Elements

The following section explains the time elements that are involved.

Grace Periods

There are six grace periods:

- Add-Delete Grace Period (AGP)
- Renew-Delete Grace Period
- Transfer-Delete Grace Period
- Auto-Renew-Delete Grace Period
- Auto-Renew Grace Period
- Redemption Grace Period (RGP).

The first four grace periods listed above are designed to provide the Registrar with the ability to cancel a revenue transaction (add, renew, or transfer) within a certain period of time and receive a credit for the original transaction.

The following describes each of these grace periods in detail.

Add-Delete Grace Period

The APG is associated with the date the Domain was registered. Domains may be deleted for credit during the initial 120 hours of a registration, and the Registrar will receive a billing credit for the original registration. If the domain is deleted during the Add Grace Period, the domain is dropped from the database immediately and a credit is applied to the Registrar's billing account.

Renew

Delete Grace Period

The Renew-Delete Grace Period is associated with the date the Domain was renewed. Domains may be deleted for credit during the 120 hours after a renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly renewed. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP (see below).

Transfer-Delete Grace Period

The Transfer-Delete Grace Period is associated with the date the Domain was transferred to another Registrar. Domains may be deleted for credit during the 120 hours after a transfer. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP. A deletion of domain after a transfer is not the method used to correct a transfer mistake. Domains that have been erroneously transferred or hijacked by another party can be transferred back to the original registrar through various means including contacting the Registry.

Auto-Renew-Delete Grace Period

The Auto-Renew-Delete Grace Period is associated with the date the Domain was auto-renewed. Domains may be deleted for credit during the 120 hours after an auto-renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly auto-renewed. It should be noted that domains that are deleted during the auto-renew delete grace period will be placed into pendingDelete and will enter the RGP.

Auto-Renew Grace Period

The Auto-Renew Grace Period is a special grace period intended to provide registrants

with an extra amount of time, beyond the expiration date, to renew their domain name. The grace period lasts for 45 days from the expiration date of the domain name. Registrars are not required to provide registrants with the full 45 days of the period.

Redemption Grace Period

The RGP is a special grace period that enables Registrars to restore domains that have been inadvertently deleted but are still in pendingDelete status within the Redemption Grace Period. All domains enter the RGP except those deleted during the AGP. The RGP period is 30 days, during which time the domain may be restored using the EPP RenewDomain command as described below. Following the 30day RGP period the domain will remain in pendingDelete status for an additional five days, during which time the domain may NOT be restored. The domain is released from the SRS, at the end of the 5 day non-restore period. A restore fee applies and is detailed in the Billing Section. A renewal fee will be automatically applied for any domain past expiration. Neustar has created a unique restoration process that uses the EPP Renew transaction to restore the domain and fulfill all the reporting obligations required under ICANN policy. The following describes the restoration process.

27.2 State Diagram

Figure 27-1 provides a description of the registration lifecycle. The different states of the lifecycle are active, inactive, locked, pending transfer, and pending delete. Please refer to section 27.1.1 for detail description of each of these states. The lines between the states represent triggers that transition a domain from one state to another.

The details of each trigger are described below:

- Create: Registry receives a create domain EPP command.
- WithNS: The domain has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- WithoutNS: The domain has not met the minimum number of nameservers required by registry policy. The domain will not be in the DNS zone.
- Remove Nameservers: Domain's nameserver(s) is removed as part of an update domain EPP command. The total nameserver is below the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- Add Nameservers: Nameserver(s) has been added to domain as part of an update domain EPP command. The total number of nameservers has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
- Delete: Registry receives a delete domain EPP command.
- DeleteAfterGrace: Domain deletion does not fall within the add grace period.
- DeleteWithinAddGrace: Domain deletion falls within add grace period.
- Restore: Domain is restored. Domain goes back to its original state prior to the delete command.
- Transfer: Transfer request EPP command is received.
- Transfer Approve/Cancel/Reject: Transfer requested is approved or cancel or rejected.
- TransferProhibited: The domain is in clientTransferProhibited and/or serverTransferProhibited status. This will cause the transfer request to fail. The domain goes back to its original state.

DeleteProhibited: The domain is in clientDeleteProhibited and/or serverDeleteProhibited status. This will cause the delete command to fail. The domain goes back to its original state.

Note: the locked state is not represented as a distinct state on the diagram as a domain may be in a locked state in combination with any of the other states: inactive, active, pending transfer, or pending delete.

27.2.1 EPP RFC Consistency

As described above, the domain lifecycle is determined by ICANN policy and the EPP RFCs. Neustar has been operating ICANN TLDs for the past 10 years consistent and compliant with all the ICANN policies and related EPP RFCs.

27.3 Resources

The registration lifecycle and associated business rules are largely determined by policy and business requirements; as such the Product Management and Policy teams will play a

critical role in working Applicant to determine the precise rules that meet the requirements of the TLD. Implementation of the lifecycle rules will be the responsibility of Development/Engineering team, with testing performed by the Quality Assurance team. Neustar's SRS implementation is very flexible and configurable, and in many case development is not required to support business rule changes.

The Applicant's registry will be using standard lifecycle rules, and as such no customization is anticipated. However should modifications be required in the future, the necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

Development/Engineering - 19 employees

Registry Product Management - 4 employees

These resources are more than adequate to support the development needs of all the TLDs operated by Neustar, including the Applicant's registry.

-end-

28. Abuse Prevention and Mitigation

Q28

The Applicant's core mission and purpose is to create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more targeted, secure and stable environment. To achieve this goal the Applicant will be implementing a range of Abuse Prevention and Mitigation policies and procedures. The following is an overview of initiatives undertaken by the Applicant:

1. gTLD Abuse Prevention and Mitigation Implementation Plan
2. Policies and Procedures to Minimize Abusive Registrations
 - 2.1. Implementation plan for Abuse Point of Contact
 - 2.2. Policies for Handling Complaints Regarding the Abuse Policies
 - 2.3. Proposed Measures for Removal of Orphan Glue Records
 - 2.4. Resourcing plans for the initial implementation of, and ongoing maintenance of, the Abuse Prevention and Mitigation initiatives
3. Measures to promote WHOIS accuracy both directly by the Registry and by Registrars via requirements in the Registry-Registrar Agreement ("RRA")):
 - 3.1. Regular monitoring of registration data for accuracy and completeness
 - 3.2. Registrar WHOIS policy self-certification and authentication
 - 3.3. WHOIS data reminder process
 - 3.4. Establishing policies and procedures to ensure Registrar compliance with WHOIS policies, which may include audits, financial incentives, penalties, or other means
 - 3.5. Registry semi-annual WHOIS verification
 - 3.6. Registrar semi-annual verification of WHOIS
4. Policies and procedures that define malicious or abusive behaviour
 - 4.1. Service Level Requirements for resolution
 - 4.2. Service Level Requirements for Law enforcement requests
 - 4.3. Coordination with sector Groups and Law Enforcement
 - 4.4. Rapid takedown and suspension
5. Controls to Ensure Proper Access to Domain Functions:
 - 5.1. Enabling two-factor authentication from Registrants to process update, transfer, and deletion requests;
 - 5.2. Enabling multiple, unique points of contact to request and/or approve update, transfer, and deletion requests;
 - 5.3. Enabling the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted
6. Additional Abuse Prevention and Mitigation initiatives
 - 6.1. Additional Mechanisms for Protection of Capital City Names
 - 6.2. Additional Mechanisms to Protect and Reserve IGO Names
 - 6.3. Governance Council
7. Resource Planning
 - 7.1. Resource Planning Specific to Backend Registry Activities

- 7.2. Administrative Services Provider - Famous Four Media Limited
8. ICANN Prescribed Measures
9. Increasing Registrant Security Awareness
10. Registrant Disqualification
11. Restrictions on Proxy Registration Services
12. Registry Lock
13. Scope/Scale Consistency
- 13.1 Scope/Scale Consistency Specific to Backend Registry Activities
14. Acceptable Use Policy ("AUP")
15. Abuse Response Process

1 gTLD Abuse Prevention and Mitigation Implementation Plan

The Applicant will be implementing a thorough and extensive Abuse Prevention and Mitigation plan, designed to minimise abusive registrations and other detrimental activities that may negatively impact internet users. This plan includes the establishment of a single abuse point of contact, responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the gTLD through all Registrars of record, including those involving a reseller. Details of this point of contact will be clearly published on the Applicant's website.

Strong abuse prevention for a new gTLD is an important benefit to the internet community. The Applicant and its backend services provider agree that a Registry must not only aim for the highest standards of technical and operational competence, but also needs to act as a steward of the space on behalf of the Internet community and ICANN in promoting the Registry's stakeholders' interest. The Applicant's Backend Services Provider brings extensive experience establishing and implementing registration policies. This experience will be leveraged to help the Applicant combat abusive and malicious domain activity within the new gTLD space.

One of the key functions of a responsible domain name Registry includes working towards the eradication of domain name abuse including, but not limited to, those resulting from:

- Illegal or fraudulent actions
- Spam
- Phishing
- Pharming
- Distribution of malware
- Fast flux hosting
- Botnets
- Illegal distribution of copyrighted material
- Distribution of child pornography
- Online sale or distribution of illegal pharmaceuticals.

Further explanation of behaviour considered to be abusive can be found in the Acceptable Use Policy ("AUP") below. Any second-level domain found to be facilitating such behaviours, either upon registration or subsequently, will be subject to rapid compliance action as per the policies outlined below.

The Applicant believes that the success of the gTLD will be determined largely by the sector's broad-spectrum of key stakeholders, who operate globally. The Applicant believes that these stakeholders will be motivated to protect the sector from detrimental practices. The Applicant further believes that sector stakeholders should be afforded the opportunity to influence the manner in which the gTLD is governed, including its abuse prevention policies where appropriate. Accordingly, the Applicant is establishing a Governance Council, to be comprised of key sector stakeholders that will serve as an advisory body. The Governance Council will elect its own Board of Directors, which will be responsible for self-governance, the recommendation of sector-specific policies, and the formulation of guidance on other best practices related to the gTLD. The Applicant aims to develop an Abuse Prevention and Mitigation Working Group in conjunction with the GC. It will give the Applicant's team advice on abuse preventions and mitigation and how this may effect registration policies. The group will meet to regularly discuss the latest trends in domain name abuse and the most effective way to prevent and remedy them. Registrants, Registrars and the Registry will all be involved in this working group. This

will likely prove important as the battle with abusive behaviour online must continuously evolve given that abusive behaviour itself mutates and changes. The Governance Council will offer significantly greater opportunities to identify emerging threats and rapidly establish procedures to deal with them than might have been possible simply with a Registry perspective.

2 Policies and Procedures to Minimize Abusive Registrations

Regardless of how well intentioned its user-base is, a Registry must have the policies, resources, personnel, and expertise in place to combat abusive DNS practices. The Applicant's Registry Backend Services Provider is at the forefront of the prevention of such abusive practices. We also believe that a strong program is essential given that Registrants have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet, often the best preventative measure to thwart these attacks is to remove the names completely from the DNS before they can impart harm, not only to the domain name Registrant, but also to millions of unsuspecting Internet users. Removing the domain name from the zone has the effect of shutting down all activity associated with the domain name, including the use of all websites and e-mail. The use of this technique should not be entered into lightly. The Applicant has an extensive, defined, and documented process for taking the necessary action of removing a domain from the zone when its presence in the zone poses a threat to the security and stability of the infrastructure of the Internet or the Registry.

Coalition for Online Accountability ("COA") Recommendations

The Applicant will further structure its policies around the COA Recommendations where relevant to this gTLD. The Applicant's goal is to provide a safe and secure browsing experience for consumers of this gTLD. A domain within this gTLD that is owned, operated by or compromised by a malicious party could cause harm to consumers, to the gTLD's reputation and to the reputation of the Internet itself. As such, additional controls are in place relating to the validity of registrations, as well as additional measures to ensure the correct identity of both Registrants and Registrars relating to changes made within the SRS, and to protecting the integrity of the DNS service as a whole. The Coalition for Online Accountability have drafted a set of policy recommendations, also endorsed by many other international organizations representing the creative industries, that should be applied to entertainment gTLDs - especially those dependent on copyright protection. The policy is comprised of a set of 7 recommendations that should be adopted by ICANN in evaluating any applicant for an entertainment-based gTLD. The recommendations were posted by COA in the form of a letter to ICANN at <http://bit.ly/HuHtmq>. We welcome the recommendations from the COA and will strongly consider the recommendations relating to the implementation of this gTLD where considered relevant.

BITS Recommendations

The Applicant will further structure its policies around the BITS Recommendations where relevant to this gTLD. The Applicant's goal is to provide a safe and secure browsing experience for consumers of this gTLD. A domain within this gTLD that is owned, operated by or compromised by a malicious party could cause harm to consumers, to the gTLD's reputation and to the reputation of the Internet itself. As such, additional controls are in place relating to the validity of registrations, as well as additional measures to ensure the correct identity of both Registrants and Registrars relating to changes made within the SRS, and to protecting the integrity of the DNS service as a whole. The Security Standards Working Group (SSWG) formed by BITS drafted a set of policy recommendations that should be applied to financial gTLDs. The policy is comprised of a set of 31 recommendations that should be adopted by ICANN in evaluating any applicant of a financial gTLD. The recommendations were posted by BITS in the form of a letter to ICANN at [<http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf>]. We welcome the recommendations from SSWG and will strongly consider the recommendations relating to the implementation of this gTLD where considered relevant.

2.1 Implementation plan for Abuse Point of Contact

As required by the Registry Agreement, The Applicant will establish and publish on its website a single abuse point of contact responsible for addressing inquiries from law enforcement and the public related to malicious and abusive matters requiring expedited attention. The Applicant will provide a timely response to abuse complaints concerning all names registered in the gTLD by registrars and their resellers. The Applicant will also provide such information to ICANN prior to the delegation of any domain names in the gTLD. This information shall consist of, at a minimum, a valid name, e-mail address dedicated solely to the handling of malicious conduct complaints and a telephone number and mailing address for the primary contact. The Applicant will ensure that this information will be kept accurate and up to date and will be provided to ICANN if and when changes are made. In addition, with respect to inquiries from ICANN-Accredited Registrars, the Applicant's Registry Backend Services Provider shall have an additional point of contact, as it does today, handling requests by Registrars related to abusive domain name practices.

2.2 Policies for Handling Complaints Regarding the Abuse Policies

In order to operate under the new gTLD, Registrants must accept the Acceptable Use Policy. The new gTLD Registry's Acceptable Use Policy clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. In addition, the policy will be incorporated into the applicable Registry-Registrar Agreement ("RRA") and reserve the right for the Registry to take the appropriate actions based on the type of abuse. This will include locking down the domain name preventing any changes to the contact and name server information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring the domain name to another Registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation. When appropriate, the Applicant will also share information with law enforcement. Each ICANN and gTLD accredited Registrar must agree to pass the Acceptable Use Policy on to its Resellers (if applicable) and ultimately to the gTLD Registrants. The Registry's initial Acceptable Use Policy that the Applicant will use in connection with the gTLD is outlined in a section below.

2.3 Proposed Measures for Removal of Orphan Glue Records

As the Security and Stability Advisory Committee of ICANN ("SSAC") rightly acknowledges, although orphaned glue records may be used for abusive or malicious purposes, the "dominant use of orphaned glue supports the correct and ordinary operation of the DNS." See <http://www.icann.org/en/committees/security/sac048.pdf>.

While orphan glue records often support the correct and ordinary operation of the DNS, we understand that such glue records can be used maliciously to point to name servers that host domains used in illegal phishing, botnets, malware, and other abusive behaviours. Problems occur when the parent domain of the glue record is deleted but its children glue records still remain in DNS.

Thus, the Registry Operator will remove orphan glue records (as defined at the above link) when provided with evidence in written form that such records are present in connection with malicious conduct. Registrars are required to delete/move all dependent DNS records before they are allowed to delete the parent domain.

To prevent orphan glue records, the Registry Backend Services Provider performs the following checks before removing a domain or name server:

Checks during domain delete:

- Parent domain delete is not allowed if any other domain in the zone refers to the child name server.
- If the parent domain is the only domain using the child name server, then both the domain and the glue record are removed from the zone.

Check during explicit name server delete:

- The Registry Backend Services Provider confirms that the current name server is not referenced by any domain name (in-zone) before deleting the name server.

Zone-file impact:

- If the parent domain references the child name server AND if other domains in the zone also reference it AND if the parent domain name is assigned a serverHold status, then the parent domain goes out of the zone but the name server glue record does not.
- If no domains reference a name server, then the glue record is removed from the zone file.

2.4 Resourcing plans for the initial implementation of, and ongoing maintenance of, the Abuse Prevention and Mitigation initiatives

Details related to resourcing plans for the initial implementation and ongoing maintenance of the Applicant's abuse plan are provided in Section 7 of this response.

3 Measures to promote WHOIS accuracy both directly by the Registry and by Registrars via requirements in the Registry-Registrar Agreement ("RRA"):

The Applicant acknowledges that ICANN has developed a number of mechanisms over the past decades that are intended to address the issue of inaccurate WHOIS information. Such measures alone have not proven to be sufficient and the Applicant will offer a mechanism whereby third parties can submit complaints directly to the Applicant about inaccurate or incomplete WHOIS data. Such information shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their Registrants. Thirty days after forwarding the complaint to the Registrar, the Applicant will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or any other action was taken. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, the Applicant reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies. Further efforts to pre-empt inaccurate WHOIS data made by the Applicant will include:

- 1) The Applicant will in general discourage the use of proxy registration services. The Applicant understands that there are instances when proxy registrations may be required and will develop best practices for when these instances occur.
- 2) The Applicant will maintain a web-based form for third parties to submit claims regarding false and/or inaccurate WHOIS data and the Applicant will forward credible claims to the Registrar for investigation/resolution. The Applicant will follow up to verify that the claim has been satisfactorily resolved. Failure of the Registrar or the Registrant to resolve the problem may result in the Applicant placing the domain name on hold, except in extraordinary circumstances.
- 3) The Applicant's Registry Backend Services Provider will regularly remind Registrars of their obligation to comply with ICANN's WHOIS Data Reminder Policy. This policy requires Registrars to validate the WHOIS information provided during the registration process, to investigate claims of fraudulent WHOIS information, and to cancel domain name registrations for which WHOIS information is determined to be invalid.
- 4) WHOIS Verification by Registrars. As part of their Registry-Registrar Agreement all accredited Registrars will be required to revalidate WHOIS data for each record they have registered in the gTLD. The Applicant will leave the ultimate determination of how this procedure takes place to the Registrar, but it must include one of the following approved methods. (1) Email notification (2) Outbound telemarketing effort to the individual listed as the administrative contact for the domain.

3.1 Regular monitoring of registration data for accuracy and completeness

As part of their Registry-Registrar Agreement, all of the Applicant's Registrars will be required to revalidate WHOIS data for each record they have registered on a bi-annual basis. This revalidation will require the Registrar to notify its Registrants in the gTLD about this requirement. While the Applicant reserves the right to suspend domain names that are not verified in a timely manner, the Applicant will engage in other outreach to the Registrant prior to suspending any domain name. As part of the gTLD Abuse reporting

system, users can report missing or incomplete WHOIS data via the Registry website. The Applicant will also perform randomized audits of verified WHOIS information to ensure compliance and accuracy.

The Applicant's selected Registry Backend Services Provider has established policies and procedures to encourage Registrar compliance with ICANN's WHOIS accuracy requirements..

3.2 Registrar WHOIS policy self-certification and authentication

The self-certification program consists, in part, of evaluations applied equally to all operational ICANN accredited Registrars for the gTLD and is conducted from time to time throughout the year. Process steps are as follows:

The Registry Backend Services Provider sends an email notification to the ICANN primary Registrar contact, requesting that the contact go to a designated URL, log in with his/her Web ID and password, and complete and submit the online form. The contact must submit the form within 15 business days of receipt of the notification.

When the form is submitted, the Registry Backend Services Provider sends the Registrar an automated email confirming that the form was successfully submitted.

The Registry Backend Services Provider reviews the submitted form to ensure the certifications are compliant.

The Registry Backend Services Provider sends the Registrar an email notification if the Registrar is found to be compliant in all areas.

If a review of the response indicates that the Registrar is out of compliance or if the Registry Backend Services Provider has follow-up questions, the Registrar has 10 days to respond to the inquiry.

If the Registrar does not respond within 15 business days of receiving the original notification, or if it does not respond to the request for additional information, the Registry Backend Services Provider sends the Registrar a Breach Notice and gives the Registrar 30 days to cure the breach.

If the Registrar does not cure the breach, the Registry Backend Services Provider may terminate the Registry-Registrar Agreement (RRA).

3.3 WHOIS data reminder process.

The Registry Backend Services Provider regularly reminds Registrars of their obligation to comply with ICANN's WHOIS Data Reminder Policy, which was adopted by ICANN as a consensus policy on 27 March 2003 (<http://www.icann.org/en/Registrars/wdrp.htm>). The Registry Backend Services Provider sends a notice to all Registrars once a year reminding them of their obligation to be diligent in validating the WHOIS information provided during the registration process, to investigate claims of fraudulent WHOIS information, and to cancel domain name registrations for which WHOIS information is determined to be invalid.

3.4 Establishing policies and procedures to ensure Registrar compliance with policies, which may include audits, financial incentives, penalties, or other means.

The Applicant will require as part of the RRA obligations that all accredited Registrars for the gTLD participate in the abuse prevention and mitigation procedures and policies, as well as efforts to improve the accuracy and completeness of WHOIS data. In addition, the Applicant will work to develop an economic incentive program, such as Market Development Funds for Registrars who meet certain SLAs for performance in this area.

3.5 Registry bi-annual WHOIS verification

Additionally, the Applicant will, of its own volition and no less than twice per year, perform a manual review of a random sampling of gTLD domain names in its Registry to test the accuracy of the WHOIS information. Although this will not include verifying the actual information in the WHOIS record, the Applicant will be examining the WHOIS data for prima facie evidence of inaccuracies. In the event that such evidence exists, it shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their Registrants. Thirty days (30) after forwarding the complaint to the

Registrar, the Applicant will reexamine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or some other action was taken. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, The Applicant reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

3.6 Registrar bi-annual verification of WHOIS

The Applicant will require in the Registry-Registrar Agreement that all accredited Registrars in this gTLD will be obliged to verify WHOIS data for each record they have registered in the gTLD twice a year. Verification can take place via email, phone or any other method to confirm the accuracy of the WHOIS data associated with the domain name. The Applicant will randomly audit WHOIS records to ensure compliance and accuracy. As part of the gTLD Abuse reporting system, users can report missing or incomplete WHOIS data via the Registry website.

4 Policies and procedures that define malicious or abusive behaviour

The applicant has developed policies and procedures that define malicious and abusive behaviour. More information on these policies and procedures can be found in section 14 - Acceptable Use Policy.

4.1 Service Level Requirements for resolution of APM related activities

As pertains to the Applicant's service level requirements for resolution, we aim to address and potentially rectify the issue as it pertains to all forms of abuse and fraud within 24 hours. Once abusive behaviour is detected or reported, the Applicant's Customer Service center immediately creates a support ticket in order to monitor and track the issue through resolution. This support team is operational 24/7/365. A preliminary assessment will be performed in order to determine whether the abuse claim is legitimate. We will classify each incidence of legitimately reported abuse into one of two categories based on the probable severity and immediacy of harm to Registrants and Internet users.

Category 1:

- Probable Severity or Immediacy of Harm: Low
- Examples of types of abusive behaviour: Spam, Malware
- Mitigation steps:
 - Investigate
 - Notify Registrant
- Response times - up to 3 days depending on severity.

Category 2:

- Probable Severity or Immediacy of Harm: Medium to High
- Examples of types of abusive behaviour: Fast Flux Hosting, Phishing, Illegal Access to other Computers or Networks, Pharming, Botnet command and control
- Mitigation steps:
 - Suspend domain name
 - Investigate
 - Restore or terminate domain name
- Response times - up to 1 day.

4.2 Service Level Requirements and Coordination regarding Law enforcement APM requests

With the assistance of its Registry Backend Services Provider, the Applicant will meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement, governmental and quasi-governmental agencies of illegal conduct in connection with the use of the gTLD. The Registry will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such a response shall include, at a minimum, an acknowledgement of receipt of the request, questions or comments concerning the request,

and an outline of the next steps to be taken by the Applicant for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by the Registry and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring Registrar is then given 24 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the Registrar has not taken the requested action after the 24-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry may place the domain on "ServerHold".

4.3 Coordination with sector Groups and Law Enforcement

One of the reasons for which the Registry Backend Services Provider was selected to serve as the Registry Backend Services Provider by the Applicant is the Registry Backend Services Provider's extensive experience and its close working relationship with a number of law enforcement agencies.

The Registry Backend Services Provider is also a participant in a number of sector groups aimed at sharing information amongst key sector players about the abusive registration and use of domain names. Through these organizations the Registry Backend Services Provider shares information with other registries, Registrars, ccTLDs, law enforcement, security professionals, etc. Not only on abusive domain name registrations within its own gTLDs, but also provides information uncovered with respect to domain names in other registries. The Registry Backend Services Provider has often found that rarely are abuses found only in the gTLDs which it manages, but also within other gTLDs. The Registry Backend Services Provider routinely provides this information to the other registries so that it can take the appropriate action.

When executed in accordance with the Registry Agreement, plans will result in compliance with contractual requirements.

The Applicant believes that the proposed collection of protections that involve both proactive and reactive mechanisms outlined above will provide an unmatched level of security and anti-abuse activity within the gTLD. These mechanisms will be part of both the Registry-Registrar Agreement as well as the Registrant Registration Agreement.

4.4 Rapid takedown and suspension system

The Applicant is committed to ensuring that the use of the internet within its Registry is compliant with all relevant laws and legal directions.

The Applicant notes that its role as the Registry operator is not one of judge and jury in all jurisdictions and as such shall direct all complainants to the legal process in the relevant jurisdiction. Upon receiving a valid and enforceable legal judgment or direction it shall comply forthright with the appropriate action which shall include rapid takedown and/or suspension.

5 Controls to Ensure Proper Access to Domain Functions

5.1 Enabling two-factor authentication from Registrants to process update, transfers, and deletion requests;

To ensure proper and secure access to domain functions, the Applicant will develop best practices for its Registrars relating to enabling its Registrants to utilize two factor authentication in its interaction with their Registrar and ultimately the Registry. The goal of these best practices is to improve domain name security and assist Registrars in protecting the accounts they manage by providing another level of assurance that only authorized registrants can communicate through the registrar with the Registry.

5.2 Enabling multiple, unique points of contact to request and/or approve update, transfer, and deletion requests;

The Applicant will investigate the costs and benefits for introducing a service whereby a Registrant can elect to designate multiple points of contact for each domain registered to approve changes to a domain before they are effectuated. The Applicant is of the

opinion that these additional checks could improve the security of each domain and will look for ways to deploy them in the most cost-effective and user-friendly manner possible.

5.3 Enabling the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted

The Applicant will investigate the costs and benefits for introducing a service where by a Registrant can elect to designate multiple points of contact for each domain registered to receive notification of changes to a domain when they are effectuated. The Applicant is of the opinion that these additional checks could improve the security of each domain and will look for ways to deploy them in the most cost-effective and user-friendly manner possible.

6. Additional Abuse Prevention and Mitigation initiatives

6.1 Additional Mechanism for Protection of Capital City Names

In parallel with the Landrush Period defined in the answer to question 18, the Applicant will implement a Capital City Claim ("CCC") service whereby additional protection will be granted to the capital city names of a country or territory listed in the ISO 3166-1 standard. The CCC process is as follows:

1. Any prospective domain name Registrant applying to register a domain name identical to the capital city name of a country or territory listed in the ISO 3166-1 standard will receive from the Applicant a CCC notification highlighting the fact that the applied-for domain name corresponds to a capital city name of a country or territory listed in the ISO 3166-1 standard.
2. A potential domain name Registrant receiving a CCC notification will have to send a response to the Applicant whereby it will unconditionally comply with the requirements as to representations and warranties required by the Applicant. This will protect the reputation of the capital city as well as any further relevant terms and conditions provided.
3. Unconditional acceptance of the warranties set out in the CCC notification will be a material requirement for a prospective Registrant to be eligible to register the domain name in question should said prospective Registrant be successful in the Landrush period.
4. Upon registration during the Landrush period of a domain name identical to a capital city name of a country or territory listed in the ISO 3166-1 standard, the Applicant will send a notification in writing to the ICANN Government Advisory Committee ("GAC") Chair.

6.2 Additional Mechanisms to Protect and Reserve IGO Names

The Applicant considers the Protection of Intergovernmental Organization ("IGO") names to be very important. The Applicant will use strings registered as second level domains in the .int gTLD as the basis for this protection. To register in the .int domain, the Registrants must be an IGO that meets the requirements found in RFC 1591. The .int domain is used for registering organizations established by international treaties between or among national governments and which are widely considered to have independent international legal personality. Thus, the names of these organizations, as with geographic names, can lend an official imprimatur, and if misused, be a source of public confusion or deception.

Reservation of IGO names:

In addition to the mandated and additional reservation of geographic names as provided for in response to Question 22, the Applicant will reserve, and thereby prevent registration of, all names that are registered as second level domains in the most recent .int zone as of 1st November 2012. By doing so, the Applicant will extend additional protection to IGOs that comply with the current eligibility requirements for the .int gTLD as defined at <http://www.iana.org/domains/int/policy/>, and that have obtained a second-level registration in the .int zone.

Release of IGO names:

In the future, should any of the IGOs wish to make use of the protected strings, the Registry will release and assign the domain to the respective IGOs using the following process:

- a) The IGO submits a request to the Applicant in the hope of the reserved name being assigned to themselves and provides the necessary documentation and details of the proposed registrant entity for the domain name registration.
- b) The Applicant will validate and authenticate the request to establish that it is a genuine bona fide request.
- c) Once the request has been approved the Applicant will notify the requesting IGO as well as ICANN and the GAC of the approval for the assignment of the domain name.
- d) The Applicant will issue a unique authorization code to the proposed IGO registrant.
- e) The proposed IGO registrant will then be able to request that the assignment of the domain name is given to them using the authorization code with an ICANN and gTLD accredited Registrar of their choice.

6.3 Governance Council

The Applicant believes that the success of the gTLD will be determined in large by the gTLD's stakeholders. Not only will these stakeholders have the primary interest of registering domains on the gTLD, but they will also be motivated to protect the sector from practices that would negatively impact the sector overall. The Applicant further believes that sector stakeholders should be afforded the opportunity to influence the manner in which the gTLD is governed. Accordingly, the Applicant is establishing a Governance Council (the "GC"), to be comprised of key sector stakeholders that will serve as an advisory body.

The GC will elect its own Board of Directors, which will be responsible for self-governance, the recommendation of sector-specific policies, and the formulation of guidance on intellectual property and other best practices related to the gTLD. This will lead the policy development process of defining how the APM Reporting Website should best reflect the options users, rights holders, etc., have for addressing infringing content or other issues.

7. Resource Planning

7.1 Resource Planning Specific to Backend Registry Activities

Responsibility for abuse mitigation rests with a variety of functional groups. The Abuse Monitoring team is primarily responsible for providing analysis and conducting investigations of reports of abuse. The customer service team also plays an important role in assisting with the investigations, responding to customers, and notifying Registrars of abusive domains. Finally, the Policy/Legal team is responsible for developing the relevant policies and procedures.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams globally distributed:

Customer Support - 12 people

Policy/Legal - 2 people

The resources are more than adequate to support the abuse mitigation procedures of the Registry.

7.2 Administrative Services Provider - Famous Four Media Limited

In addition to those resources set out above provided by the Registry's backend services provider the Applicant's Administration Services Provider shall provide the following extra resources:

- Sunrise Validation Team - This shall comprise of 11 employees of which at least one shall be a qualified lawyer specializing in intellectual property law.
- Ongoing Rights Protection Team - This shall comprise of 11 employees of which at least one shall be a qualified lawyer specializing in intellectual property law.

The two key objectives of the Sunrise Validation Team and the Ongoing rights Protection Team (together the "Rights Team") is to:

- a. Prevent abusive registrations; and
 - b. Identify and address the abusive use of registered names on an ongoing basis
- Because rights protection is a fundamental core objective of the Applicant it has contracted with its Registry Administration Services Provider that the number of full time personnel made available to the Applicant will be 125% of the estimated requirement to ensure that at all times the Applicant is over resourced in this area. In addition the Applicant shall instruct outside Counsel in any relevant jurisdiction on all matters that are unable to be adequately dealt with by the Sunrise Validation Team or the Ongoing Rights Protection Team.

8. ICANN Prescribed Measures

In accordance with its obligations as a Registry operator, the Applicant will comply with all requirements in the 'gTLD Applicant Guidebook'. In particular, we will comply with the following measures prescribed by ICANN which serve to mitigate the potential for abuse in the gTLD:

- DNSSEC deployment, which reduces the opportunity for pharming and other man-in-the-middle attacks. We will encourage Registrars and Internet Service Providers to deploy DNSSEC capable resolvers in addition to encouraging DNS hosting providers to deploy DNSSEC in an easy-to-use manner in order to facilitate deployment by Registrants. Prohibition on Wild Carding as required by section 2.2 of Specification 6 of the Registry Agreement.
- Removal of Orphan Glue records (discussed above in section 4).

9. Increasing Registrant Security Awareness

In order to operate a secure and reliable gTLD, the Applicant will attempt to improve Registrant awareness of the threats of domain name hijacking, Registrant impersonation and fraud, and emphasise the need for and responsibility of Registrants to keep registration (including WHOIS) information accurate. Awareness will be raised by:

- Publishing the necessary information on the Abuse page of our Registry website in the form of presentations and FAQ's.
- Developing and providing to Registrants and resellers Best Common Practices that describe appropriate use and assignment of domain auth Info codes and risks of misuse when the uniqueness property of this domain name password is not preserved. The increase in awareness renders Registrants less susceptible to attacks on their domain names owing to the adoption of the recommended best practices thus serving to mitigate the potential for abuse in the gTLD. The clear responsibility on Registrants to provide and maintain accurate registration information (including WHOIS) further serves to minimise the potential for abusive registrations in the gTLD.

10. Registrant Disqualification

Registrants, their agents or affiliates found through the application of the AUP to have repeatedly engaged in abusive registration may be disqualified from maintaining any registrations or making future registrations. This will be triggered when the Registry Backend Services Provider's records indicate that a Registrant has had action taken against it an unusual number of times through the application of our Anti-Abuse Policy. Registrant disqualification provides an additional disincentive for qualified Registrants to maintain abusive registrations in that it puts at risk even otherwise non-abusive

registrations, through the possible loss of all registrations.

In addition, name servers that are found to be associated only with fraudulent registrations will be added to a local blacklist and any existing or new registration that uses such fraudulent NS record will be investigated.

The disqualification of 'bad actors' and the creation of blacklists mitigates the potential for abuse by preventing individuals known to partake in such behaviour from registering domain names.

For a Registrant to be placed on a list of bad actors, the Applicant will examine the factors noted above, and such determination shall be made by the Applicant at its sole discretion. Once the Applicant determines that a Registrant should be placed onto the list of bad actors, the Applicant will notify its Registry Backend Services Provider, who will be instructed to cause all of the Registrant's second-level domains in the gTLD to resolve to a page which notes that the domain has been disabled for abuse-related reasons. The second-level domains at issue will remain in this state until the expiration of the Registrant's registration term or a decision from a UDRP panel or court of competent jurisdiction requires the transfer or cancellation of such domains.

11. Restrictions on Proxy Registration Services

The Applicant will in general discourage the use of proxy registration services. The Applicant further understands that there are instances when proxy registrations may be required and will develop best practices when these instances occur. Whilst it is understood that implementing measures to promote WHOIS accuracy is necessary to ensure that the Registrant may be tracked down, it is recognised that some Registrants may wish to utilise a proxy registration service to protect their privacy. In the event that Registrars elect to offer such services, the following conditions apply:

- Registrars should take the best practice guidance developed by the Applicant and the Governance Council for the gTLD into account when making Proxy registration services available to its Registrants.
- Registrars must ensure that the actual WHOIS data is obtained from the Registrant and must maintain accurate records of such data.
- Registrars must provide Law Enforcement Agencies ("LEA") with the actual WHOIS data upon receipt of a verified request.

These conditions will be implemented contractually by inclusion of corresponding clauses in the RRA as well as being published on the Abuse page of the Registry website.

Individuals and organisations will be encouraged through the Abuse page to report any domain names they believe violate the above restrictions, following which appropriate action may be taken by the Registry Backend Services Provider. Publication of these conditions on the Abuse page of the Registry website ensures that Registrants are aware that despite utilisation of a proxy registration service, actual WHOIS information will be provided to LEA upon request in order to hold Registrants liable for all actions in relation to their domain name.

The certainty that WHOIS information relating to domain names which draw the attention of LEA will be disclosed results in the gTLD being less attractive to those seeking to register domain names for abusive purposes, thus mitigating the potential for abuse in the gTLD.

12. Registry Lock

Certain mission-critical domain names such as transactional sites, email systems and site supporting applications may warrant a higher level of security. Whilst the Applicant will take efforts to promote the awareness of security amongst Registrants, it is recognised that an added level of security may be provided to Registrants by 'Registry locking' the domain name and thereby prohibiting any updates at the Registry operator level. The Registry lock facility will be offered to all Registrars who may request this service on behalf of their Registrants in order to prevent unintentional transfer, modification or deletion of the domain name. This facility mitigates the potential for abuse by prohibiting any unauthorised updates that may be associated with fraudulent behaviour.

For example, an attacker may update nameservers of a mission-critical domain name, thereby redirecting customers to an illegitimate website without actually transferring control of the domain name.

Upon receipt of a list of domain names to be placed on Registry lock by an authorised representative from a Registrar, the Registry Backend Services Provider will:

1. Validate that the Registrar is the Registrar of record for the domain names.
2. Set or modify the status codes for the names submitted to serverUpdateProhibited, serverDeleteProhibited and/or serverTransferProhibited depending on the request.
3. Record the status of the domain name in the Shared Registration System (SRS).
4. Provide a monthly report to Registrars indicating the names for which the Registry lock service was provided in the previous month.

13. Scope/Scale Consistency

The Applicant believes that the proposed collection of protections that involve both proactive and reactive mechanisms outlined above will provide an unmatched level of security and anti-abuse activity within the gTLD and is appropriate for the size and scale of the gTLD.

13.1 Scope/Scale Consistency Specific to Backend Registry Activities

The Registry Backend Services Provider is an experienced backend Registry provider that has developed and uses proprietary system scaling models to guide the growth of its gTLD supporting infrastructure. These models direct the Registry Backend Services Provider's infrastructure scaling to include, but not be limited to, server capacity, data storage volume, and network throughput that are aligned to projected demand and usage patterns. The Registry Backend Services Provider periodically updates these models to account for the adoption of more capable and cost-effective technologies.

The Registry Backend Services Provider's scaling models are proven predictors of needed capacity and related cost. As such, they provide the means to link the projected infrastructure needs of the gTLD with necessary implementation and sustainment cost. Using the projected usage volume for the most likely scenario (defined in Question 46, Template 1 - Financial Projections: Most Likely) as an input to its scaling models, The Registry Backend Services Provider derived the necessary infrastructure required to implement and sustain this gTLD and its APM policies.

14. Acceptable Use Policy

This Acceptable Use Policy gives the Registry the ability to quickly lock, cancel, transfer or take ownership of any domain name, either temporarily or permanently, if the domain name is being used in a manner that appears to threaten the stability, integrity or security of the Registry, or any of its Registrar partners and/or that may put the safety and security of any Registrant or user at risk. The process also allows the Registry to take preventive measures to avoid any such criminal or security threats. The Acceptable Use Policy may be triggered through a variety of channels, including, among other things, private complaint, public alert, government or enforcement agency outreach, and the on-going monitoring by the Registry or its partners. In all cases, the Registry or its designees will alert the Registry's Registrar partners about any identified threats, and will work closely with them to bring offending sites into compliance.

The following are some (but not all) activities that may be subject to rapid domain compliance:

- Phishing; a criminal activity employing tactics to defraud and defame Internet users via sensitive information with the intent to steal or expose credentials, money or identities. A phishing attack often begins with a spoofed email posing as a trustworthy electronic correspondence that contains hijacked brand names e.g.(financial institutions, credit card companies, e-commerce sites). The language of a phishing email is misleading and persuasive by generating either fear and/or excitement to ultimately lure the recipient to a fraudulent Web site. It is paramount for both the phishing email and Web

site to appear credible in order for the attack to influence the recipient. As with the spoofed email, phishers aim to make the associated phishing Web site appear credible. The legitimate target Web site is mirrored to make the fraudulent site look professionally designed. Fake third-party security endorsements, spoofed address bars, and spoofed padlock icons falsely lend credibility to fraudulent sites as well. The persuasive inflammatory language of the email combined with a legitimate looking Web site is used to convince recipients to disclose sensitive information such as passwords, usernames, credit card numbers, social security numbers, account numbers, and mother's maiden name.

- Malware; malicious software that was intentionally developed to infiltrate or damage a computer, mobile device, software and/or operating infrastructure or website without the consent of the owner or authorized party. This includes, amongst others, Viruses, Trojan horses, and worms.
- Domain Name or Domain Theft; the act of changing the registration of a domain name without the permission of its original Registrant.
- Botnet Command and Control; Services run on a domain name that is used to control a collection of compromised computers or "zombies," or to direct Distributed Denial of Service attacks ("DDoS attacks")
- Distribution of Malware; The intentional creation and intentional or unintentional distribution of "malicious" software designed to infiltrate a computer system without the owner's consent, including, without limitation, computer viruses, worms, keyloggers, and Trojans.
- Fast Flux Attacks/Hosting; A technique used to shelter Phishing, Pharming, and Malware sites and networks from detection and to frustrate methods employed to defend against such practices, whereby the IP addresses associated with fraudulent sites are changed rapidly so as to make the true location of the sites difficult to find.
- Hacking; the attempt to gain unauthorized access (or exceed the level of authorized access) to a computer, information system, user account or profile, database, or security system.
- Pharming; The redirecting of unknown users to fraudulent sites or services, typically through, but not limited to, DNS hijacking or poisoning;
- Spam; The use of electronic messaging systems to send unsolicited bulk messages. The term applies to email spam and similar abuses such as instant messaging spam, mobile messaging spam, and spamming of websites and Internet forums.
- Child Pornography; the storage, publication, display and/or dissemination of pornographic materials depicting individuals under the legal age in the relevant jurisdiction.
- Further abusive behaviours include, but are not limited to; Cybersquatting, Front-Running, Gripe Sites, Deceptive and/or Offensive Domain Names, Fake Renewal Notices, Cross-gTLD Registration Scam, Name Spinning, Pay-per-Click, Traffic Diversion, False Affiliation, Domain Kiting / Tasting, fast-flux and 419 scams.

The Registry reserves the right, at its sole discretion, to take any administrative and operational actions necessary, including the use of computer forensics and information security technological services, among other things, in order to implement the Acceptable Use Policy. In addition, the Registry reserves the right to deny, cancel or transfer any registration or transaction, or place any domain name(s) on Registry lock, hold or similar status, that it deems necessary, to its discretion; (1) to protect the integrity and stability of the Registry; (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of the Registry as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement or (5) to correct mistakes made by the Registry or any Registrar in connection with a domain name registration. The Registry also reserves the right to place upon Registry lock, hold or similar status a domain name during resolution of a dispute.

Registrants must also agree that they will not use their domain for any purposes which are prohibited by the laws of the jurisdiction(s) in which they do business or any other applicable law. You may not use your domain for any purposes or in any manner which violate a statute, rule or law governing use of the Internet and/or electronic commerce, including those statutes related to gaming and/or online gambling.

In addition, The Applicant reserves the right to deny attempted registrations from repeat violators of the Registry's Acceptable Use Policy. The Registry's Acceptable Use Policy

will incorporate a certification by the Registrant that the domain will be used only for licensed, legitimate activities, and not to facilitate piracy or infringements. The Registrant will be required to accept these terms as part of its registration agreement. The Applicant reserves the right to suspend or cancel a domain for violation of the Registry's Acceptable Use Policy.

15. Abuse Response Process

The Registry is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the gTLD, or are part of a real-time investigation by law enforcement.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring Registrar will be notified and be given 48 hours to investigate the activity. This will result in either the take down of the domain name by placing the domain name on hold or the deletion of the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the Registrar has not taken the requested action after the 48-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry may place the domain on "ServerHold". Although this action removes the domain name from the gTLD zone, the domain name record still appears in the gTLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

Additionally, the Applicant will require Registrars to adhere to the following abuse-prevention procedures:

- Each new gTLD accredited Registrar must provide and maintain a valid primary point of contact for abuse complaints. The Applicant will require this as part of the new gTLD RRA.
 - The Applicant will explicitly define for Registrars what constitutes abusive behaviour including but not limited to, malicious, negligent, and reckless behaviour. The definition of abusive behaviour will be contained in the AUP and the Applicant will require this as part of the new gTLD RRA.
 - Registrars must notify the Registry Operator immediately regarding any investigation or compliance action including the nature of the investigation or compliance action by ICANN or any outside party (e.g., law enforcement, etc.), along with the gTLD impacted. This will be required as part of the new gTLD RRA.
 - The Applicant will initiate an Abuse Prevention and Mitigation Working Group. This group will be developed in conjunction with the gTLD Governance Council mentioned above. Its aim will be to give the Applicant's team alternate perspectives about handling incidents of abuse and ways to mitigate them. The group will meet regularly to discuss the latest trends in domain name abuse and the most effective way to prevent and remedy them for the gTLD.
- end-

29. Rights Protection Mechanisms

Q29

The Applicant will be implementing an extensive range of Rights Protection Mechanisms ("RPMs") designed to minimize abusive registrations and other activities that may affect the legal rights of others. The Applicant will implement and comply with all ICANN required RPMs and will in addition implement further measures to better protect the rights of others and minimize abusive registrations.

The following is an overview of Applicant's response to Q29:

1. Rights Protection as a core objective
2. Plans for Rights Protection Mechanisms as part of Start-Up
3. ICANN Mandated Rights Protection Mechanisms
 - 3.1. Trademark Clearinghouse ("TMCH")
 - 3.2. Applicant's Sunrise Period ("ASP")
 - 3.3. Trademark Claims Service ("TCS")
 - 3.4. Uniform Domain Name Dispute Resolution Policy ("UDRP")
 - 3.5. Uniform Rapid Suspension System ("URS")
 - 3.6. Trademark Post-Delegation Dispute Resolution Procedure ("PDDRP")
4. Additional Rights Protection Mechanisms to be implemented by the Applicant on a Voluntary Basis
 - 4.1. Mechanism to protect IGO Names ("PIN")
 - 4.2. Mechanism for Further Protection of Capital City Names ("CCC")
5. Efforts to promote WHOIS Accuracy
 - 5.1. Thick WHOIS
 - 5.2. Semi Annual Audits to Ensure Accurate WHOIS
6. Policies Handling Complaints Regarding Abuse and Rights Issues
7. Registry Acceptable Use Policy("AUP")
8. Monitoring for Malicious Activity
9. Resourcing Plans Specific to Backend Registry Activities
10. Registry Backend Services Provider Experience with Rights Protection Measures

1 Rights Protection as a core objective

The Applicant is firmly committed to the protection of Intellectual Property rights and to implementing the mandatory RPMs contained in the Applicant Guidebook and detailed in Specification 7 of the Registry Agreement. Use of domain names that infringe upon the legal rights of others in the gTLD will not be tolerated and preventing abusive registrations is a core objective of the Applicant. The nature of such uses creates security and stability issues for the Registry, Registrars, and Registrants, as well as for users of the Internet in general. The Applicant will prevent abusive registrations and reduce opportunities for behaviours such as phishing or pharming by implementing comprehensive registration, anti-abuse, and rights protection guidelines as defined in its AUP, as well as innovative additional RPMs such as PIN and the CCC, as described below. In order to identify and address the abusive use of registered names on an ongoing basis, the Applicant will also incorporate and abide by all mandated RPMs as specified in Specification 7 of the Registry Agreement and as adopted by the ICANN Board of Directors as ICANN Consensus Policies.

2 Plans for Rights Protection Mechanisms as part of Start-Up

The timeline for start-up RPMs in the Applicant's gTLD is as follows:

Phase 1 - Sunrise Process:

- Day 1: Sunrise round opens
- Day 60: Sunrise round Closes
- Day 61: Sunrise Allocation including Contention Resolution Mechanisms ("CRM") opens
- Day 71: Sunrise Allocation CRM closes
- The following Rights Protection Mechanisms apply:
 - a. TMCH
 - b. Sunrise Eligibility Requirements ("SER")
 - c. Sunrise Dispute Resolution Policy ("SDRP")
 - d. UDRP
 - e. URS
 - f. PIN
 - g. TCS*

Phase 2 - Landrush process:

- Day 72: Landrush opens
- Day 102: Landrush closes
- Day 103: Landrush CRM opens
- Day 113: Landrush CRM closes

- The following Rights Protection Mechanisms apply:
 - a. UDRP
 - b. URS
 - c. PIN
 - d. CCC
 - e. TCS*

Phase 3 - General Availability/Registrations:

- Day 114: General availability begins

- The following Rights Protection Mechanisms apply:
 - a. UDRP
 - b. URS
 - c. PIN
 - d. PDDRP
 - e. TCS* (90 days)

* To ease the concerns of trademark owners and mitigate the impact of infringing registrations, the Applicant will be implementing the Trademark Claims service in all three phases of launch. It is important to note that during the General Availability Phase, the Trademark Claims service will be used for 90 days, 30 days longer than the ICANN mandated minimum.

3 ICANN Mandated Rights Protection Mechanisms

3.1 Trademark Clearinghouse ("TMCH")

The first mandatory RPM required of each new gTLD Registry is support for, and interaction with, the TMCH. The TMCH is intended to serve as a central repository for information pertaining to the rights of trademark holders to be authenticated, stored, and disseminated. The data maintained in the clearinghouse will support and facilitate other RPMs, including the mandatory Sunrise Period and Trademark Claims service. Although the operational details of how the TMCH will interact with Registry operators and Registrars are still being developed by ICANN, the Applicant is actively monitoring the developments of the Implementation Assistance Group ("IAG"). The IAG is working with ICANN staff to refine and finalize the rules, procedures and technical requirements for the TMCH. In addition, the gTLD's Registry Backend Services Provider is actively participating in the IAG to ensure that the protections afforded by the clearinghouse and associated RPMs are feasible, implementable, and well understood.

Utilizing the TMCH, the Applicant will offer: (i) a Sunrise registration service for 60 days during the pre-launch phase giving eligible trademark owners an early opportunity to register second-level domains in new gTLDs; and (ii) a TCS in all 3 phases of launch including 90 days after phase 3 general availability.

3.2 Applicant's Sunrise Period ("ASP")

All domain names registered during the Sunrise Period will be subject to the Applicant's domain name registration policy. The Applicant will surpass ICANN's mandated minimum by offering a Sunrise Period for sixty (60) days. Owners of trademarks listed in the TMCH that also meet the Applicant's domain name registration requirements will be able to register domain names that are an identical match of their listed trademarks. The Applicant has engaged Famous Four Media Limited ("FFM") as well as other suppliers to assist with this process. The FFM Sunrise Validation Team will consist of a minimum of 11 employees who will work with the Applicant's Trademark Validation Team ("TVT") and outside counsel, to receive and authenticate all Sunrise registrations.

Registrars who are accredited to sell names in the gTLD will ensure that all Sunrise Registrants meet SERs, which will be verified by Clearinghouse data. The proposed SERs include: (i) ownership of a mark that is (a) nationally or regionally registered and for which proof of use, such as a declaration and a single specimen of current use - was submitted to, and validated by, the TMCH; or (b) that have been court-validated; or (c) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008, (ii) optional Registry-elected requirements regarding the international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.

Upon submission of all of the required information and documentation, the Registrar will forward the information to the Applicant's TVT for authentication. The Applicant's TVT will review the information and documentation and verify the trademark information and registration eligibility, and notify the potential registrant of any deficiencies.

The Applicant will also incorporate a SDRP. The SRDP will allow challenges to Sunrise Registrations by third parties after acceptance of the registration based on the following four grounds: (i) at the time the challenged domain name was registered, the registrant did not hold a trademark registration of national or regional effect or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national or regional effect or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not have the necessary protections on or before the effective date of the Registry Agreement.

After receiving a Sunrise Complaint, the TVT will review the Complaint to see if the Complainant reasonably asserts a legitimate challenge as defined by the SDRP. If not, the TVT will send a notice to the Complainant that the complaint does not fall within one of the delineated grounds as defined by the SDRP and that the Applicant considers the matter closed.

If the domain name is found to not meet the SERs, the TVT will immediately suspend the domain name. Thereafter, the TVT will immediately notify the Sunrise Registrant of the suspension of the domain name, the nature of the complaint, and provide the registrant with the option to correct the SER deficiencies in a timely manner or the domain name will be cancelled.

If the registrant responds in a timely manner, the response will be reviewed by the TVT to determine if the SERs are met. If the TVT is satisfied by the registrant's response, the TVT will submit a request to lift the suspension of the domain name and notify the Complainant that their dispute was denied. If the registrant does not respond in a timely manner, the TVT will then notify the Complainant that the complaint was upheld and the registration will be cancelled.

3.3 Trademark Claims Service

The Applicant will offer a TCS in Sunrise and Landrush as well as 90 days of general registration (30 days longer than the ICANN mandated minimum period.) The TCS will be monitored by the TVT. Registrars who are accredited to sell names in the gTLD will be required to review all domain names requested to be registered during the Trademark Claims period to determine if they are an identical match of a trademark that has been filed with the TMCH. A domain name will be considered an identical match when the domain name consists of the complete and identical textual elements of the mark, and includes domain names where (a) spaces contained within a mark are either replaced by hyphens or omitted; (b) certain special characters contained within a trademark are spelled out with appropriate words describing it (e.g., @ and &); and (c) punctuation or special characters contained within a mark that are unable to be used in a second-level domain name are either (i) omitted or (ii) replaced by hyphens or underscores. Domain names that are plural forms of a mark or that merely contain a mark as a sub string will not qualify as an identical match.

If the Registrar determines that a prospective domain name registration is identical to a mark registered in the TMCH, the Registrar will be required to ensure that a "Trademark Claims Notice" ("Notice") in English is sent to the prospective registrant of the domain name and a blind copy is sent to the Applicant's TVT. The Notice will provide the prospective registrant with information regarding the trademark referenced in the notice to enhance understanding of the Trademark rights being claimed by the trademark holder. The Notice will be provided in real time without cost to the prospective registrant.

After sending the Notice, the Registrar will require the prospective registrant to specifically warrant within five (5) days that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge that the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice. If the warranty satisfies these requirements, the Registrar will effectuate the registration and notify the Applicant's TVT.

After the effectuation of a registration that is identical to a mark listed in the TMCH, the Registrar will be required to notify the trademark owner that a domain name representing the listed mark has been registered. A copy of this communication will also be sent to the TVT. The trademark owner then has the option of filing a Complaint under the UDRP and the URS against the domain name registrant. The Applicant will require in its relevant agreements that the Registry, Registrar, and registrant all submit to and abide by the determinations of the UDRP and the URS providers.

3.4 Uniform Domain Name Dispute Resolution Policy

The Applicant will abide by all decisions rendered by UdrpP providers and will specify in its Registry Registrar Agreement ("RRA") and Registration Agreements ("RA") that all parties must also abide by all decisions made by panels in accordance with the UDRP. On the Applicant's Registry website, the Applicant will designate a Rights Protection Contact ("Rights Contact") which will receive all UDRP Complaints and decisions. Upon receipt of a determination, the Rights Contact will work with technical staff at the Registry Backend Services Provider to temporarily lock any domain names as required, and will notify the appropriate Registrar to cancel or transfer all registrations determined by a UDRP panel to be infringing.

3.5 Uniform Rapid Suspension System

The Applicant will implement the URS as provided in the Applicant Guidebook. The Applicant will also specify in its RRA that all parties abide by all decisions made by panels in accordance with the URS. In response to complaints made by trademark owners that the UDRP was too cost prohibitive and slow, and that more than 70 percent of UDRP cases were "clear cut" cases of cybersquatting, ICANN adopted the Implementation Review Team's ("IRT") recommendation that all new gTLD registries be required, pursuant to their contracts with ICANN, to take part in a URS. The purpose of the URS is to provide a more cost effective and timely mechanism for brand owners than the UDRP to protect their trademarks and to promote consumer protection on the Internet.

The URS is not meant to address questionable cases of alleged infringement (e.g., use of terms in a generic sense) or for anti-competitive purposes or denial of free speech, but rather for those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place.

Unlike the UDRP which requires little involvement of gTLD registries, the URS envisages much more of an active role at the Registry-level. For example, rather than requiring the Registrar to lock down a domain name subject to a UDRP dispute, under the URS it is the Registry that must lock the domain within 24 hours of receipt of the complaint from the URS Provider to restrict all changes to the registration data, including transfer and deletion of the domain names.

The Rights Contact will receive all URS Complaints verified by the URS Provider and provide its contact information. In the event of a decision in favour of the complainant, the Registry is required to suspend the domain name. This suspension remains in effect for the remainder of the registration period and would not resolve the original website. The nameservers would be redirected to an informational web page describing the URS

Process. The WHOIS for that domain will state that the domain name will not be able to be transferred, deleted, or modified for the life of the registration. Finally, there is an option for a successful complainant to extend the registration period for one additional year at commercial rates. Upon receipt of a decision in the registrant's favour, Rights Contact will notify the Registry operator to unlock the domain name.

3.6 Trademark Post-Delegation Dispute Resolution Procedure ("PDDRP")

The Applicant will participate in all post-delegation procedures required by the Registry agreement, including the PDDRP, and will abide by any decisions of any PDDRP Provider as required in Specification 7 of the Registry Agreement.

4 Additional Rights Protection Mechanisms to be implemented by the Applicant

4.1 Mechanism to Protect IGO Names

The Applicant considers the Protection of Intergovernmental Organization ("IGO") names to be very important. The Applicant will use strings registered as second level domains in the .int gTLD as the basis for this protection. To register in the .int domain, the Registrants must be an IGO that meets the requirements found in RFC 1591. The .int domain is used for registering organizations established by international treaties between or among national governments and which are widely considered to have independent international legal personality. Thus, the names of these organizations, as with geographic names, can lend an official imprimatur, and if misused, be a source of public confusion or deception.

Reservation of IGO names:

In addition to the mandated and additional reservation of geographic names as provided for in response to Question 22, the Applicant will reserve, and thereby prevent registration of, all names that are registered as second level domains in the most recent .int zone as of 1st November 2012. By doing so, the Applicant will extend additional protection to IGOs that comply with the current eligibility requirements for the .int gTLD as defined at <http://www.iana.org/domains/int/policy/>, and that have obtained a second-level registration in the .int zone.

Release of IGO names:

In the future, should any of the IGOs wish to make use of the protected strings, the Registry will release and assign the domain to the respective IGOs using the following process:

- a) The IGO submits a request to the Applicant in the hope of the reserved name being assigned to themselves and provides the necessary documentation and details of the proposed registrant entity for the domain name registration.
- b) The Applicant will validate and authenticate the request to establish that it is a genuine bona fide request.
- c) Once the request has been approved the Applicant will notify the requesting IGO as well as ICANN and the GAC of the approval for the assignment of the domain name.
- d) The Applicant will issue a unique authorization code to the proposed IGO registrant.
- e) The proposed IGO registrant will then be able to request that the assignment of the domain name is given to them using the authorization code with an ICANN and gTLD accredited Registrar of their choice.

4.2 Mechanism for Further Protection of Capital City Names

In parallel with the Landrush Period defined in the answer to question 18, the Applicant will implement a Capital City Claim (CCC) service whereby additional protection will be granted to the capital city names of a country or territory listed in the ISO 3166-1 standard. The CCC process is as follows:

- a) Any prospective domain name registrant applying to register a domain name identical to the capital city name of a country or territory listed in the ISO 3166-1 standard will receive from the Applicant a CCC notification highlighting the fact that the applied-for domain name matches a capital city name of a country or territory listed in the ISO 3166-1 standard.
- b) A potential domain name registrant receiving a CCC notification will have to send a

response to the Applicant whereby they will agree to unconditionally comply with requirements as to representations and warranties required by the Applicant in order to protect the reputation of the capital city as well as any further relevant terms and conditions provided.

c) Unconditional acceptance of the warranties set out in the CCC notification will be a material requirement for a prospective registrant to be eligible to register the domain name in question should said prospective registrant be successful in the Landrush period.

d) Upon registration during the Landrush period of a domain name identical to a capital city name of a country or territory listed in the ISO 3166-1 standard, the Applicant will send a notification in writing to the ICANN Government Advisory Committee ("GAC") Chair.

5 Efforts to promote WHOIS Accuracy

5.1. Thick WHOIS

The Applicant will include a thick searchable WHOIS database both accessible on port 43 as well as on port 80 (http) as required in Specification 4 of the Registry Agreement. A thick WHOIS provides numerous advantages including a centralized location of registrant information, the ability to more easily manage and control the accuracy of data, and a consistent user experience, as well as greater transparency, a factor critical to rights holders as well as law enforcement in pursuing abusive uses of a domain.

5.2. Bi-Annual Audits to Ensure Accurate WHOIS

The Applicant's TTV will perform a bi-annual review of a random sampling of domain names within the applied-for gTLD to test the accuracy and authenticity of the WHOIS information. Through this review, the Applicant's TTV will examine the WHOIS data for evidence of inaccurate or incomplete Whois information. In the event that such errors or missing information exists, it shall be forwarded to the Registrar, who shall be required to address such deficiencies with its Registrants.

6 Policies Handling Complaints Regarding Abuse and Rights Issues

In addition to the RPMs addressed above, the Applicant will implement a number of measures to handle complaints regarding the abusive registration of domain names in its gTLD that may infringe on the rights of others. Further details are described in the response to Question 28.

7 Registry Acceptable Use Policy

One of the key policies each new gTLD Registry needs is to have an AUP that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. The policy must be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the Registry to take the appropriate actions based on the type of abuse. This may include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring the domain name to another Registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation. The gTLD's AUP, set forth in our response to Question 28, will include prohibitions on phishing, pharming, dissemination of malware, fast flux hosting, hacking, and child pornography. In addition, the policy will include the right of the Registry to take action necessary to deny, cancel, suspend, lock, or transfer any registration in violation of the policy.

In addition, the Applicant reserves the right to deny attempted registrations from repeat violators of the Registry's AUP. The Registry's AUP will incorporate a certification by the registrant that the domain will be used only for licensed, legitimate activities, and not to facilitate piracy or infringements. The registrant will be required to accept these terms as part of its registration agreement. The Applicant reserves the right to suspend or cancel a domain for violation of the Registry's AUP.

8 Monitoring for Malicious Activity

The Applicant is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the AUP are dealt with in a timely and decisive manner.

These include taking action against those domain names that are being used to threaten the stability and security of the gTLD, or are part of a real-time investigation by law enforcement.

Once a complaint is received or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring Registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety, or to provide a compelling argument to the Registry to keep the name in the zone. If the Registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry may place the domain on "ServerHold". Although this action removes the domain name from the gTLD zone, the domain name record still appears in the gTLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

9 Resourcing Plans Specific to Backend Registry Activities

Responsibility for rights protection rests with a variety of functional groups. The Trademark Validation Team and Sunrise Validation Teams are primarily responsible for investigating claims of marks for domain registration. The customer service team also plays an important role in assisting with the investigations, responding to customers, and notifying Registrars of abusive domains. Finally, the Policy/Legal team is responsible for developing the relevant policies and procedures.

The rights protection mechanisms described in the response above involve a wide range of tasks, procedures, and systems. The responsibility for each mechanism varies based on the specific requirements. In general the development of applications such as sunrise and IP claims is the responsibility of the Engineering team, with guidance from the Product Management team. Customer Support and Legal play a critical role in enforcing certain policies such as the rapid suspension process. These teams have very substantial experience implementing these or similar processes.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources will be made available:

- Development/Engineering - 19 people
- Product Management - 4 people
- Customer Support - 12 people

The resources are more than adequate to support the rights protection mechanisms of the Registry.

Administrative Services Provider - Famous Four Media Limited

In addition to those resources set out above provided by the Registry's backend services provider the Applicant's Administration Services Provider shall provide the following extra resources:

- Sunrise Validation Team - This shall comprise of 11 employees of which at least one shall be a qualified lawyer specializing in intellectual property law.
- Ongoing Rights Protection Team - This shall comprise of 11 employees of which at least one shall be a qualified lawyer specializing in intellectual property law.

The two key objectives of the Sunrise Validation Team and the Ongoing rights Protection Team (together the "Rights Team") is to:

- a) Prevent abusive registrations; and
- b) Identify and address the abusive use of registered names on an ongoing basis

Given that rights protection is a fundamental core objective of the Applicant it has contracted with its Registry Administration Services Provider that the number of full time personnel made available to the Applicant will be 125% of the estimated requirement to ensure that at all times the Applicant is over resourced in this area.

In addition the Applicant shall instruct outside Counsel in any relevant jurisdiction on all matters that are unable to be adequately dealt with by the Sunrise Validation Team or the Ongoing Rights Protection Team.

10 Registry Backend Services Provider Experience with Rights Protection Measures

The gTLD's Registry Backend Services Provider, Neustar Inc., has already implemented Sunrise and/or Trademark Claims programs for numerous gTLDs including .biz, .us, .travel, .tel and .co and will implement both of these services on behalf of the Applicant.

Neustar's Experience with Sunrise Process:

In early 2002, Neustar became the first Registry operator to successfully launch an authenticated Sunrise process. This process permitted qualified trademark owners to pre-register their trademarks as domain names in the .us gTLD space prior to the opening of the space to the general public. Unlike any other "Sunrise" plans implemented or proposed before that time, Neustar validated the authenticity of trademark applications and registrations with the United States Patent and Trademark Office (USPTO).

As the back-end Registry operator for the .tel gTLD and the .co ccTLD, Neustar launched a validated Sunrise program employing processes that are very similar to those that will be used by the TMCH for new gTLDs.

Below is a high level overview of the implementation of the .co Sunrise period and the Trademark Claims service that was part of the .biz launch. Neustar's experience in each of these RPMs will enable it to seamlessly provide these services on behalf of the Applicant as required by ICANN.

Sunrise and .co

The Sunrise process for .co was divided into two sub-phases:

- Local Sunrise giving holders of eligible trademarks that have obtained registered status from the Colombian trademark office the opportunity to apply for the .co domain names corresponding with their marks.
- Global Sunrise program giving holders of eligible registered trademarks of national effect, that have obtained a registered status in any country of the world the opportunity to apply for .co domain names corresponding with their marks for a period of time before registration is open to the public at large.

Like the new gTLD process set forth in the Applicant Guidebook, trademark owners had to have their rights validated by a Clearinghouse provider prior to the registration being accepted by the Registry. The Clearinghouse used a defined process for checking the eligibility of the legal rights claimed as the basis of each Sunrise application using official national trademark databases and submitted documentary evidence.

Applicants and/or their designated agents had the option of interacting directly with the Clearinghouse to ensure their applications were accurate and complete prior to submitting them to the Registry via an optional "Pre-validation Process". Regardless of whether an Applicant was "pre-validated", all Applicants had to submit their corresponding domain name applications through a .co accredited Registrar. When the Applicant was pre-validated through the Clearinghouse, they were given an associated approval number that had to be supplied to the Registry. If Applicants were not pre-validated, they were required to submit the necessary trademark information through their Registrar to the Registry.

At the Registry level, Neustar, subsequently either delivered the:

- Approval number and domain name registration information to the Clearinghouse, or
- When there was no approval number, trademark information and the domain name registration information was provided to the Clearinghouse through EPP (as is currently required under the Applicant Guidebook).

Information was then used by the Clearinghouse for further validation of those pre-validated applications, or initial validation of those that did not select pre-validation. If the Applicant was validated and their trademark matched the domain name applied for, the Clearinghouse communicated that fact to the Registry via EPP. When there was only one validated sunrise application for a domain name, the application proceeded to registration when the .co launched. If there were multiple validated applications for the same domain name (recognizing that there could be multiple trademark owners sharing the same trademark), those were processed via the .co Sunrise auction process. Neustar tracked all of the information it received and the status of each application on a secure Website to enable trademark owners to view the status of their Sunrise application.

Although the exact process for the Sunrise program and its interaction with trademark owners, Registry, Registrars, and TMCH is not finalized at the time of the application, Neustar's expertise in launching multiple Sunrise processes and its established software will ensure a smooth and compliant Sunrise process for the new gTLDs.

a) Trademark Claims Service Experience

When Neustar's .biz gTLD launched in 2001, Neustar became the first gTLD with a Trademark Claims ("TC") service. Neustar developed the TC Service by enabling companies to stake claims to domain names prior to the commencement of live .biz domain registrations. During the TC process, Neustar received over 80,000 TC from entities around the world. Recognizing that multiple intellectual property owners could have trademark rights in a particular mark, multiple TC for the same string were accepted. All applications were logged into a TC database managed by Neustar.

The Trademark Claimant was required to provide various information about their trademark rights, including the:

- Particular trademark or service mark relied on for the trademark Claim
- Date a trademark application on the mark was filed, if any, on the string of the domain name
- Country where the mark was filed, if applicable
- Registration date, if applicable
- Class or classes of goods and services for which the trademark or service mark was registered
- Name of a contact person with whom to discuss the claimed trademark rights.

Once all TC and domain name applications were collected, Neustar then compared the claims contained within the TC database with its database of collected domain name applications (DNAs). In the event of a match between a TC and a domain name application, an e-mail message was sent to the domain name Applicant notifying the Applicant of the existing TC. The e-mail also stressed that if the Applicant chose to continue the application process and was ultimately selected as the registrant, the Applicant would be subject to Neustar's dispute proceedings if challenged by the Trademark Claimant for that particular domain name.

The domain name Applicant had the option to proceed with the application or cancel the application. Proceeding with an application meant that the Applicant wanted the application to proceed to registration despite having been notified of an existing Trademark Claim. By choosing to "cancel," the Applicant made a decision in light of an existing TC notification to not proceed.

If the Applicant did not respond to the e-mail notification from Neustar, or elected to cancel the application, the application was not processed. This prevented the Applicant from registering the actual domain name. If the Applicant affirmatively elected to continue the application process after being notified of the claimant's (or claimants') alleged trademark rights to the desired domain name, Neustar processed the application. This process is very similar to the one ultimately adopted by ICANN and incorporated in the latest version of the Applicant Guidebook. Although the collection of TC for new gTLDs will be by the TMCH, many of the aspects of Neustar's TC process in 2001 are similar to those in the Applicant Guidebook. This makes Neustar uniquely qualified to implement the new gTLD TC process.

Neustar was also a key contributor to the development of the Uniform Dispute Resolution Policy ("UDRP") in 1998. This became the first "Consensus Policy" of ICANN and has been required to be implemented by all domain name registries since that time. The UDRP is intended to be an alternative dispute resolution process to transfer domain names from those that have registered and used domain names in bad faith. Although there is not much of an active role that the domain name Registry plays in the implementation of the UDRP, Neustar has closely monitored UDRP decisions that have involved the gTLDs which it supports and ensures that the decisions are implemented by the Registrars supporting its gTLDs.

-end-

30(a). Security Policy: Summary of the security policy for the proposed registry

Q30A

The Applicant and our back-end operator, Neustar, recognize the vital need to secure the systems and the integrity of the data in commercial solutions. The Applicant's registry solution will leverage industry-best security practices including the consideration of physical, network, server, and application elements.

The Applicant and Neustar's approach to information security starts with comprehensive information security policies. These are based on the industry best practices for security including SANS (SysAdmin, Audit, Network, Security) Institute, NIST (National Institute of Standards and Technology), and Center for Internet Security (CIS). Policies are reviewed annually by Neustar's information security team.

The following is a summary of the security policies that will be used in the Applicant's registry, including:

1. Summary of the security policies used in the registry operations
2. Description of independent security assessments
3. Description of security features that are appropriate for the TLD
4. List of commitments made to registrants regarding security levels

All of the security policies and levels described in this section are appropriate for the Applicant's registry.

30(a).1 Summary of Security Policies

Neustar, Inc. has developed a comprehensive Information Security Program in order to create effective administrative, technical, and physical safeguards for the protection of its information assets, and to comply with Neustar's obligations under applicable law, regulations, and contracts. This Program establishes Neustar's policies for accessing, collecting, storing, using, transmitting, and protecting electronic, paper, and other records containing sensitive information.

The Program defines:

- The policies for internal users and our clients to ensure the safe, organized and fair use of information resources.
- The rights that can be expected with that use.
- The standards that must be met to effectively comply with policy.
- The responsibilities of the owners, maintainers, and users of Neustar's information resources.
- Rules and principles used at Neustar to approach information security issues

The following policies are included in the Program:

1. Acceptable Use Policy

The Acceptable Use Policy provides the "rules of behavior" covering all Neustar Associates for using Neustar resources or accessing sensitive information.

2. Information Risk Management Policy

The Information Risk Management Policy describes the requirements for the on-going information security risk management program, including defining roles and responsibilities for conducting and evaluating risk assessments, assessments of technologies used to provide information security and monitoring procedures used to measure policy compliance.

3. Data Protection Policy

The Data Protection Policy provides the requirements for creating, storing, transmitting, disclosing, and disposing of sensitive information, including data classification and labeling requirements, the requirements for data retention. Encryption and related technologies such as digital certificates are also covered under this policy.

4. Third Party Policy

The Third Party Policy provides the requirements for handling service provider contracts, including specifically the vetting process, required contract reviews, and on-going monitoring of service providers for policy compliance.

5. Security Awareness and Training Policy

The Security Awareness and Training Policy provide the requirements for managing the on-going awareness and training program at Neustar. This includes awareness and training

activities provided to all Neustar Associates.

6. Incident Response Policy

The Incident Response Policy provides the requirements for reacting to reports of potential security policy violations. This policy defines the necessary steps for identifying and reporting security incidents, remediation of problems, and conducting "lessons learned" post-mortem reviews in order to provide feedback on the effectiveness of this Program. Additionally, this policy contains the requirement for reporting data security breaches to the appropriate authorities and to the public, as required by law, contractual requirements, or regulatory bodies.

7. Physical and Environmental Controls Policy

The Physical and Environment Controls Policy provides the requirements for securely storing sensitive information and the supporting information technology equipment and infrastructure. This policy includes details on the storage of paper records as well as access to computer systems and equipment locations by authorized personnel and visitors.

8. Privacy Policy

Neustar supports the right to privacy, including the rights of individuals to control the dissemination and use of personal data that describes them, their personal choices, or life experiences. Neustar supports domestic and international laws and regulations that seek to protect the privacy rights of such individuals.

9. Identity and Access Management Policy

The Identity and Access Management Policy covers user accounts (login ID naming convention, assignment, authoritative source) as well as ID lifecycle (request, approval, creation, use, suspension, deletion, review), including provisions for system/application accounts, shared/group accounts, guest/public accounts, temporary/emergency accounts, administrative access, and remote access. This policy also includes the user password policy requirements.

10. Network Security Policy

The Network Security Policy covers aspects of Neustar network infrastructure and the technical controls in place to prevent and detect security policy violations.

11. Platform Security Policy

The Platform Security Policy covers the requirements for configuration management of servers, shared systems, applications, databases, middle-ware, and desktops and laptops owned or operated by Neustar Associates.

12. Mobile Device Security Policy

The Mobile Device Policy covers the requirements specific to mobile devices with information storage or processing capabilities. This policy includes laptop standards, as well as requirements for PDAs, mobile phones, digital cameras and music players, and any other removable device capable of transmitting, processing or storing information.

13. Vulnerability and Threat Management Policy

The Vulnerability and Threat Management Policy provides the requirements for patch management, vulnerability scanning, penetration testing, threat management (modeling and monitoring) and the appropriate ties to the Risk Management Policy.

14. Monitoring and Audit Policy

The Monitoring and Audit Policy covers the details regarding which types of computer events to record, how to maintain the logs, and the roles and responsibilities for how to review, monitor, and respond to log information. This policy also includes the requirements for backup, archival, reporting, forensics use, and retention of audit logs.

15. Project and System Development and Maintenance Policy

The System Development and Maintenance Policy covers the minimum security requirements for all software, application, and system development performed by or on behalf of Neustar and the minimum security requirements for maintaining information systems.

30.(a).2 Independent Assessment Reports

Neustar IT Operations is subject to yearly Sarbanes-Oxley (SOX), Statement on Auditing Standards #70 (SAS70) and ISO audits. Testing of controls implemented by Neustar management in the areas of access to programs and data, change management and IT Operations are subject to testing by both internal and external SOX and SAS70 audit groups. Audit Findings are communicated to process owners, Quality Management Group and Executive Management. Actions are taken to make process adjustments where required and remediation of issues is monitored by internal audit and QM groups.

External Penetration Test is conducted by a third party on a yearly basis. As authorized by Neustar, the third party performs an external Penetration Test to review potential security weaknesses of network devices and hosts and demonstrate the impact to the environment. The assessment is conducted remotely from the Internet with testing divided into four phases:

- A network survey is performed in order to gain a better knowledge of the network that was being tested
- Vulnerability scanning is initiated with all the hosts that are discovered in the previous phase
- Identification of key systems for further exploitation is conducted
- Exploitation of the identified systems is attempted.

Each phase of the audit is supported by detailed documentation of audit procedures and results. Identified vulnerabilities are classified as high, medium and low risk to facilitate management's prioritization of remediation efforts. Tactical and strategic recommendations are provided to management supported by reference to industry best practices.

30.(a).3 Augmented Security Levels and Capabilities

The Applicant and its backend provider Neustar will provide the same high level of security provided across all of the registries it manages.

A key to Neustar's Operational success is Neustar's highly structured operations practices. The standards and governance of these processes:

- Include annual independent review of information security practices
- Include annual external penetration tests by a third party
- Conform to the ISO 9001 standard (Part of Neustar's ISO-based Quality Management System)
- Are aligned to Information Technology Infrastructure Library (ITIL) and CoBIT best practices
- Are aligned with all aspects of ISO IEC 17799
- Are in compliance with Sarbanes-Oxley (SOX) requirements (audited annually)
- Are focused on continuous process improvement (metrics driven with product scorecards reviewed monthly).

A summary view to Neustar's security policy in alignment with ISO 17799 can be found in section 30.(a).4 below.

BITS Recommendations

The Applicant will structure its policies around the BITS Recommendations where relevant to this gTLD.

The Applicants goal with this gTLD is to provide a safe and secure browsing experience for consumers of this gTLD. A domain within this gTLD that is owned, operated by or compromised by a malicious party could cause harm to consumers, to the TLD's reputation and to the reputation of the Internet itself. As such, additional controls are in place relating to the validity of registrations, as well as additional measures to ensure the correct identity of both Registrants and Registrars relating to changes made within the SRS, and to protecting the integrity of the DNS service as a whole.

The Security Standards Working Group (SSWG) formed by BITS drafted a set of policy recommendations that should be applied to financial TLDs. The policy comprises of a set

of 31 recommendations that should be adopted by ICANN in evaluating any applicant of a financial TLD. The recommendations were posted by BITS in the form of a letter to ICANN at [<http://www.icann.org/en/correspondence/aba-bits-to-beckstrom-crocker-20dec11-en.pdf>]

We welcome the recommendations from SSWG and will strongly consider the recommendations relating to the implementation of this gTLD where considered relevant.
Coalition for Online Accountability ("COA") Recommendations

The Applicant will structure its policies around the COA Recommendations where relevant to this gTLD.

The Applicant's goal with this gTLD is to provide a safe and secure browsing experience for consumers of this gTLD. A domain within this gTLD that is owned, operated by or compromised by a malicious party could cause harm to consumers, to the gTLD's reputation and to the reputation of the Internet itself. As such, additional controls are in place relating to the validity of registrations, as well as additional measures to ensure the correct identity of both Registrants and Registrars relating to changes made within the SRS, and to protecting the integrity of the DNS service as a whole.

The Coalition for Online Accountability have drafted a set of policy recommendations, also endorsed by many other international organizations representing the creative industries, that should be applied to entertainment gTLDs - especially those dependent on copyright protection. The policy comprises of a set of 7 recommendations that should be adopted by ICANN in evaluating any applicant for an entertainment-based gTLD. The recommendations were posted by COA in the form of a letter to ICANN at <http://bit.ly/HuHtmq>.

We welcome the recommendations from the COA and will strongly consider the recommendations relating to the implementation of this gTLD where considered relevant.

30.(a).4 Commitments and Security Levels

The Applicant's registry commits to high security levels that are consistent with the needs of the TLD. These commitments include:

Compliance with High Security Standards

- Security procedures and practices that are in alignment with ISO 17799
- Annual SOC 2 Audits on all critical registry systems
- Annual 3rd Party Penetration Tests
- Annual Sarbanes Oxley Audits

Highly Developed and Document Security Policies

- Compliance with all provisions described in section 30.(a).4 below and in the attached security policy document.
- Resources necessary for providing information security
- Fully documented security policies
- Annual security training for all operations personnel

High Levels of Registry Security

- Multiple redundant data centers
- High Availability Design
- Architecture that includes multiple layers of security
- Diversified firewall and networking hardware vendors
- Multi-factor authentication for accessing registry systems
- Physical security access controls
- A 24x7 manned Network Operations Center that monitors all systems and applications
- A 24x7 manned Security Operations Center that monitors and mitigates DDoS attacks
- DDoS mitigation using traffic scrubbing technologies

We commit to the following:

- Safeguarding the confidentiality, integrity and availability of registrant's data.
- Compliance with the relevant regulation and legislation with respect to privacy.
- Working with law enforcement where appropriate in response to illegal activity or at

the request of law enforcement agencies.

- Validating requests from external parties requesting data or changes to the registry to ensure the identity of these parties and that their request is appropriate. This includes requests from ICANN.
- That access to DNS and contact administrative facilities requires multi-factor authentication by the Registrar on behalf of the registrant.
- That Registry data cannot be manipulated in any fashion other than those permitted to authenticated Registrars using the EPP or the SRS web interface. Authenticated Registrars can only access Registry data of domain names sponsored by them.
- A Domain transfer can only be done by utilizing the AUTH CODE provided to the Domain Registrant.
- Those emergency procedures are in place and tested to respond to extraordinary events affecting the integrity, confidentiality or availability of data within the registry.

The Applicant will further be implementing a thorough and extensive Abuse Prevention and Mitigation plan, designed to minimise abusive registrations and other detrimental activities that may impact security and negatively impact internet users. This plan includes the establishment of a single abuse point of contact, responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the gTLD through all Registrars of record, including those involving a reseller. Details of this point of contact will be clearly published on the Applicant's website.

The following is an overview of certain other security related initiatives undertaken by the Applicant - (see response to Q28 for more detail):

- Policies and Procedures to Minimize Abusive Registrations
- Abuse Point of Contact
- Policies for Handling Complaints Regarding the Abuse Policy
- Acceptable Use Policy ("AUP")
- Measures for removal of Orphan Glue records
- Measures to promote Whois accuracy both directly by the Registry and by Registrars via requirements in the Registry-Registrar Agreement ("RRA")):
 - Registry semi-annual WHOIS verification
 - Authentication of Registrant information as complete and accurate at time of registration.
 - Regular monitoring of registration data for accuracy and completeness
 - Registrar self-certification
 - WHOIS Data reminder processes
 - Establishing policies and procedures to ensure Registrar compliance with policies, which may include audits, financial incentives, penalties, or other means.
 - Registrar verification of WHOIS
- Policies and procedures that define malicious or abusive behavior
- Abuse Response Process
 - Service Levels Requirements for Resolution
 - Service Levels Requirements for Law enforcement Requests
 - Coordination with Industry Groups and Law Enforcement
- Controls to ensure proper access to domain functions:
 - Enabling two-factor authentication from Registrants to process update, transfers, and deletion requests;
 - Enabling multiple, unique points of contact to request and/or approve update, transfer, and deletion requests;
 - Enabling the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted
- Additional Abuse Prevention and Mitigation initiatives:
 - Additional Mechanism for Protection of Capital City Names
 - Additional Mechanisms to Protect and Reserve IGO Names
- Increasing Registrant Security Awareness
- Registrant Disqualification
- Restrictions on Proxy Registration Services
- Registry Lock Option

Resourcing Plans

The development and maintenance of the information security policies and practices are the primary responsibility of the Information Security team. As described in response to Question 31, the information security team is comprised of highly trained security professionals. They establish security policies, actively monitor for intrusions and other nefarious activity, and ensure that all Neustar employees are adhering to Neustar's security policies and best practices. These engineers ensure that the registry data is not compromised in any way.

The necessary resources to support all of the registry's security needs will be pulled from the pool of resources described in detail in the response to Question 31. The following resources are available from the team:

- Information Security - 16 employees

The resources are more than adequate to support the database needs of all the TLDs operated by Neustar, including the Applicant's registry.

-end-

© *Internet Corporation For Assigned Names and Numbers.*

Reference Material 23.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/392/ICANN/9

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION

(BELGIUM)

vs/

TOP LEVEL DESIGN, LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXP/392/ICANN/9

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION (BELGIUM)

vs.

TOP LEVEL DESIGN, LLC (USA)

Expert Determination

Objector

The International Lesbian Gay Bisexual Trans and Intersex Association
Mr. Renato Sabbadini
Contact Information
Redacted

Objector's Representative

International Gay & Lesbian Travel Association
Mr. Clark Massad
Contact Information Redacted

Applicant

Top Level Design, LLC
Mr. Raymond King
Contact Information
Redacted

Applicant's Representative

N/A

Expert Panel

Professor Dr. Bernhard Schlink
Humboldt-Universität zu Berlin, Juristische Fakultät
Contact Information
Redacted

Table of Contents

Procedure	4
Summary of Parties' Positions	4
Findings	6
Decision	10

Procedure

1. On 12 March 2013, The International Lesbian Gay Bisexual Trans and Intersex Association ("ILGA"), represented by the International Gay & Lesbian Travel Association ("IGLTA"), filed a Community Objection against the application by Top Level Design, LLC ("TLD") for the string .GAY, written in capital letters. On 22 May 2013, TLD filed its response. On 7 June 2013, I, Professor Dr. Bernhard Schlink, was appointed by the Chairman of the Standing Committee of the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") as Expert in this matter.
2. On 4 July 2013, the Centre confirmed the full constitution of the Expert Panel, transferred the file to me and invited me to proceed with this matter. On 2 August 2013, I informed the parties that I had received the file and did not intend to invite additional submissions and did not consider holding a hearing. The parties did not submit any further submissions or statements nor did they request to be granted leave to submit additional submissions.
3. I proceeded with this matter in accordance with the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook") and Appendix III to the Rules.
4. The language of all submissions was English. All communications by the parties, the Expert Panel and the Centre were submitted electronically (Article 6(a) of the Procedure).
5. The draft Expert Determination was rendered to the Centre on 13 August 2013, *i.e.* within 45 days after receipt of the file transmitted by the Centre on 4 July 2013.

Summary of Parties' Positions

Objector's Position

6. ILGA presents itself as an established institution that has an ongoing relationship with the clearly delineated gay community, which ILGA writes capitalized as Gay Community. To demonstrate that it is an established institution that has an ongoing relationship with the gay community, ILGA documents that it is the only worldwide federation of more than 1000 lesbian, gay, bisexual, transgender and intersex national and local organizations in over 100 nations and on all five continents; that it has existed since 1978; that every two years it holds a world conference; that its many activities and particularly its fight against state-sponsored homophobia are covered in annual reports; and that it enjoys consultative status with the Economic and Social Council of the United Nations. To demonstrate that the gay community is a clearly delineated community, ILGA describes how a sense of community emerged among gay individuals in the early 20th century; how the Stonewall events in New York in 1969 triggered gay individuals around the world to experience themselves as part of a community; how since then more and more gay organizations sprout and provide the gay community with a network of cooperation, support, and services; and how the annual gay pride march demonstrates the unity, vitality, and strength of the gay community, which

includes all individuals whose gender identities and sexual orientations fall outside of the societal norms for heterosexual behavior.

7. ILGA claims substantial opposition from a significant part of the gay community to which the string .GAY may be targeted. It describes how the gay community came to understand that it needs a voice inside the new generic top-level domain ("gTLD") program, how it took the lead on the community application by dotgay llc ("dotgay") for the string .gay, how this application has the support from ILGA and more than 150 gay community organizations, and that these same organizations also object to the application by TLD for the string .GAY.

8. ILGA argues that TLD's operation of the string .GAY would damage the gay community. According to ILGA, TLD denies the existence of a gay community and does not understand that being gay is the expression of the essential nature of a gay person and not a choice of a gay lifestyle or a homosexual culture. To operate a string .GAY while denying the existence of the gay community would be a harmful act in and of itself. Furthermore, the operation of the string .GAY would usurp and exploit the name of the gay community, which these days includes lesbian, gay, bisexual, trans, queer, intersex people and allies. Taking a group's name and using it to create a profitable business should be regarded as exploitation, unless it is done for and endorsed by the community itself. TLD would use the string .GAY to generate profits that would not benefit the community. Its operation of the string .GAY would make this gTLD available to all registrants for any purpose and any use with no restriction, thereby allowing for abuses of the domain name that might cause the gay community harm, for example from registrants masquerading as members of the community who in fact were anti-gay activists intending to use the registration for anti-gay purposes.

9. ILGA sees a major damage in the loss of opportunities for the gay community with the operation of the string .GAY by TLD. The operation of the string .GAY under a non-gay community leadership and responsibility, and solely for profit, would not give the gay community the safety that it could enjoy from a gTLD under gay community leadership and responsibility. Registrants of the string .GAY could not rely on other registrants being reliably gay, and people who approach registrants of the string .GAY could not rely upon finding trustworthy gay businesses and enterprises, gay community programs and services. In addition, the operation of the string .GAY under a non-gay community leadership and responsibility and solely for profit would not allow the gay community to assemble the funds and resources that it needs to support its programs and services.

10. In its objection, ILGA requests that TLD "be forced to withdraw its application". Pursuant to Article 21 (d) of the Procedure, the Panel in its Expert Determination decides whether an objection is successful or dismissed; it cannot force an applicant to withdraw its application. ILGA's request that TLD be forced to withdraw its application does not fall into the scope of the present proceedings.

Applicant's Position

11. TLD challenges ILGA's standing. It sees many different gay lifestyles and cultures, too many to talk of one gay community. Not wanting to categorically deny the existence of a gay community, TLD finds it at least impractical to define the gay community for the purposes of the new gTLD application and dispute resolution procedure. TLD also regards ILGA as a strawman for dotgay, the competing applicant for .GAY who itself does not have standing as an objector; TLD therefore regards ILGA's objection as abusive.

12. TLD further argues that there is no substantial opposition from a significant part of the gay community against its application, and that TLD does not even target the string .GAY to the gay community but welcomes anybody to register domain names under this gTLD without prior restrictions.

13. TLD finally argues that the material detriment to the legitimate interest of the gay community that ILGA sees likely to arise from TLD's operation of the string .GAY is irrelevant. TLD finds likelihood of material detriment not sufficient, but thinks that certainty is required. TLD does not deny that it will not operate the string .GAY in the particular interest of the gay community. But it sees no need to do so; it will operate the string .GAY in a completely open and unrestricted manner and thereby serve the interests of all who may register equally and, doing that, even reduce prejudice against the gay community.

Findings

14. Based on the submissions of the parties, ILGA has standing. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), *i.e.* with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.

15. ILGA is a globally recognized institution, existing since 1978, organized around the cause of the gay community, fighting for the freedom to live and express one's gender identity and sexual orientation outside of the societal norms for heterosexual behavior without any discrimination. ILGA existed much prior to the new gTLD proceedings and its purpose is far broader than merely taking the role of objector in the present proceedings.

16. ILGA has also proven substantial opposition against TLD's application for the string .GAY (Module 3.5.4 of the Guidebook, second test). It has named more than 150 gay community organizations that support the community application by dotgay for the string .gay and also object to the application by TLD for the string .GAY. The strong association between the the string .GAY and the gay community that ILGA represents (Module 3.5.4 of the Guidebook, third test) is obvious.

17. For an objection to be successful, the objector has to prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted; Module 3.5.4 of the Guidebook, fourth test, mentions as detrimental in particular damage to the reputation of the community, a failure of the applicant to act in accordance with the interests of the community, interference with the core activities of the community, impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, and economic damage to the community.

18. ILGA has not proven that TLD's application creates a likelihood of material detriment to the rights of a significant portion of the gay community, nor has ILGA attempted to prove this. Instead, ILGA has attempted to prove a likelihood of material detriment to the legitimate interests of the gay community. To prove this, it would have been sufficient to prove the likelihood of damage to the reputation of the community, of a failure of the applicant to act in accordance with the interests of the community, of interference with the core activities of the community, of impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, or of economic damage to the community (Module 3.5.4 of the Guidebook, fourth test). ILGA has argued that the gay community needs a gTLD that is designed to serve the gay community and to operate accordingly. It should be a safe gTLD where registrants and users can rely on the fact that other registrants who present themselves as gay and as providers of programs, services, funds, and support for gay people are actually gay and trustworthy. The gTLD should be safeguarded against anti-gay registrants who want to use it as a tool for discrimination against the gay community. Furthermore the gTLD should not be operated only for profit, not even foremost for profit, but with the purpose of giving a fair share of the revenue back to the gay community for its needs and activities. To avoid these likely usurpations and exploitations the gTLD should be administered by the gay community itself.

19. With these submissions ILGA has not proven an interference with the gay community's core activities or an economic damage to the gay community that would result from TLD's operation of the string .GAY. Nor has ILGA proven that TLD would not act in accordance with the interests of the community; all that is clear from ILGA's and also TLD's assertions is that TLD would not feel a particular responsibility towards the community but rather treat its members and interests like any other users and interests.

20. ILGA has shown that over the last century and particularly over the last decades the gay community has turned the name gay from a derogatory term into a respected name. Even though the name gay is not a legally protected name of the gay community, ILGA's concern, that the usurpation and exploitation of this name for naked profit making might make the gay community look like a community of customers and consumers rather than a community of people with a special identity and special concerns, may be understandable. But this feared adverse effect on the gay community's appearance would be far from a damage to the reputation of the gay community. In our capitalist world, each and every name is being used for profit making, and everybody is being targeted as a customer and consumer. The reputation of individuals and communities grows out of their qualities, engagements, and activities that transcend the level of profit making and being a customer and consumer.

21. ILGA has certainly demonstrated that the gay community depends on the DNS for its core activities. Within the DNS it depends on its own gTLD. TLD's operation of the string .GAY would not impair the gay community's core activities or economic situation or even reputation. But since the strings .GAY and .gay, written differently, but treated identically within the DNS, can not exist simultaneously, TLD's operation of the string .GAY would keep the gay community from promoting its core activities, improving its economic situation, and also enhancing its reputation by operating its own string .gay. It would also keep the gay community from operating its own string .gay with special mindfulness for the gay community's needs and interests. The interference that can be found in this is an interference less with what the gay community has than with what the gay community wants – its own gTLD. If TLD would operate the string .GAY, the gay community would be deprived of the chance to operate its own string .gay and to make manifold use of it.

22. The detriment that the gay community is threatened by, is the loss of the chance to operate its own string .gay. Supported by ILGA and more than 150 gay organizations, dotgay filed a community application for the string .gay. If TLD, rather than the gay community represented by ILGA as the objector and dotgay as the applicant, were granted the string .gay, the gay community would lose the chance to operate its own string .gay. This loss might be regarded as a detriment to the legitimate interests of the gay community. But Module 3.5.4 of the Guidebook clarifies that this detriment alone is not sufficient for ILGA's objection to be successful.

23. Module 3.5.4 of the Guidebook states that "an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment". This cannot be taken literally as referring to a situation in which the objector's one and only argument is that it, in its role as an applicant for the string, should get the string rather than the other applicant; no objector would argue in such a reductionist way. It can only refer to a situation in which the objector argues that the community involved would be better served if its application were successful and it got the string rather than the other applicant. The logic behind the quoted Module 3.5.4 of the Guidebook is that the Guidebook stipulates a different procedure for the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant. That procedure is the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

24. The objector that the above quote of Module 3.5.4 of the Guidebook deals with is an applicant himself. But, again, this must not be taken literally as meaning that the objector and the applicant have to be one and the same institution. The institutions must not be identical as long as the interests and the community involved are.

25. This is confirmed by Module 3.2.2.4 of the Guidebook, which gives standing for a Community Objection only to an institution that has "not been established solely in conjunction with the gTLD application process". Because the possibility of applying for a new gTLD is new, and the operation of a new gTLD is a technically and logistically advanced and sophisticated business, for an established institution that represents an established community, the obvious choice is not to take on the task of operating this business itself but rather to delegate it to a new, technically and logistically properly equipped institution. In this situation, Module 3.5.4 of the Guidebook, if taken literally as requiring objector and applicant to be one and the same institution, would become irrelevant: the new institution, as applicant, could not object under Module 3.2.2.4 of the Guidebook and the old institution that could object, not being the applicant, could not argue that the community involved would be better served if its application were successful and it got the string rather than the other applicant. But Module 3.2.2.4 of the Guidebook is meant to become relevant and to steer the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win to the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

26. So for Module 3.5.4 of the Guidebook, the objector, the established institution, and the applicant, the new institution, are to be treated as one entity under the following conditions: The objector and the applicant are intrinsically linked because they serve the same community, share the same interests, cooperate closely, and practice a division of labor under which the

objection comes from the established institution that has established ties to the community and knows and represents its interests plausibly and competently, while the application comes from the new institution charged with applying for a new gTDL and running it on behalf of the community.

27. In this case, if the arguments that the objector brings forward under the Community Objection Procedure of Module 3.5.4 of the Guidebook are the same that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, then they have to be dealt with under the latter procedure, and therefore cannot be regarded as material detriment under the Community Objection Procedure of Module 3.5.4 of the Guidebook.

28. ILGA and dotgay are not one and the same institution, but they are intrinsically linked. As described in ILGA's objection, the gay community, of which ILGA is the established representative, took leadership of the community application by dotgay, and dotgay advised, supported, and organized ILGA's community objection. ILGA, the established institution, and dotgay, the new institution, practice a division of labor under which they serve the gay community and pursue the same interests optimally.

29. ILGA argues that the gay community would be better served if dotgay's application were successful and dotgay got the string rather than TLD. It emphasizes the history, vitality, and strength of the gay community and how it is clearly defined and richly organized; the nexus between the string .gay and the gay community; the registration policies under which dotgay would operate the string .gay in the interest of the gay community; and the gay community's support for the operation of the string .gay by dotgay. These are the arguments that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

30. The interplay between the Community Objection Procedure of Module 3.2.2.4 of the Guidebook and the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook is intricate. The contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant, belong into the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook. If the community involved could exclude the other applicant by using the Community Objection Procedure of Module 3.2.2.4 of the Guidebook, presenting an established institution as an objector, and presenting arguments that were not sufficient to win in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, this procedure would be voided and kept from serving the purpose for which it is created.

31. One might consider dealing with the intricate interplay between the two procedures by requiring that the likelihood of material detriment to the legitimate interests of the community under Module 3.5.4 of the Guidebook were proven in a manner that would also fulfill the criteria of the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook and, if that proof succeeded, allow the objection to prevail. The arguments that ILGA presents offer enough material to suggest that such criteria might well be fulfilled. But the Guidebook stipulates the Community Priority Evaluation as a different procedure before a different panel. This has to be respected.

32. So while the lost chance of operating its own string .gay, caused by TLD being delegated the string .GAY, might be regarded as a detriment to the legitimate interests of the gay community, under Module 3.5.4 of the Guidebook this detriment is not sufficient for a finding of material detriment and for ILGA's objection to be successful.

Decision

For all the above reasons and according to Article 21(d) of the Procedure, I hereby render the following Expert Determination:

1. ILGA's objection fails and is dismissed.
2. The Applicant TLD prevails.
3. TLD's advance payment of costs shall be refunded by the Centre to TLD.

16 November 2013

A handwritten signature in blue ink, appearing to read 'Schlink', written in a cursive style.

Prof. Dr. Bernhard Schlink, Expert

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/393/ICANN/10

**THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION**

(BELGIUM)

vs/

TOP LEVEL DOMAIN HOLDINGS LIMITED

(BRITISH VIRGIN ISLANDS)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXP/393/ICANN/10

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION (BELGIUM)

vs.

TOP LEVEL DOMAIN HOLDINGS LIMITED (BRITISH VIRGIN ISLANDS)

Expert Determination

Objector

The International Lesbian Gay Bisexual Trans and Intersex Association
Mr. Renato Sabbadini
Contact Information
Redacted

Objector's Representative

International Gay & Lesbian Travel Association
Mr. Clark Massad
Contact Information Redacted

Applicant

Top Level Domain Holdings Limited
Mr. Antony Van Couvering
Contact Information Redacted

Applicant's Representative

Minds + Machines
Mr. Reg Levy
Contact Information Redacted

Expert Panel

Professor Dr. Bernhard Schlink
Humboldt-Universität zu Berlin, Juristische Fakultät
Contact Information
Redacted

Table of Contents

Procedure	4
Summary of Parties' Positions	4
Findings	6
Decision	10

Procedure

1. On 12 March 2013, The International Lesbian Gay Bisexual Trans and Intersex Association ("ILGA"), represented by the International Gay & Lesbian Travel Association ("IGLTA"), filed a Community Objection against the application by Top Level Domain Holding Limited ("TLDH"), represented by Minds + Machines for the string .gay. On 22 May 2013, TLDH filed its response. On 7 June 2013, I, Professor Dr. Bernhard Schlink, was appointed by the Chairman of the Standing Committee of the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") as Expert in this matter.
2. On 4 July 2013, the Centre confirmed the full constitution of the Expert Panel, transferred the file to me and invited me to proceed with this matter. On 2 August 2013, I informed the parties that I had received the file and did not intend to invite additional submissions and did not consider holding a hearing. The parties did not submit any further submissions or statements nor did they request to be granted leave to submit additional submissions.
3. I proceeded with this matter in accordance with the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook") and Appendix III to the Rules.
4. The language of all submissions was English. All communications by the parties, the Expert Panel and the Centre were submitted electronically.
5. The Expert Determination was rendered to the Centre on 13 August 2013, *i.e.* within 45 days after receipt of the file transmitted by the Centre on 4 July 2013.

Summary of Parties' Positions

Objector's Position

6. ILGA presents itself as an established institution that has an ongoing relationship with the clearly delineated gay community, which ILGA writes capitalized as Gay Community. To demonstrate that it is an established institution that has an ongoing relationship with the gay community, ILGA documents that it is the only worldwide federation of more than 1000 lesbian, gay, bisexual, transgender and intersex national and local organizations in over 100 nations and on all five continents; that it has existed since 1978; that every two years it holds a world conference; that its many activities and particularly its fight against state-sponsored homophobia are covered in annual reports; and that it enjoys consultative status with the Economic and Social Council of the United Nations. To demonstrate that the gay community is a clearly delineated community, ILGA describes how a sense of community emerged among gay individuals in the early 20th century; how the Stonewall events in New York in 1969 triggered gay individuals around the world to experience themselves as part of a community; how since then more and more gay organizations sprout and provide the gay community with a network of cooperation, support, and services; and how the annual gay pride march demonstrates the unity, vitality, and strength of the gay community, which

includes all individuals whose gender identities and sexual orientations fall outside of the societal norms for heterosexual behavior.

7. ILGA claims substantial opposition from a significant part of the gay community to which the string .gay may be targeted. It describes how the gay community came to understand that it needs a voice inside the new generic top-level domain ("gTLD") program, how it took the lead on the community application by dotgay llc ("dotgay") for the string .gay, how this application has the support from ILGA and more than 150 gay community organizations, and that these same organizations also object to the application by TLDH for the string .gay.

8. ILGA argues that TLDH's operation of the string .gay would damage the gay community. According to ILGA, TLDH does not reach out to the gay community and does nothing to protect the gay community. Furthermore, TLDH's operation of the string .gay would usurp and exploit the name of the gay community, which these days includes lesbian, gay, bisexual, trans, queer, intersex people and allies. Taking a group's name and using it to create a profitable business should be regarded as exploitation, unless it is done for and endorsed by the community itself. TLDH would use the string .gay to generate profits that would not benefit the community. Its operation of the string .gay would make this gTLD available to all registrants for any purpose and any use with no restriction, thereby allowing for abuses of the domain name that might cause the gay community harm, for example from registrants masquerading as members of the community who in fact were anti-gay activists intending to use the registration for anti-gay purposes.

9. ILGA sees a major damage in the loss of opportunities for the gay community with the operation of the string .gay by TLDH. The operation of the string .gay under a non-gay community leadership and responsibility, and solely for profit, would not give the gay community the safety that it could enjoy from a gTLD under gay community leadership and responsibility. Registrants of TLDH's string .gay could not rely on other registrants being reliably gay, and people who approach registrants of TLDH's string .gay could not rely upon finding trustworthy gay businesses and enterprises, gay community programs and services. In addition, the operation of the string .gay under a non-gay community leadership and responsibility and solely for profit would not allow the gay community to assemble the funds and resources that it needs to support its programs and services.

10. In its objection, ILGA requests that TLDH "be forced to withdraw its application". Pursuant to Article 21 (d) of the Procedure, the Panel in its Expert Determination decides whether an objection is successful or dismissed; it cannot force an applicant to withdraw its application. Thus, ILGA's request that TLDH be forced to withdraw its application does not fall into the scope of the present proceedings.

Applicant's Position

11. TLDH challenges ILGA's standing. According to TLDH, the "so-called gay community" is not a clearly delineated community, because it is not a defined, hierarchically structured bloc with a leader or a group speaking for all its members. According to TLDH, ILGA is also not an established institution, because it has lost its consultative status with the Economic and Social Council of the United Nations in 1994.

12. TLDH further denies the material detriment to the legitimate interest of the gay community that ILGA sees likely to arise from TLDH's operation of the string .GAY – while applying explicitly for the string .gay, TLDH in its application also writes the gTLD for

which it applies in capital letters as .GAY. TLDH points out that it will provide a procedure that allows registrants to report content that they find inappropriate, harmful, or damaging to any person and especially to lesbian, gay, bisexual, transgender, and intersex people. By not placing restrictions on registration, TLDH claims to not harm the so called gay community but rather to protect lesbian, gay, bisexual, transgender, and intersex people against discriminatory registration policies. Because TLDH denies the existence of a gay community, it can see no need for the gay community to assemble funds and resources to support its programs and services and no harm in this need being unfulfilled.

Findings

13. Based on the submissions of the parties, ILGA has standing. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), *i.e.* with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence. TLDH's notion of a community being a bloc with a hierarchical top down structure and one leader or speaker may suit a paramilitary organisation or a certain type of political party, but is far from characteristic for a community.

14. ILGA is a globally recognized institution, existing since 1978, organized around the cause of the gay community, fighting for the freedom to live and express one's gender identity and sexual orientation outside of the societal norms for heterosexual behavior without any discrimination. That ILGA has once lost its consultative status with the Economic and Social Council of the United Nations is irrelevant; it has regained this status. ILGA existed much prior to the new gTLD proceedings and its purpose is far broader than merely taking the role of objector in the present proceedings.

15. ILGA has also proven substantial opposition against TLDH's application for the string .gay (Module 3.5.4 of the Guidebook, second test). It has named more than 150 gay community organizations that support the community application by dotgay for the string .gay and also object to the application by TLDH for the string .gay. The strong association between the the string .gay and the gay community that ILGA represents (Module 3.5.4 of the Guidebook, third test) is obvious.

16. For an objection to be successful, the objector has to prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted; Module 3.5.4 of the Guidebook, fourth test, mentions as detrimental in particular damage to the reputation of the community, a failure of the applicant to act in accordance with the interests of the community, interference with the core activities of the community, impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, and economic damage to the community.

17. ILGA has not proven that TLDH's application creates a likelihood of material detriment to the rights of a significant portion of the gay community, nor has it attempted to prove this. Instead, ILGA has attempted to prove a likelihood of material detriment to the legitimate interests of the gay community. To prove this, it would have been sufficient to prove the likelihood of damage to the reputation of the community, of a failure of the applicant to act in accordance with the interests of the community, of interference with the core activities of the community, of impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, or of economic damage to the community (Module 3.5.4 of the Guidebook, fourth test). ILGA has argued that the gay community needs a gTLD, that is designed to serve the gay community and to operate accordingly. It should be a safe domain where registrants and users can rely on the fact that other registrants who present themselves as gay and as providers of programs, services, funds, and support for gay people are actually gay and trustworthy. The gTLD should be safeguarded against anti-gay registrants who want to use it as a tool for discrimination against the gay community. Furthermore the gTLD should not be operated only for profit, not even foremost for profit, but with the purpose of giving a fair share of the revenue back to the gay community for its needs and activities. To avoid these likely usurpations and exploitations the gTLD should be administered by the gay community itself.

18. With these assertions ILGA has not proven an interference with the gay community's core activities or an economic damage to the gay community that would result from TLDH's operation of the string .gay. Nor has ILGA proven that TLDH would not act in accordance with the interests of the community; all that is clear from ILGA's and also TLDH's assertions is that TLDH would not feel a particular responsibility towards the community but rather treat it and its members like any other user.

19. ILGA has shown that over the last century and particularly over the last decades the gay community has turned the name gay from a derogatory term into a respected name. Even though the name gay is not a legally protected name of the gay community, ILGA's concern, that the usurpation and exploitation of this name for naked profit making might make the gay community look like a community of customers and consumers rather than a community of people with a special identity and special concerns, may be understandable. But this feared adverse effect on the gay community's appearance would be far from a damage to the reputation of the gay community. In our capitalist world, each and every name is being used for profit making, and everybody is being targeted as a customer and consumer. The reputation of individuals and communities grows out of their qualities, engagements, and activities that transcend the level of profit making and being a customer and consumer.

20. ILGA has certainly demonstrated that the gay community depends on the DNS for its core activities. Within the DNS it depends on its own gTLD. TLDH's operation of the string .gay would not impair the gay community's core activities or economic situation or even reputation. But since the strings .gay and .gay, treated identically within the DNS, even if they are written differently, can not exist simultaneously, TLDH's operation of the string .gay would keep the gay community from promoting its core activities, improving its economic situation, and also enhancing its reputation by operating its own string .gay. It would also keep the gay community from operating its own string .gay with special mindfulness for the gay community's needs and interests. The interference that can be found in this is an interference less with what the gay community has than with what the gay community wants – its own gTLD. If TLDH would operate the string .gay, the gay community would be deprived of the chance to operate its own string .gay and to make manifold use of it.

21. The detriment that the gay community is threatened by is the loss of the chance to operate its own string .gay. Supported by ILGA and more than 150 gay organizations, dotgay filed a community application for the string .gay. If TLDH, rather than the gay community represented by ILGA as the objector and dotgay as the applicant, were granted the string .gay, the gay community would lose the chance to operate its own string .gay. This loss of the chance to operate its own string .gay might be regarded as a detriment to the legitimate interests of the gay community. But Module 3.5.4 of the Guidebook clarifies that this detriment alone is not sufficient for ILGA's objection to be successful.

22. Module 3.5.4 of the Guidebook states that "an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment". This cannot be taken literally as referring to a situation in which the objector's one and only argument is that it, in its role as applicant, should get the string rather than the other applicant; no objector would argue in such a reductionist way. It can only refer to a situation in which the objector argues that the community involved would be better served if its application were successful and it got the string rather than the other applicant. The logic behind the quoted Module 3.5.4 of the Guidebook is that the Guidebook stipulates a different procedure for the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant. That procedure is the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

23. The objector that the above quote of Module 3.5.4 of the Guidebook deals with is an applicant himself. But, again, this must not be taken literally as meaning that the objector and the applicant have to be one and the same institution. The institutions must not be identical as long as the interests and the community involved are.

24. This is confirmed by Module 3.2.2.4 of the Guidebook, which gives standing for a Community Objection only to an institution that has "not been established solely in conjunction with the gTLD application process". Because the possibility of applying for a new gTLD is new, and the operation of a new gTLD is a technically and logistically advanced and sophisticated business, for an established institution that represents an established community, the obvious choice is not to take on the task of operating this business itself but rather to delegate it to a new, technically and logistically properly equipped institution. In this situation, Module 3.5.4 of the Guidebook, if taken literally as requiring objector and applicant to be one and the same institution, would become irrelevant: the new institution, as applicant, could not object under Module 3.2.2.4 of the Guidebook and the old institution that could object, not being the applicant, could not argue that the community involved would be better served if its application were successful and it got the string rather than the other applicant. But Module 3.2.2.4 of the Guidebook is meant to become relevant and to steer the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win to the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

25. So for Module 3.5.4 of the Guidebook, the objector, the established institution, and the applicant, the new institution, are to be treated as one entity under the following conditions: The objector and the applicant are intrinsically linked because they serve the same community, share the same interests, cooperate closely, and practice a division of labor under which the objection comes from the established institution that has established ties to the community

and knows and represents its interests plausibly and competently, while the application comes from the new institution charged with applying for a new gTLD and running it on behalf of the community.

26. In this case, if the arguments that the objector brings forward under the Community Objection Procedure of Module 3.5.4 of the Guidebook are the same that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, then they have to be dealt with under the latter procedure, and therefore cannot be regarded as material detriment under the Community Objection Procedure of Module 3.5.4 of the Guidebook.

27. ILGA and dotgay are not one and the same institution, but they are intrinsically linked. As described in ILGA's objection, the gay community, of which ILGA is the established representative, took leadership of the community application by dotgay, and dotgay advised, supported, and organized ILGA's community objection. ILGA, the established institution, and dotgay, the new institution, practice a division of labor under which they serve the gay community and pursue the same interests optimally.

28. ILGA argues that the gay community would be better served if dotgay's application were successful and dotgay got the string rather than TLDH. It emphasizes the history, vitality, and strength of the gay community and how it is clearly defined and richly organized; the nexus between the string .gay and the gay community; the registration policies under which dotgay would operate the string .gay in the interest of the gay community; and the gay community's support for the operation of the string .gay by dotgay. These are the arguments that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

29. The interplay between the Community Objection Procedure of Module 3.2.2.4 of the Guidebook and the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook is intricate. The contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant, belong into the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook. If the community involved could exclude the other applicant by using the Community Objection Procedure of Module 3.2.2.4 of the Guidebook, presenting an established institution as an objector, and presenting arguments that were not sufficient to win in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, this procedure would be voided and kept from serving the purpose for which it is created.

30. One might consider dealing with the intricate interplay between the two procedures by requiring that the likelihood of material detriment to the legitimate interests of the community under Module 3.5.4 of the Guidebook were proven in a manner that would also fulfill the criteria of the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook and, if that proof succeeded, allow the objection to prevail. The arguments that ILGA presents offer enough material to suggest that such criteria might well be fulfilled. But the Guidebook stipulates the Community Priority Evaluation as a different procedure before a different panel. This has to be respected.

31. So while the lost chance of operating its own string .gay, caused by TLDH being delegated the string .gay, might be regarded as a detriment to the legitimate interests of the gay community, under Module 3.5.4 of the Guidebook this detriment is not sufficient for a finding of material detriment and for ILGA's objection to be successful.

Decision

For all the above reasons and according to Article 21(d) of the Procedure, I hereby render the following Expert Determination:

1. ILGA's objection fails and is dismissed.
2. The Applicant TLDH prevails.
3. TLDH's advance payment of costs shall be refunded by the Centre to TLDH.

16 November 2013



Prof. Dr. Bernhard Schlink, Expert

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/394/ICANN/11

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION

(BELGIUM)

vs/

UNITED TLD HOLDCO LTD.

(CAYMAN ISLANDS)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXP/394/ICANN/11

THE INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX
ASSOCIATION (BELGIUM)

vs.

UNITED TLD HOLDCO LTD. (CAYMAN ISLANDS)

Expert Determination

Objector

The International Lesbian Gay Bisexual Trans and Intersex Association
Mr. Renato Sabbadini
Contact Information
Redacted

Objector's Representative

International Gay & Lesbian Travel Association
Mr. Clark Massad
Contact Information Redacted

Applicant

United TLD Holdco Ltd.
Mr. Jeffrey Eckhaus
Ugland House, South Church Street
Contact Information
Redacted

Applicant's Representative

Greenberg Traurig, LLP
Mr. Ian C. Ballon, Ms. Wendy M. Mantell, Mr. Justin A. Barton
Contact Information Redacted

Expert Panel

Professor Dr. Bernhard Schlink
Humboldt-Universität zu Berlin, Juristische Fakultät
Contact Information
Redacted

Table of Contents

Procedure	4
Summary of Parties' Positions	4
Findings	6
Decision	10

Procedure

1. On 12 March 2013, The International Lesbian Gay Bisexual Trans and Intersex Association ("ILGA"), represented by the International Gay & Lesbian Travel Association ("IGLTA"), filed a Community Objection against the application by United TLD Holdco Ltd. ("United TLD") for the string .gay. On 22 May 2013, United TLD filed its response. On 7 June 2013, I, Professor Dr. Bernhard Schlink, was appointed by the Chairman of the Standing Committee of the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC") as Expert in this matter.
2. On 15 July 2013, the Centre confirmed the full constitution of the Expert Panel, transferred the file to me and invited me to proceed with this matter. On 2 August 2013, I informed the parties that I had received the file and did not intend to invite additional submissions and did not consider holding a hearing. The parties did not submit any further submissions or statements nor did they request to be granted leave to submit additional submissions.
3. I proceeded with this matter in accordance with the Rules for Expertise of the ICC ("Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook") and Appendix III to the Rules.
4. The language of all submissions was English. All communications by the parties, the Expert Panel and the Centre were submitted electronically (Article 6(a) of the Procedure).
5. The draft Expert Determination was rendered to the Centre on 13 August 2013, *i.e.* within 45 days after receipt of the file transmitted by the Centre on 15 July 2013.

Summary of Parties' Positions

Objector's Position

6. ILGA presents itself as an established institution that has an ongoing relationship with the clearly delineated gay community, which ILGA writes capitalized as Gay Community. To demonstrate that it is an established institution that has an ongoing relationship with the gay community, ILGA documents that it is the only worldwide federation of more than 1000 lesbian, gay, bisexual, transgender and intersex national and local organizations in over 100 nations and on all five continents; that it has existed since 1978; that every two years it holds a world conference; that its many activities and particularly its fight against state-sponsored homophobia are covered in annual reports; and that it enjoys consultative status with the Economic and Social Council of the United Nations. To demonstrate that the gay community is a clearly delineated community, ILGA describes how a sense of community emerged among gay individuals in the early 20th century; how the Stonewall events in New York in 1969 triggered gay individuals around the world to experience themselves as part of a community; how since then more and more gay organizations sprout and provide the gay community with a network of cooperation, support, and services; and how the annual gay pride march demonstrates the unity, vitality, and strength of the gay community, which

includes all individuals whose gender identities and sexual orientations fall outside of the societal norms for heterosexual behavior.

7. ILGA claims substantial opposition from a significant part of the gay community to which the string .gay may be targeted. It describes how the gay community came to understand that it needs a voice inside the new generic top-level domain ("gTLD") program, how it took the lead on the community application by dotgay llc ("dotgay") for the string .gay, how this application has the support from ILGA and more than 150 gay community organizations, and that these same organizations also object to the application by United TLD for the string .gay.

8. ILGA argues that United TLD's operation of the string .gay would damage the gay community. According to ILGA, United TLD does not recognize the gay community, denies its identity and renders it to a commodity among other commodities to be bought and sold. To operate a string .gay while denying the identity of the gay community would be a harmful act in and of itself. Furthermore, the operation of the string .gay would usurp and exploit the name of the gay community, which these days includes lesbian, gay, bisexual, trans, queer, intersex people and allies. Taking a group's name and using it to create a profitable business should be regarded as exploitation, unless it is done for and endorsed by the community itself. United TLD would use the string .gay to generate profits that would not benefit the community. Its operation of the string .gay would make this gTLD available to all registrants for any purpose and any use with no restriction, thereby allowing for abuses of the domain name that might cause the gay community harm, for example from registrants masquerading as members of the community who in fact were anti-gay activists intending to use the registration for anti-gay purposes.

9. ILGA sees a major damage in the loss of opportunities for the gay community with the operation of the string .gay by United TLD. The operation of the string .gay under a non-gay community leadership and responsibility, and solely for profit, would not give the gay community the safety that it could enjoy from a gTLD under gay community leadership and responsibility. Registrants of the string .gay could not rely on other registrants being reliably gay, and people who approach registrants of the string .gay could not rely upon finding trustworthy gay businesses and enterprises, gay community programs and services. In addition, the operation of the string .gay under a non-gay community leadership and responsibility and solely for profit would not allow the gay community to assemble the funds and resources that it needs to support its programs and services.

10. In its objection, ILGA requests that United TLD "be forced to withdraw its application". Pursuant to Article 21 (d) of the Procedure, the Panel in its Expert Determination decides whether an objection is successful or dismissed; it cannot force an applicant to withdraw its application. Thus, ILGA's request that United TLD be forced to withdraw its application does not fall into the scope of the present proceedings.

Applicant's Position

11. United TLD challenges ILGA's standing. It claims that there is no such thing as a gay community and that what is called the gay community cannot be regarded as a clearly delineated community, because it is too diverse, too much in flux, and lacks a single ideology. In any case, according to United TLD, the so-called gay community is too diverse to be represented by ILGA or any other organization or set of organizations.

12. United TLD further argues that there is no substantial opposition from a significant part of the so-called gay community against its application. It points to the fact that there is no evidence that the members of the so-called gay community who are not organized in or around ILGA object United TLD's application.

13. United TLD finally denies the material detriment to the legitimate interest of the gay community that ILGA sees likely to arise from United TLD's operation of the string .gay. By operating an open gTLD without restrictions, boundaries, and limitations, United TLD would not only embrace the people who identify with the term gay, but would allow all people who wish to interact under the gTLD name gay to do so. United TLD claims that its operation of .gay would not allow for more discrimination or more expression of abusive, hateful, and harmful views than already exist. As to the funds and resources that ILGA wants to raise through dotgay's operation of the string .gay to support programs and services of the gay community, United TLD argues that ILGA is not entitled to them. Finally United TLD criticizes ILGA's objection as anti-competitive, because if the string .gay were operated by dotgay rather than United TLD, fewer people could register under it.

Findings

14. Based on the submissions of the parties, ILGA has standing. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), *i.e.* with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence. That this community is diverse, in flux, and in lack of a single ideology does not deprive it of being a community; communities are living entities.

15. ILGA is a globally recognized institution, existing since 1978, organized around the cause of the gay community, fighting for the freedom to live and express one's gender identity and sexual orientation outside of the societal norms for heterosexual behavior without any discrimination. ILGA does not claim to represent the gay community in each and every context and respect and is not required to do so; all that Module 3.2.2.4 of the Guidebook asks for is that it has an ongoing relationship with the gay community. This, ILGA has certainly demonstrated. ILGA existed much prior to the new gTLD proceedings and its purpose is far broader than merely taking the role of objector in the present proceedings.

16. ILGA has also proven substantial opposition against United TLD's application for the string .gay (Module 3.5.4 of the Guidebook, second test). It has named more than 150 gay community organizations that support the community application by dotgay for the string .gay and also object to the application by United TLD for the string .gay. That there are gay people and gay organizations that do not object is irrelevant; Module 3.5.4 of the Guidebook does not ask for comprehensive opposition of the community but only for substantial opposition within the community. The strong association between the the string .gay and the gay community that ILGA represents (Module 3.5.4 of the Guidebok, third test) is obvious.

17. For an objection to be successful, the objector has to prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted; Module 3.5.4 of the Guidebook, fourth test, mentions as detrimental in particular damage to the reputation of the community, a failure of the applicant to act in accordance with the interests of the community, interference with the core activities of the community, impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, and economic damage to the community.

18. ILGA has not proven that United TLD's application creates a likelihood of material detriment to a significant portion of the gay community, nor has ILGA attempted to prove this. Instead, ILGA has attempted to prove a likelihood of material detriment to the legitimate interests of the gay community. To prove this, it would have been sufficient to prove the likelihood of damage to the reputation of the community, of a failure of the applicant to act in accordance with the interests of the community, of interference with the core activities of the community, of impairment of the community's dependency on the Domain Name System ("DNS") for its core activities, or of economic damage to the community (Module 3.5.4 of the Guidebook, fourth test). ILGA has argued that the gay community needs a gTLD, that is designed to serve the gay community and to operate accordingly. It should be a safe domain where registrants and users can rely on the fact that other registrants who present themselves as gay and as providers of programs, services, funds, and support for gay people are actually gay and trustworthy. The gTLD should be safeguarded against anti-gay registrants who want to use it as a tool for discrimination against the gay community. Furthermore the gTLD should not be operated only for profit, not even foremost for profit, but with the purpose of giving a fair share of the revenue back to the gay community for its needs and activities. To avoid these likely usurpations and exploitations the gTLD should be administered by gay community itself.

19. With these submissions ILGA has not proven an interference with the gay community's core activities or an economic damage to the gay community that would result from United TLD's operation of the string .gay. Nor has ILGA proven that United TLD would not act in accordance with the interests of the community; all that is clear from ILGA's and also United TLD's assertions is that United TLD would not feel a particular responsibility towards the community but rather treat it and its members like any other user.

20. What ILGA has shown is that over the last century and particularly over the last decades the gay community has turned the name gay from a derogatory term into a respected name. Even though the name gay is not a legally protected name of the gay community, ILGA's concern, that the usurpation and exploitation of this name for naked profit making might make the gay community look like a community of customers and consumers rather than a community of people with a special identity and special concerns, may be understandable. But this feared adverse affect on the gay community's appearance would be far from a damage to thereputation of the gay community. In our capitalist world, each and every name is being used for profit making, and everybody is being targeted as a customer and consumer. The reputation of individuals and communities grows out of their qualities, engagements, and activities that transcend the level of profit making and being a customer and consumer.

21. ILGA has certainly demonstrated that the gay community depends on the DNS for its core activities. Within the DNS it depends on its own gTLD. United TLD's operation of the string .gay would not impair the gay community's core activities or economic situation or

even reputation. But since the string .gay, operated by United TLD, and the string .gay, operated by dotgay, can not exist simultaneously, United TLD's operation of the string .gay would keep the gay community from promoting its core activities, improving its economic situation, and also enhancing its reputation by operating its own string .gay. It would also keep the gay community from operating its own string .gay with special mindfulness for the gay community's needs and interests. The interference that can be found in this is an interference less with what the gay community has than with what the gay community wants – its own gTLD. If United TLD would operate the string .gay, the gay community would be deprived of the chance to operate its own string .gay and to make manifold use of it.

22. The detriment that the gay community is threatened by is the loss of the chance to operate its own string .gay. Supported by ILGA and more than 150 gay organizations, dotgay filed a community application for the string .gay. If United TLD, rather than the gay community represented by ILGA as the objector and dotgay as the applicant, were granted the string .gay, the gay community would lose the chance to operate its own string .gay. This loss of the chance to operate its own string .gay might be regarded as a detriment to the legitimate interests of the gay community. But Module 3.5.4 of the Guidebook clarifies that this detriment alone is not sufficient for ILGA's objection to be successful.

23. Module 3.5.4 of the Guidebook states that "an allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment". This cannot be taken literally as referring to a situation in which the objector's one and only argument is that it, in its role as applicant, should get the string rather than the other applicant; no objector would argue in such a reductionist way. It can only refer to a situation in which the objector argues that the community involved would be better served if its application were successful and it got the string rather than the other applicant. The logic behind the quoted Module 3.5.4 of the Guidebook is that the Guidebook stipulates a different procedure for the contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant. That procedure is the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

24. The objector that the above quote of Module 3.5.4 of the Guidebook deals with is an applicant himself. But, again, this must not be taken literally as meaning that the objector and the applicant have to be one and the same institution. The institutions must not be identical as long as the interests and the community involved are.

25. This is confirmed by Module 3.2.2.4 of the Guidebook, which gives standing for a Community Objection only to an institution that has "not been established solely in conjunction with the gTLD application process". Because the possibility of applying for a new gTLD is new, and the operation of a new gTLD is a technically and logistically advanced and sophisticated business, for an established institution that represents an established community, the obvious choice is not to take on the task of operating this business itself but rather to delegate it to a new, technically and logistically properly equipped institution. In this situation, Module 3.5.4 of the Guidebook, if taken literally as requiring objector and applicant to be one and the same institution, would become irrelevant: the new institution, as applicant, could not object under Module 3.2.2.4 of the Guidebook and the old institution that could object, not being the applicant, could not argue that the community involved would be better served if its application were successful and it got the string rather than the other applicant. But Module 3.2.2.4 of the Guidebook is meant to become relevant and to steer the contention

between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win to the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

26. So for Module 3.5.4 of the Guidebook, the objector, the established institution, and the applicant, the new institution, are to be treated as one entity under the following conditions: The objector and the applicant are intrinsically linked because they serve the same community, share the same interests, cooperate closely, and practice a division of labor under which the objection comes from the established institution that has established ties to the community and knows and represents its interests plausibly and competently, while the application comes from the new institution charged with applying for a new gTDL and running it on behalf of the community.

27. In this case, if the arguments that the objector brings forward under the Community Objection Procedure of Module 3.5.4 of the Guidebook are the same that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, then they have to be dealt with under the latter procedure, and therefore cannot be regarded as material detriment under the Community Objection Procedure of Module 3.5.4 of the Guidebook.

28. ILGA and dotgay are not one and the same institution, but they are intrinsically linked. As described in ILGA's objection, the gay community, of which ILGA is the established representative, took leadership of the community application by dotgay, and dotgay advised, supported, and organized ILGA's community objection. ILGA, the established institution, and dotgay, the new institution, practice a division of labor under which they serve the gay community and pursue the same interests optimally.

29. ILGA argues that the gay community would be better served if dotgay's application were successful and dotgay got the string rather than United TLD. It emphasizes the history, vitality, and strength of the gay community and how it is clearly defined and richly organized; the nexus between the string .gay and the gay community; the registration policies under which dotgay would operate the string .gay in the interest of the gay community; and the gay community's support for the operation of the string .gay by dotgay. These are the arguments that matter in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook.

30. The interplay between the Community Objection Procedure of Module 3.2.2.4 of the Guidebook and the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook is intricate. The contention between two applicants, one a community-based applicant, the other a standard applicant, and the decision on whether the community-based applicant will serve the community involved well enough to win against the standard applicant, belong into the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook. If the community involved could exclude the other applicant by using the Community Objection Procedure of Module 3.2.2.4 of the Guidebook, presenting an established institution as an objector, and presenting arguments that were not sufficient to win in the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook, this procedure would be voided and kept from serving the purpose for which it is created.

31. One might consider dealing with the intricate interplay between the two procedures by requiring that the likelihood of material detriment to the legitimate interests of the community under Module 3.5.4 of the Guidebook were proven in a manner that would also fulfill the

criteria of the Community Priority Evaluation Procedure of Module 4.2.2 of the Guidebook and, if that proof succeeded, allow the objection to prevail. The arguments that ILGA presents offer enough material to suggest that such criteria might well be fulfilled. But the Guidebook stipulates the Community Priority Evaluation as a different procedure before a different panel. This has to be respected.

32. So while the lost chance of operating its own string .gay, caused by United TLD being delegated the string .gay, might be regarded as a detriment to the legitimate interests of the gay community, under Module 3.5.4 of the Guidebook this detriment is not sufficient for a finding of material detriment and for ILGA's objection to be successful.

Decision

For all the above reasons and according to Article 21 (d) of the Procedure, I hereby render the following Expert Determination:

1. ILGA's objection fails and is dismissed.
2. The Applicant United TLD prevails.
3. United TLD's advance payment of costs shall be refunded by the Centre to United TLD.

16 November 2013



Prof. Dr. Bernhard Schlink, Expert

Reference Material 24.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/447/ICANN/64

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE

(BELGIUM)

vs/

BOOKING.COM B.V

(THE NETHERLANDS)

(Consolidated with case No. EXP/385/ICANN/2

HOTEL CONSUMER PROTECTION COALITION (USA) vs/
BOOKING.COM B.V (THE NETHERLANDS))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE (BELGIUM)

- V -

BOOKING.COM B.V. (THE NETHERLANDS)

**INTERNATIONAL CENTRE FOR EXPERTISE
OF THE INTERNATIONAL CHAMBER OF COMMERCE**

EXP/447/ICANN/64

CONSOLIDATED WITH CASE EXP/385/ICANN/2
HOTEL CONSUMER PROTECTION COALITION (USA) v. BOOKING.COM B.V. (THE NETHERLANDS)

EXPERT DETERMINATION

TABLE OF CONTENTS

1. Introduction	3
2. Proceedings	5
3. Potential Relief	7
4. Place of the Proceedings	7
5. Language of the Proceedings	7
6. Communications	8
7. Standards and Burden of Proof	8
8. Reasoning and Decision	9
9. Costs	25
10. Determination	26

This expert determination is made in expertise proceedings pursuant to Module 3 of the gTLD Applicant Guidebook (“Guidebook”) and its Attachment, the New gTLD Dispute Resolution Procedure (the “Procedure”). These proceedings take place under the International Chamber of Commerce (“ICC”) Rules for Expertise (in force as from 1 January 2003) (the “Rules”), as supplemented by the ICC Practice Note on the Administration of Cases under the Procedure (the “ICC Practice Note”).

1. INTRODUCTION

- 1.1 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has implemented a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Further to this program, parties may apply for new gTLDs in accordance with the terms and conditions set by ICANN. Procedure, article 1(a).
- 1.2 The program includes a dispute resolution procedure for resolving disputes between a party who applies for a new gTLD and a party who objects to the application – namely, the Procedure. *Id.*, article 1(b). The Procedure provides that dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules identified in article 4(b) of the Procedure. *Id.*, article 1(c).
- 1.3 By applying for a new gTLD, an applicant accepts the applicability of the Procedure and the applicable DRSP rules. An objector likewise accepts the applicability of the Procedure and the applicable DRSP rules by filing an objection to an application for a new gTLD. The parties cannot derogate from the Procedure without the express approval of ICANN and cannot derogate from the applicable DRSP rules without the express approval of the relevant DRSP. *Id.*, article 1(d).
- 1.4 There are four types of objections a party may raise against an application for a new gTLD. *Id.*, article 2(e). One of these is known as a “Community Objection”. A Community Objection is an objection that there is substantial opposition to the application from a significant portion of the community to which the string (i.e., the new gTLD) may be explicitly or implicitly targeted. *Id.*, article 2(e)(iv). HOTREC, Hotels, Restaurants & Cafés

in Europe (the “Objector”) has raised this type of objection against the application of Booking.com B.V. (the “Applicant”) for the new gTLD “.HOTELS” (the “Application”).

1.5 Pursuant to articles 3(d) and 4(b)(iv) of the Procedure, Community Objections shall be administered by the ICC International Centre for Expertise (the “Centre”) in accordance with the Rules, as supplemented by the ICC as needed. The ICC Practice Note is such a supplement to the Rules. In the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail. *Id.*, article 4(c). In all cases, the expert shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its case. *Id.*, article 4(e).

1.6 The Objector’s contact details are as follows:

HOTREC, HOTELS, RESTAURANTS & CAFÉS IN EUROPE
Attn: Mr. Kent Nyström, President
Contact Information Redacted

1.7 The Objector is represented by:

Ms. Nathalie Dreyfus
DREYFUS & ASSOCIÉS
Contact Information Redacted

1.8 The Applicant’s contact details are as follows:

BOOKING.COM B.V.
Attn: Mr. Jaap van den Broek, Corporate Counsel
Contact
Information
Redacted

1.9 The Applicant is represented by:

Mr. Alfred Meijboom
Mr. Joran Spauwen
KENNEDY VAN DER LAAN N.V.
Contact Information
Redacted

1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
Contact Information Redacted

1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
Contact Information Redacted

2. PROCEEDINGS

2.1 Below is a summary of the main procedural steps in these proceedings.

2.2 On 13 March 2013, the Objector filed its Community Objection with the Centre (the “Objection”) pursuant to article 7 of the Procedure.

2.3 By letter dated 4 April 2013, the Centre notified the parties that it had conducted an administrative review of the Objection pursuant to article 9(a) of the Procedure and had found the Objection in compliance with articles 5 through 8 of the Procedure. The Centre accordingly registered the Objection for processing in accordance with article 9(b) of the Procedure.

2.4 By letter dated 25 April 2013, and with the agreement of all parties, the Centre informed the parties that it had decided to consolidate this case with case EXP/385/ICANN/2 pursuant to article 12 of the Procedure.

2.5 On 24 May 2013, the Applicant submitted its response to the Objection (the “Response”) pursuant to article 11 of the Procedure. By letter dated 30 May 2013, the Centre confirmed to the parties that the Response was in accordance with the Procedure and the Rules.

- 2.6 On 24 June 2013, the Chairman of the Standing Committee appointed Ms. Kirby as the Expert in the consolidated proceedings pursuant to article 13 of the Procedure, article 9(5) of the Rules and article 3(3) of Appendix I to the Rules.
- 2.7 On 1 July 2013, the Objector sought a stay of these proceedings.
- 2.8 On 9 July 2013, the Applicant opposed any stay of these proceedings.
- 2.9 On 22 July 2013, the Objector sought leave to file an additional submission in reaction to the Applicant's Response.
- 2.10 On 25 July 2013, the Applicant opposed the Objector's request to file an additional submission.
- 2.11 On 6 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Expert. The Centre clarified that, despite the consolidation of this case with case EXP/385/ICANN/2, the Expert was to render a separate determination for each case.
- 2.12 By letter dated 13 August 2013, the Expert denied the Objector's request for a stay of these proceedings. The reasons for the Expert's decision are set forth in her letter and are incorporated here by reference.
- 2.13 Also on 13 August 2013, by way of the same letter, the Expert decided to allow the Objector to file an additional submission pursuant to article 17(a) of the Procedure.
- 2.14 The Objector filed its additional submission on 20 August 2013 ("Additional Submission").
- 2.15 On 27 August 2013, the Applicant filed its response to the Additional Submission ("Additional Response").
- 2.16 By two emails dated 3 September 2013, the Applicant confirmed that it had no objection to the way these proceedings were conducted and agreed that it had been treated with equality and has been given a reasonable opportunity to present its position. By email dated 4 September 2013, the Objector did the same.

- 2.17 Article 21(a) of the Procedure, provides that the Centre and the expert shall make reasonable efforts to ensure that the expert renders her decision within 45 days of the “constitution of the Panel”.¹ The Centre considers that the Panel is constituted when the expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the expert. In this case, the Panel was constituted on 6 August 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that her determination was rendered no later than 20 September 2013. Procedure, articles 6(e), 6(f).
- 2.18 Pursuant to article 21(b) of the Procedure, the Expert submitted her determination in draft form to the Centre for scrutiny as to form before it was signed.
- 2.19 Further to paragraph 6 of the ICC Practice Note, the parties waived the requirements for the expert mission as set out in article 12(1) of the Rules.

3. POTENTIAL RELIEF

Article 21(d) of the Procedure provides that the remedies available to an applicant or an objector in these proceedings are limited to the success or dismissal of the objection and the refund by the Centre to the prevailing party of its advance payment of costs pursuant to article 14(e) of the Procedure and any relevant provisions of the Rules.

4. PLACE OF THE PROCEEDINGS

Pursuant to article 4(d) of the Procedure, the place of the proceedings is the location of the DRSP – i.e., the Centre – which is located in Paris, France.

5. LANGUAGE OF THE PROCEEDINGS

- 5.1 English is the language of the proceedings pursuant to article 5(a) of the Procedure. All submissions in these proceedings have been made in English.

¹ All quotations in this determination are set forth “as is”. Any grammatical or typographical errors are in the original documents.

- 5.2 Having said this, the Objector has submitted several exhibits in French, German and Portuguese without providing an English translation. *See, e.g.*, Objection, Appendices 14(A), 14(B), 16(A)-16(F), 18(A)-18(D), 22, 28(A), 40(A), 40(B). The Applicant has raised no objection in this regard. Article 15 of the Rules provides, among other things, that where a party proceeds with the expertise proceedings without objecting to a failure to comply with any provision of the Rules, any direction given by the Centre or the expert, or any requirement related to the conduct of the expertise proceedings, that party shall be deemed to have waived its right to object. In all events, however, none of these documents was material to the Expert's determination.
- 5.3 The Objector also submitted in French a copy of its statutes as they are published in the Official Belgium Bulletin. *See id.*, Appendix 8. While the Objector did not produce a translation of this document per se, it did also submit a copy of its statutes in English. *See id.*, Appendix 7. Again, the Applicant has raised no objection in this regard. *See* Rules, article 15.

6. COMMUNICATIONS

Pursuant to article 6(a) of the Procedure, all communications by the parties, the Expert and the Centre in these proceedings were submitted electronically.

7. STANDARDS AND BURDEN OF PROOF

- 7.1 In determining an objection, the expert shall apply the standards that have been defined by ICANN. Procedure, article 20(a). In this regard, section 3.5 of Module 3 of the Guidebook sets forth "Dispute Resolution Principles (Standards)" for each of the four types of objection that can be raised under the Procedure. The standards applicable to Community Objections are set forth in section 3.5.4 of Module 3 of the Guidebook. In addition, the expert may refer to and base her findings upon the statements and documents submitted and any rules or principles that she determines to be applicable. *Id.*, article 20(b).
- 7.2 The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards. *Id.*, article 20(c).

8. REASONING AND DECISION

- 8.1 This determination is made pursuant to article 21 of the Procedure. Further to paragraph 8 of the ICC Practice Note, the parties are deemed to have agreed that this determination shall be binding upon the parties, as permitted by article 12(3) of the Rules.
- 8.2 Although I have considered all of the allegations, evidence and arguments the parties have submitted to me, I refer in my determination only to those I consider relevant to my reasoning and decisions.

Two-Step Approach

- 8.3 To have its Objection considered, the Objector must have standing. As the first step in making my determination, I accordingly must review the Objection and decide whether the Objector has standing to object. Guidebook, Module 3 § 3.2.2.
- 8.4 To have standing to raise its Community Objection, the Objector must prove that (1) it is an “established institution” and (2) it has an “ongoing relationship with a clearly delineated community”. *Id.* § 3.2.2.4. And the community named by the Objector must be a community “strongly associated” with the new gTLD that is the subject of the Application. *Id.*
- 8.5 If I find that the Objector has standing, my second step is to determine the merits of the Objection in light of the standards set out in section 3.5.4 of Module 3 of the Guidebook applicable to Community Objections. Further to those standards, I am to apply a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, for a Community Objection to be successful, an objector must prove that (1) the community invoked by the objector is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association between the community invoked and the applied-for gTLD”; and (4) the application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Standing

- 8.6 The Objector contends that it has standing to object to the Application for the new gTLD “.HOTELS”. According to the Objector, it is a non-profit international association that brings together 44 national associations representing the interests of the hospitality industry in 27 European countries. Objection § 1; the Objector’s profile, Objection, Appendix 5; the Objector’s list of members, Objection, Appendix 6. Some of these national associations – such as Groupement National des Chaînes Hôtelières – in turn have members (such as Accor) that are among the world’s leading hotel chains and operate in many parts of the world, including Africa, Asia, Europe, Latin America, the Middle East and North America. Objection § 2.5; Accor 2011 Annual Report (operating over 4 400 hotels in 92 countries), Objection, Appendices 14(C)-14(D).
- 8.7 The Objector notes that Europe is the largest tourist destination in the world, with a global market share of over 50%. In 2011, three European countries – France, Italy and Spain – were among the top-five tourist destinations. Objection § 2. The Objector represents the interests of European hotels, restaurants, cafes and similar establishments in the European decision-making process before the European Commission, the Council of Ministers and the European Parliament. *Id.* § 2.2. Since 2007, it has also developed various tools to assist hotel operators across Europe, including the European Hospitality Quality scheme, the Hotelstars Union (a harmonized European hotel classification system), a methodology for improving fire safety in hotels, and benchmarks for fair practices in online distribution. *Id.* § 2.3; information from the Objector’s website on the Hotelstars Union, Objection, Appendix 11; press releases dated 10 February 2010 on the Objector’s guidelines for fire safety in European hotels, Objection, Appendix 12; position paper dated 27 April 2012 on the Objector’s benchmarks of fair practices in online distribution, Objection, Appendix 13. The Objector is also an Affiliated Member of the United Nations World Tourism Organisation (“UNWTO”) and collaborates closely with the International Hotel & Restaurant Association (“IH&RA”), the only international association recognized by the United Nations as representative of the global hotel industry. Objection § 2.2; list of UNWTO Affiliated Members dated 11 March 2013, Objection, Appendix 10(A).
- 8.8 The Objector states that it has been based in Brussels since 1991 and became a non-profit international association in 1994. The Objector is a recognized association listed in the European Transparency Register. It has statutes establishing its governing rules, principles

and procedures. The latest iteration of these was adopted in 2011. The General Assembly is the Objector’s highest decision-making body and brings together representatives of all member associations. The General Assembly elects nine members to an Executive Committee, which is chaired by the President and oversees management of the association. The Objector’s Secretariat, which is led by the Chief Executive Officer, manages the association and its activities on a day-to-day basis. Objection §§ 1, 2.1; the Objector’s statutes adopted 28 October 2011, Objection, Appendix 7; the Objector’s listing dated 10 March 2013 in the European Transparency Register, Objection, Appendix 9.

- 8.9 The Objector considers it axiomatic that the “Hotel Community” – which the Objector defines as the “set of all hotels that meet the definition of ISO 18513:2003” (Objection at 5; International Organization for Standardization 18513:2003 § 2.2.1, Objection, Appendix 3)² – is “strongly associated” with the gTLD “.HOTELS”. *See* Objection §§ 5-5.3.
- 8.10 In light of the above, the Objector considers that it is (1) an “established institution” with (2) an “ongoing relationship with a clearly delineated community” – namely, the Hotel Community (Objection at 6) – that is “strongly associated” with the new gTLD “.HOTELS” that is the subject of the Application, and that it therefore has standing to bring its Objection. For the reasons explained below, I agree.
- 8.11 Section 3.2.2.4 of Module 3 of the Guidebook sets forth a series of non-exclusive factors I may consider in determining whether the Objector is an “established institution”. These non-exclusive factors are (1) the level of global recognition of the institution; (2) the length of time the institution has been in existence; and (3) public historical evidence of the institution’s existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. In all events, however, the institution must not have been established solely in conjunction with the gTLD application process.
- 8.12 That same section also sets forth a series of non-exclusive factors that I may consider in determining whether the Objector has an “ongoing relationship with a clearly delineated community”. These non-exclusive factors are (1) the presence of mechanisms for

² *See also* Objection § 3.1 (explaining that the Hotel Community “includes hotel operators as such, individual hotels, boutique hotels, hotel chains including owned and leased, franchised or managed hotels, and hotel networks or entities that represent the interests of hotels”).

participation in activities, membership and leadership; (2) an institutional purpose related to the benefit of the associated community; (3) the performance of regular activities that benefit the associated community; and (4) the level of formal boundaries around the community.

- 8.13 In determining whether the Objector has standing, I am to “perform a balancing of the factors listed above, as well as other relevant information”. Guidebook, Module 3 at 3-8. It is not expected that the Objector must satisfy each and every factor considered in order to satisfy the standing requirements. *Id.*
- 8.14 Based on the record in this case, I find that the Objector is an “established institution”. The Objector was established in 1991 – more than two decades before the gTLD application process opened for user registration and application submission in January 2012. *See* Guidebook, Module 1 at 1-2. The Objector necessarily enjoys global recognition within the hospitality industry through its membership in UNWTO and by virtue of the international character of its members, who are national associations that represent the interests of the hospitality industry in 27 European countries and, in turn, have as members hotel operators who have thousands of hotels around the globe.
- 8.15 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the Hotel Community. As noted above (§ 8.9), the Objector has defined the Hotel Community as the “set of all hotels that meet the definition of ISO 18513:2003”. There is no dispute that it is possible to define such a group and label it the Hotel Community. The issue is whether the Hotel Community, thus defined, constitutes a “clearly delineated community” with which the Objector has an “ongoing relationship” for purposes of section 3.2.2.4 of Module 3 of the Guidebook.
- 8.16 Though it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what constitutes a “clearly delineated community”. When evaluating the merits of an objection, the Guidebook suggests that I could balance a number of factors to determine whether the community at issue can be considered “clearly delineated”. These factors include (1) the level of public recognition of the group as a community at a local or global level; (2) the level of formal boundaries around the community and what persons or entities are considered to form the community; (3) the length of time the community has been in

existence; (4) the global distribution of the community; and (5) the number of people or entities that make up the community. *Id.* § 3.5.4.

- 8.17 The Guidebook does not suggest any factors I could consider when considering what constitutes a “clearly delineated community” for purposes of standing. But there is nothing in the Guidebook that suggests that the words “clearly delineated community” should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. In light of this, I consider that the five factors listed above may be helpful to my analysis of whether the Hotel Community is a “clearly delineated community” for purposes of assessing whether the Objector has standing.
- 8.18 In considering these factors, the Objector makes reference to the principles, recommendations and implementation guidelines established by the ICANN Generic Names Support Organization (“GNSO”), which were used as the basis for the new gTLD program. Objection § 3; *see also* Additional Submission at 2. Implementation Guideline P concerns Community Objections and explains that the term “community” should be “interpreted broadly and will include, for example, an economic sector”. Summary of GNSO Principles, Recommendations & Implementation Guidelines, IG P, Objection, Appendix 4; GNSO Final Report dated 8 August 2007, Part A, Objection, Appendix 15.
- 8.19 The Applicant disputes that the GNSO implementation guidelines “can be used to determine the appropriate test set by ICANN” because neither the Guidebook nor the Procedure call for them to be applied in these proceedings. Response at 5. In these circumstances, the Applicant states that I “need to decide on the appropriate tests in line with parties’ reasonable expectations pursuant to the Guidebook and Procedure.” *Id.* The Guidebook, however, gives me broad discretion in this regard by suggesting a number of non-exclusive factors I could take into consideration in determining whether the community at issue can be considered “clearly delineated”. Guidebook, Module 3 § 3.5.4. And the Procedure expressly provides that, in addition to the standards set out in section 3.5.4 of Module 3 of the Guidebook, I may also refer to and base my findings upon the statements and documents submitted and any rules or principles that I determine to be applicable. Procedure, article 20(b). Under these circumstances, I consider it within my discretion to take the GNSO implementation guidelines into account as part of my analysis.

- 8.20 With this approach in mind, I find that the Hotel Community, as defined by the Objector (*see supra* ¶ 8.9), is a “clearly delineated community” composed of people and entities operating hotels. It is common knowledge that this community has many thousands of members around the world and has existed for centuries. The Objector necessarily has an “ongoing relationship” with the Hotel Community because it brings together dozens of national associations that represent the interests of the hospitality industry, including hotel operators, in Europe. The Objector also represents the interests of hotel operators before European bodies and participates in the UNWTO, in addition to spearheading a variety of practical initiatives in Europe for the benefit of the Hotel Community.
- 8.21 That the Hotel Community is “strongly associated” with the gTLD “.HOTELS” cannot be gainsaid. Although it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what it means for a community to be “strongly associated” with the applied-for gTLD. When evaluating the merits of an objection, the Guidebook suggests several factors I could balance to determine whether there is such a “strong association”. These include (1) statements contained in the application; (2) other public statements by the applicant; and (3) associations by the public. *Id.* § 3.5.4. While these factors could also be potentially helpful in the context of evaluating the term “strongly associated” for purposes of standing, I do not consider a factor-by-factor analysis necessary on the facts presented here, where the applied-for gTLD effectively names the community at issue.
- 8.22 I accordingly find that the Objector has standing to bring the Objection at issue here.
- 8.23 The Applicant resists this conclusion and contends that the Objector does not have standing because the Objection is *ultra vires*, as the Objector’s statutes do not permit it to make the Objection. Specifically, the Applicant notes that the Objector is a Belgian association and that its statutes do not provide that part of its purpose is objecting to applications. In light of this, the Applicant contends that Belgian law does not permit the Objector to file the Objection and that a legal action filed by the Objector would be inadmissible. Moreover, under Belgian law, the directors of the Objector could be held personally liable to the Objector itself or third parties for violating provisions related to the purpose of the association. Response ¶¶ 1.1-1.5; *see also* Additional Response at 1-3; legal opinion dated 23 May 2013 of Stefaan Cnudde, Response, Annex 2. I disagree.

- 8.24 The opinion of Mr. Cnudde, on which the Applicant relies, does not address the issue of the Objector's standing in these proceedings at all. It rather addresses (1) how a Belgian court would consider legal proceedings filed by the Objector and (2) the potential of the Objector's directors to be held liable for having the Objector act *ultra vires* – neither of which is at issue in these proceedings under the Procedure and the Rules. I accordingly consider these arguments inapposite with respect to the issue of whether or not the Objector has standing. This is reason enough to reject them. I also note, however, that Mr. Cnudde's opinion appears to be in tension with the Objector's statutes. *See* Objection, Appendix 7 (contemplating the possibility that the Objector may act as a plaintiff in legal proceedings); *see also* legal opinion dated 22 July 2013 of Philippe Simonart, Additional Submission, Annex 1.
- 8.25 The Applicant also contends that the Objector does not have standing because the Objector's community is not strongly associated with the applied-for gTLD. Response ¶¶ 2.1-2.5. Specifically, the Applicant submits that the Objector's community is what the Applicant calls the "Limited Hotel Operator Community", which it defines as consisting of hotel operators in 27 European countries. *Id.* ¶ 2.2. The Applicant contends that this Limited Hotel Operator Community is not "strongly associated" with the gTLD ".HOTELS", which the Applicant contends is instead strongly associated with something it calls the "Global Hotel Community", which it says the Objector does not represent. *Id.* ¶ 2.3; *see also* Additional Response at 3-4. I cannot follow the Applicant here.
- 8.26 The issue I need to consider in the context of standing is whether the Objector has "an ongoing relationship with a clearly delineated community" that is "strongly associated" with the new gTLD ".HOTELS". For the reasons noted above (¶¶ 8.20-8.21), I consider that the Objector has established that it does. In addition, it is not clear to me on what basis the Applicant considers it can redefine the community the Objector considers to be at issue. The Applicant's position appears to be based on the idea that the Objector cannot represent the interests of a community beyond its membership. The issue here, however, is not whether the Objector *represents* the community at issue, but whether it has an "ongoing relationship" with that community. And in all events, associations frequently have relationships with, and

represent the interests of, communities far larger than their membership. I accordingly do not see any basis for the Applicant's position.³

Merits

- 8.27 Having found that the Objector has standing, I must now turn to the merits of its Objection. As noted above (¶ 8.5), with respect to Community Objections, the Guidebook sets forth a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, to succeed, the Objector must prove that (1) the community it invokes – the Hotel Community – is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association” between the Hotel Community and the gTLD “.HOTELS”; and (4) the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Hotel Community.
- 8.28 In the context of deciding standing, I have already found that the Hotel Community is a “clearly delineated community” and that there is a “strong association” between the Hotel Community and the gTLD “.HOTELS”. *See supra* ¶¶ 8.20-8.21. It therefore remains for me to determine whether the Hotel Community's opposition to the Application is “substantial” and whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Hotel Community.
- 8.29 The Objector contends that the Hotel Community's opposition to the Application is “substantial”. In this regard, the Objector notes that a number of associations has expressed opposition to the Application, including the Objector,⁴ IH&RA, the German Hotel Association, and the Hotel Consumer Protection Coalition (“HCPC”), whose members operate tens of thousands of hotels in about 100 countries around the world. Objection § 4.2; comments dated 26 September 2012 of IH&RA, Objection, Appendix 24(A) (mislabelled Appendix 26); comments dated 26 September 2012 of the German Hotel Association, Objection, Appendix 24(B); comments dated 11 August 2012 of HCPC,

³ I note that the Applicant brings this argument back in several variations when opposing the merits of the Objection. *See, e.g.*, Response ¶¶ 3.1-3.4, 4.1, 5.1, 9.1-9.6. For the reasons explained above, I do not find this line of argument persuasive in any of its iterations.

⁴ The Objector has also submitted letters from 24 of its members expressing individual support for the Objection. *See* Objection, Appendices 32(A)-32(X).

Objection, Appendix 24(C). Several large hotel groups have also individually published negative comments, including Accor, Hilton, InterContinental and Wyndham. Objection § 4.2; comments dated 25 September 2012 of Accor, Objection, Appendix 24(E); comments dated 26 September 2012 by Hilton Worldwide, Inc., Objection, Appendix 24(F); comments dated 11 August 2012 of InterContinental Hotels Group, Objection, Appendix 24(G); comments dated 10 August 2012 of Wyndham Worldwide Corporation, Objection, Appendix 24(H).

8.30 In addition, UNWTO, IH&RA and a variety of associations from different countries have submitted letters formally supporting the Objection. Objection § 4.2; letters dated 12 March 2013 from UNWTO, four Brazilian hospitality associations, French Hospitality in Europe, Fédération Nationale du Tourism of Morocco, and three Australian hospitality associations, Objection, Appendices 25, 28(B), 29(A), 29(C), 30(C), 30(D), 30(E); letters dated 11 March 2013 from the American Hotel & Lodging Association, the Austrian Hotel Association and HCPC, Objection, Appendices 27, 29(B), 31; letter dated 10 March 2013 from Hotel Association Nepal, Objection, Appendix 30(A); letter dated 4 March 2013 from IH&RA, Objection, Appendix 26.

8.31 In light of the above, the Objector contends that it has established that the Hotel Community's opposition to the Application is "substantial". For the reasons set forth below, I agree.

8.32 Section 3.5.4 of Module 3 of the Guidebook suggests that I "could balance a number of factors to determine whether there is substantial opposition" by the Hotel Community to the Application. These factors include (1) the number of expressions of opposition relative to the composition of the community; (2) the representative nature of the entities expressing opposition; (3) the level of recognized stature or weight among sources of opposition; (4) the historical defense of the community in other contexts; and (5) the costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

8.33 Through the Objector, the Application is opposed by associations representing the hospitality industry, including hotel operators, in 27 European countries. In addition, UNWTO, IH&RA and associations supporting hotel operators in Australia, Brazil, Morocco, Nepal, and the United States formally support the Objection. The Objection is

also formally supported by HCPC, whose members are among the largest hotel operators in the world. The stature and weight of the entities expressing opposition to the Application cannot be overstated. And together, these entities represent the interests of a broad range of Hotel Community members doing business around the globe in Africa, Asia, Europe, Latin America, the Middle East and North America. In light of this, I consider the Hotel Community's opposition to the Application to be "substantial".

- 8.34 The Applicant opposes this conclusion on the grounds that the Objector has failed to quantify the number of expressions of opposition relative to the composition of the community. In light of this, the Applicant notes that it is impossible to compare the number of expressions of opposition to the total number of entities within the community and assess what proportion of the community they represent. Response ¶¶ 6.1-6.4. While the Guidebook suggests that such numbers could be a factor in my analysis, it does not require that they be, and I consider the facts discussed above (¶ 8.33) sufficient to establish the Hotel Community's "substantial" opposition to the Application.
- 8.35 The Applicant likewise contends that the Objector has failed to put on sufficient evidence of the historical defense of the Hotel Community in other contexts and the costs it has incurred in expressing opposition. *Id.* ¶¶ 7.1-8.2. While the Guidebook likewise lists these as factors that could be relevant to assessing whether community opposition is "substantial", in the context of this case, I do not find them so. The Objector's alleged failure to put on sufficient evidence with respect to these factors is accordingly immaterial to my decision. The Applicant also objects to the Objector's reliance on opposition to the Application from entities that are not part of the Hotel Community. *Id.* ¶ 5.2. This, however, I likewise have not relied on in reaching my decision.
- 8.36 This brings me to the last element the Objector must prove to succeed on its Objection – namely, that the Application creates a "likelihood of material detriment to the rights or legitimate interests of a significant portion" of the Hotel Community. Broadly speaking, the Objector contends that it does for two reasons. The first has to do with concerns over intellectual property infringements, and the second with concerns flowing from the Applicant's intention to prevent members of the Hotel Community from registering domain names in ".HOTELS".

- 8.37 With respect to the Objector's first concern, the Objector considers that, if the gTLD ".HOTELS" is delegated to anyone, it would lead to an increase in cybersquatting and the "Hotel Community would have to face tremendous legal costs to remove the infringing domains", while the "advertising revenues from the infringing domain names would simply be stolen from legitimate advertisers causing substantial costs of redress." Objection § 6.3.5; *see also* U.S. Anti-Cybersquatting Consumer Protection Act, Objection, Appendix 48.
- 8.38 Turning to the Application in particular, the Objector contends that the Applicant intends to use ".HOTELS" to "register domain names infringing trademark rights to market its own services." Objection § 6.3.2. Specifically, the Objector contends that the Applicant intends to register descriptive, geographical and branded domain names that refer to the actual day-to-day business activities of the Applicant and its affiliates, subsidiaries and partners. *Id.* § 6.3.1. In doing so, the Objector contends that the Applicant intends to "ignor[e] the rights of third parties". *Id.* In support of this contention, the Objector quotes from a section of the Application that states as follows:
- [The Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.*
- Application, Response, Annex 1 § 18(c); *see* Objection § 6.3.2.
- 8.39 According to the Objector, this means that the "Applicant is attempting to justify free riding, unfair competition or brandjacking by playing the UDRP/URS procedure and diverting the system established to protect rights owners." Objection § 6.3.2. Moreover, "[w]ith the registration of branded domain names," the Objector foresees that the "Applicant will also control the communication and the image associated with the targeted hotels and may either dumb down a hotel's image with a standardized presentation or worse, completely ruin the marketing of hotel owners by not respecting their approach or image." *Id.* § 6.3.6. The Objector also foresees that the Applicant might operate domain names in a way that disrupts an alleged consensus the Hotel Community has reached with respect to mass communication online. *Id.* § 6.3.7.

8.40 With respect to the Objector's second concern, the Objector contends that the Application would harm the Hotel Community because the Applicant proposes to operate “.HOTELS” as what is known as a “single registrant TLD”. *Id.* §§ 6.1.1-6.1.2. This is explained in section 18(c) of the Application, which states in pertinent part as follows:

At least during the initial months or even years following the delegation of the .hotels gTLD to [the Applicant], this extension is likely going to be a so-called “single registrant TLD” [. . .]. [A] “single registrant TLD” is a TLD where ‘(i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, and (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator.

Therefore, parties who are not [the Applicant] or – insofar and the extent [the Applicant] deems appropriate – an Affiliate within the meaning of the Registry Operator Agreement will not be entitled to register domain names in the .hotels gTLD.

Response, Annex 1 § 18(c). Single registrant TLDs are also sometimes referred to as “closed” gTLDs.

8.41 The Objector states that, if the Applicant were allowed to operate “.HOTELS” as a closed gTLD, hotels that are not affiliated with the Applicant would be unable to register domain names in “.HOTELS”. According to the Objector, this means that the “Applicant, a single stakeholder would control and prevent others from registering domain names within a string representing their own economic sector, thus leading to a monopoly.” Objection § 6.1.2. According to the Objector, such a monopoly would harm consumers and violate the competition laws in the United States and Europe. *Id.* §§ 6.1.2, 6.3.4; *see also* Sherman Antitrust Act, Objection, Appendix 42; Treaty on the Functioning of the European Union, articles 101-102, Objection, Appendix 43.

8.42 The Objector contends that the Applicant's proposal to operate “.HOTELS” as a closed gTLD shows that it does not intend to act in accordance with the interests of the Hotel Community. Objection § 6.1.3. The Objector further contends that the Hotel Community depends heavily on the domain name system (the “DNS”), as so many consumers now make their travel arrangements online. *Id.* § 6.2; The 2012 Traveler, Google, August 2012, Objection, Appendix 46; Internet Travel Hotel Booking Statistics (research date 23 September 2012), statisticbrain.com, Objection, Appendix 47; Roland Schegg & Michael Fux, The Power of Internet Distribution Systems, March 2012, Objection, Appendix 49. If

the Applicant operates “.HOTELS” as proposed, the Objector contends it “will be positioned to gain advantage in direct navigation and online search to the detriment of the Hotel Community” (Objection § 6.2), as “Internet users will be automatically redirected to a limited choice of hotels in accordance with the Applicant’s interests, and so may be deceived” (*id.* § 6.3.3). In this regard, the Objector states that, as “there is little doubt that Search Engine Optimization (SEO) mechanisms will favor meaningful TLDs, the operation by the Applicant of the TLD HOTELS would exclude *de facto* domains not in the TLD HOTELS namespace from the first results of search engines [. . .] with dramatic economic consequences for the Hotel Community members”. *Id.* § 6.4.

- 8.43 The Objector further contends that, even if the Applicant one day decided to operate “.HOTELS” as an open gTLD, it would not act “in the consumer interests” as a “neutral party”, but rather link registration of domain names in “.HOTELS” to the Applicant’s services. *Id.* § 6.3.8. In this regard, the Objector makes reference to part of the Application which states as follows:

The Applicant may make the .hotels top-level domain available to qualifying domain name registrants at an acceptable cost to them, to be determined if and when the Applicant would decide at its own discretion to allow third parties to register domain names, and – as the case may be – bundle such domain name registrations with additional added-value products and services generally offered by [the Applicant] in the course of its ordinary business activities, like operating the so-called “Bookit button”, which is a tool that can be integrated in websites, and whereby customers can make direct hotel reservations through [the Applicant’s] secure online transaction systems”.

Response, Annex 1 § 18(c); *see* Objection § 6.3.8. According to the Objector, such a “registration policy would increase user confusion and be detrimental to non-eligible members” because the Applicant considers “.HOTELS” a “marketing tool for maximizing its benefit”. Objection § 6.3.8.

- 8.44 In light of the above, the Objector considers that it has proven that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the Hotel Community. For the reasons set out below, I disagree.
- 8.45 Section 3.5.4 of Module 3 of the Guidebook suggests that I could use several non-exclusive factors in determining whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Hotel Community. These non-exclusive factors are (1) the nature and extent of damage to the reputation of the Hotel

Community that would result from the Applicant's operation of the gTLD ".HOTELS"; (2) evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the Hotel Community or users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests; (3) interference with the core activities of the Hotel Community that would result from the Applicant's operation of the gTLD ".HOTELS"; (4) dependence of the Hotel Community on the DNS for its core activities; (5) the nature and extent of concrete or economic damage to the Hotel Community that would result from the Applicant's operation of the gTLD ".HOTELS"; and (6) the level of certainty that the alleged detrimental outcomes would occur. In all events, an allegation of detriment that consists only of an applicant being delegated the gTLD instead of an objector will not be sufficient for a finding of material detriment.

8.46 With respect to the Objector's first concern about potential intellectual property infringements, a preliminary remark. To the extent the Objector has concerns that the creation of ".HOTELS" will increase cybersquatting no matter who has the gTLD, I consider this a concern that relates to ICANN's new gTLD program in general, rather than the Application in particular, and that the Community Objection is not the avenue to address such a concern. Turning to the concerns the Objector has raised with respect to the Application specifically, I can find no evidence in the record that suggests that the Applicant considers it can infringe the intellectual property rights of third parties or has any intention of doing so. On the contrary, section 29 of the Application (Response, Annex 1) sets forth the Applicant's commitment to the protection of intellectual property rights and how it intends to implement the mandatory rights protection mechanisms contained in the Guidebook and detailed in Specification 7 of the draft New gTLD Registry Agreement.

8.47 Moreover, the quotation from the Application that the Objector sets forth to support its allegations (*supra* ¶ 8.38) is taken out of context and does not support the Objector's position. In fact, taken in context, the quotation is further evidence of the steps the Applicant would take to minimize the potential for trademark disputes with third parties regarding domain names registered in the ".HOTELS" gTLD:

[E]ven if only [the Applicant] will be entitled to register domain names, this does not exclude the hypothesis that disputes may arise with one or more third parties as regards domain names that are registered in the .hotels gTLD.

In order to avoid these risks, [the Applicant] intends to implement the following policies and processes:

First, the domain names to be registered by [the Applicant] could relate to the following:

- * registered trademarks of [the Applicant];*
- * names of affiliates and/or hotel partners of [the Applicant];*
- * names of departments within [the Applicant], and its subsidiaries;*
- * etc.*

Furthermore, [the Applicant] envisages registering a fair number of generic words that are directly or indirectly related to the day-to-day business activities and operations of [the Applicant] and its Affiliates.

Prior to effectively registering such domain names in the .hotels gTLD, [the Applicant] will require its legal department to review the list of these domain names on a regular basis in order to satisfy itself that they will not infringe the rights of third parties.

In any case, [the Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.

Response, Annex 1 § 18(c).

8.48 The Objector has similarly failed to prove any likely material detriment to the Hotel Community flowing from the Applicant’s proposal to operate “.HOTELS” as a closed gTLD. In this regard, I note that the Objector itself has pointed out that, since it filed its Objection, Specification 11 of the draft New gTLD Registry Agreement has been revised. See Objector’s email dated 9 August 2013. Specifically, paragraphs 3(c) and 3(d) of that Specification now provide in pertinent part as follows:

- (c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.*
- (d) Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” [. . .]. “Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others.*

Draft New gTLD Registry Agreement dated 2 July 2013. As the Objector has noted, these provisions cast considerable doubt on whether the Applicant would be able to operate “.HOTELS” as a closed gTLD, as it has proposed. *See* Objector’s email dated 9 August 2013. It is accordingly far from certain that the Applicant would be able to exclude members of the Hotel Community from registering domain names in “.HOTELS” and cause the alleged detriment the Objector foresees.

- 8.49 In addition, the Objector has failed to prove any material detriment the Hotel Community would likely suffer in the (unlikely) event the Applicant were permitted to operate “.HOTELS” as a closed gTLD. Rather, the Objector’s submissions set forth a series of speculative allegations with no evidence to support a finding that any material detriment to the Hotel Community will likely come to pass. This is insufficient to meet the Objector’s burden of proof on this issue.
- 8.50 Specifically, the Objector contends that the Applicant’s operation of “.HOTELS” as a closed gTLD would harm consumers and be a monopoly in violation of US and European competition laws. But the Objector does not even explain, much less prove why this is the case. And its focus on harm to consumers misses the heart of the issue, which is whether the Application creates a likelihood of material detriment to a significant portion of the Hotel Community. The Objector similarly contends that the Applicant’s operation of “.HOTELS” as a closed gTLD will result in online consumers being redirected to a limited choice of hotels in line with the Applicant’s interests that will be favored by SEO mechanisms. Again, however, the Objector provides no evidence to support this alleged dystopian future. Finally, the Objector contends that, even if the Applicant operated “.HOTELS” as an open gTLD, it would do so in a way that was not in keeping with consumer interests, would increase user confusion and would be detrimental to those the Applicant nevertheless still decided to exclude. Again, this allegation is speculative and finds no evidentiary support in the text of the Application or otherwise. And it again places the focus on alleged potential harm to consumers, rather than likely detriment to the Hotel Community.
- 8.51 In closing, I note that the lack of evidence to support the Objector’s allegations of material detriment is striking, particularly in light of the gravity of its allegations and the volume of its submissions. The Objector submitted well over 100 exhibits in this case. Of these, it refers to only nine in its section on material detriment. And of these nine, most are not

documentary evidence. Rather, they are legal exhibits – the Sherman Antitrust Act, the Treaty on the Functioning of the European Union, the Latham Trademark Act, EU Directive 2008/95/EC, the Anti-Cybersquatting Consumer Protection Act. Objection, Appendices 42-45, 48. The only four pieces of documentary evidence on which the Objector relies to support its allegations with respect to material detriment are (1) the Application itself, (2) a study Google commissioned on the role travel plays in the lives of Americans, (3) internet travel hotel booking statistics on statisticbrain.com, and (4) the results of an online survey on hotel distribution in Germany, Austria and Switzerland. Response, Annex 1; Objection, Appendices 46, 47, 49. These materials are insufficient to substantiate the allegations the Objector makes.

8.52 For these reasons, I find the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Hotel Community.

9. COSTS

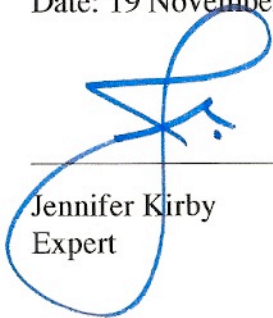
9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).

9.2 As I have decided to dismiss the Objection, the Applicant is the prevailing party in these proceedings. The Centre shall accordingly refund to the Applicant its advance payment of costs.

10. DETERMINATION

- 10.1 For the reasons set out above, the Expert makes the following determination:
- 10.2 The Objection is dismissed and the Applicant accordingly prevails;
- 10.3 The Centre shall refund to the Applicant its advance payment of costs.

Date: 19 November 2013



Jennifer Kirby
Expert

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/385/ICANN/2

HOTEL CONSUMER PROTECTION COALITION

(USA)

vs/

BOOKING.COM B.V

(THE NETHERLANDS)

(Consolidated with case No. EXP/447/ICANN/64

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE (BELGIUM) vs/
BOOKING.COM B.V. (THE NETHERLANDS))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

HOTEL CONSUMER PROTECTION COALITION (USA)

- v -

BOOKING.COM B.V. (THE NETHERLANDS)

**INTERNATIONAL CENTRE FOR EXPERTISE
OF THE INTERNATIONAL CHAMBER OF COMMERCE**

EXP/385/ICANN/2

CONSOLIDATED WITH CASE EXP/447/ICANN/64

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE (BELGIUM) v. BOOKING.COM B.V. (THE NETHERLANDS)

EXPERT DETERMINATION

TABLE OF CONTENTS

1. Introduction	3
2. Proceedings	5
3. Potential Relief	7
4. Place of the Proceedings	7
5. Language of the Proceedings	7
6. Communications	7
7. Standards and Burden of Proof	8
8. Reasoning and Decision	8
9. Costs	24
10. Determination	25

This expert determination is made in expertise proceedings pursuant to Module 3 of the gTLD Applicant Guidebook (“Guidebook”) and its Attachment, the New gTLD Dispute Resolution Procedure (the “Procedure”). These proceedings take place under the International Chamber of Commerce (“ICC”) Rules for Expertise (in force as from 1 January 2003) (the “Rules”), as supplemented by the ICC Practice Note on the Administration of Cases under the Procedure (the “ICC Practice Note”).

1. INTRODUCTION

- 1.1 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has implemented a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Further to this program, parties may apply for new gTLDs in accordance with the terms and conditions set by ICANN. Procedure, article 1(a).
- 1.2 The program includes a dispute resolution procedure for resolving disputes between a party who applies for a new gTLD and a party who objects to the application – namely, the Procedure. *Id.*, article 1(b). The Procedure provides that dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules identified in article 4(b) of the Procedure. *Id.*, article 1(c).
- 1.3 By applying for a new gTLD, an applicant accepts the applicability of the Procedure and the applicable DRSP rules. An objector likewise accepts the applicability of the Procedure and the applicable DRSP rules by filing an objection to an application for a new gTLD. The parties cannot derogate from the Procedure without the express approval of ICANN and cannot derogate from the applicable DRSP rules without the express approval of the relevant DRSP. *Id.*, article 1(d).
- 1.4 There are four types of objections a party may raise against an application for a new gTLD. *Id.*, article 2(e). One of these is known as a “Community Objection”. A Community Objection is an objection that there is substantial opposition to the application from a significant portion of the community to which the string (i.e., the new gTLD) may be explicitly or implicitly targeted. *Id.*, article 2(e)(iv). The Hotel Consumer Protection

Coalition (the “Objector”) has raised this type of objection against the application of Booking.com B.V. (the “Applicant”) for the new gTLD “.HOTELS” (the “Application”).

1.5 Pursuant to articles 3(d) and 4(b)(iv) of the Procedure, Community Objections shall be administered by the ICC International Centre for Expertise (the “Centre”) in accordance with the Rules, as supplemented by the ICC as needed. The ICC Practice Note is such a supplement to the Rules. In the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail. *Id.*, article 4(c). In all cases, the expert shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its case. *Id.*, article 4(e).

1.6 The Objector’s contact details are as follows:

HOTEL CONSUMER PROTECTION COALITION
Attn: Mr. Michael Menis, InterContinental Hotels Group
Contact Information Redacted

1.7 The Objector is represented by:

Mr. Douglas M. Isenberg
THE GIGALAW FIRM
Contact Information Redacted

1.8 The Applicant’s contact details are as follows:

BOOKING.COM B.V.
Attn: Mr. Jaap van den Broek, Corporate Counsel
Contact
Information
Redacted

1.9 The Applicant is represented by:

Mr. Alfred Meijboom
Mr. Joran Spauwen
KENNEDY VAN DER LAAN N.V.
Contact Information
Redacted

1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
Contact Information Redacted

1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
Contact Information Redacted

2. PROCEEDINGS

2.1 Below is a summary of the main procedural steps in these proceedings.

2.2 On 12 March 2013, the Objector filed its Community Objection with the Centre (the “Objection”) pursuant to article 7 of the Procedure.

2.3 By letter dated 28 March 2013, the Centre notified the parties that it had conducted an administrative review of the Objection pursuant to article 9(a) of the Procedure and had found the Objection in compliance with articles 5 through 8 of the Procedure. The Centre accordingly registered the Objection for processing in accordance with article 9(b) of the Procedure.

2.4 By letter dated 25 April 2013, and with the agreement of all parties, the Centre informed the parties that it had decided to consolidate this case with case EXP/447/ICANN/64 pursuant to article 12 of the Procedure.

2.5 On 24 May 2013, the Applicant submitted its response to the Objection (the “Response”) pursuant to article 11 of the Procedure. By letter dated 30 May 2013, the Centre confirmed to the parties that the Response was in accordance with the Procedure and the Rules.

2.6 On 14 June 2013, in reaction to the Applicant’s Response, the Objector submitted an additional submission dated 12 June 2013 (“Additional Submission”).

- 2.7 On 19 June 2013, the Applicant objected to the Objector's filing its Additional Submission.
- 2.8 On 24 June 2013, the Chairman of the Standing Committee appointed Ms. Kirby as the Expert in the consolidated proceedings pursuant to article 13 of the Procedure, article 9(5) of the Rules and article 3(3) of Appendix I to the Rules.
- 2.9 On 2 July 2013, the Objector requested a stay of these proceedings.
- 2.10 On 9 July 2013, the Applicant opposed the requested stay.
- 2.11 On 6 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Expert. The Centre clarified that, despite the consolidation of this case with case EXP/447/ICANN/64, the Expert was to render a separate determination for each case.
- 2.12 By letter dated 13 August 2013, the Expert denied the Objector's request for a stay of these proceedings. The reasons for the Expert's decision are set forth in her letter and are incorporated here by reference.
- 2.13 Also on 13 August 2013, by way of the same letter, the Expert decided to allow in the Objector's Additional Submission pursuant to article 17(a) of the Procedure.
- 2.14 On 27 August 2013, the Applicant filed its response to the Additional Submission ("Additional Response").
- 2.15 By two emails dated 3 September 2013, the Applicant confirmed that it had no objection to the way these proceedings were conducted and agreed that it had been treated with equality and has been given a reasonable opportunity to present its position. By two emails dated 2 and 3 September 2013, the Objector did the same.
- 2.16 Article 21(a) of the Procedure, provides that the Centre and the expert shall make reasonable efforts to ensure that the expert renders her decision within 45 days of the "constitution of the Panel".¹ The Centre considers that the Panel is fully constituted when the expert is

¹ All quotations in this determination are set forth "as is". Any grammatical or typographical errors are in the original documents.

appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the expert. In this case, the Panel was constituted on 6 August 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that her determination was rendered no later than 20 September 2013. Procedure, articles 6(e), 6(f).

2.17 Pursuant to article 21(b) of the Procedure, the Expert submitted her determination in draft form to the Centre for scrutiny as to form before it was signed.

2.18 Further to paragraph 6 of the ICC Practice Note, the parties waived the requirements for the expert mission as set out in article 12(1) of the Rules.

3. POTENTIAL RELIEF

Article 21(d) of the Procedure provides that the remedies available to an applicant or an objector in these proceedings are limited to the success or dismissal of the objection and the refund by the Centre to the prevailing party of its advance payment of costs pursuant to article 14(e) of the Procedure and any relevant provisions of the Rules.

4. PLACE OF THE PROCEEDINGS

Pursuant to article 4(d) of the Procedure, the place of the proceedings is the location of the DRSP – i.e., the Centre – which is located in Paris, France.

5. LANGUAGE OF THE PROCEEDINGS

English is the language of the proceedings pursuant to article 5(a) of the Procedure. All submissions in these proceedings have been made in English.

6. COMMUNICATIONS

Pursuant to article 6(a) of the Procedure, all communications by the parties, the Expert and the Centre in these proceedings were submitted electronically.

7. STANDARDS AND BURDEN OF PROOF

- 7.1 In determining an objection, the expert shall apply the standards that have been defined by ICANN. Procedure, article 20(a). In this regard, section 3.5 of Module 3 of the Guidebook sets forth “Dispute Resolution Principles (Standards)” for each of the four types of objection that can be raised under the Procedure. The standards applicable to Community Objections are set forth in section 3.5.4 of Module 3 of the Guidebook. In addition, the expert may refer to and base her findings upon the statements and documents submitted and any rules or principles that she determines to be applicable. *Id.*, article 20(b).
- 7.2 The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards. *Id.*, article 20(c).

8. REASONING AND DECISION

- 8.1 This determination is made pursuant to article 21 of the Procedure. Further to paragraph 8 of the ICC Practice Note, the parties are deemed to have agreed that this determination shall be binding upon the parties, as permitted by article 12(3) of the Rules.
- 8.2 Although I have considered all of the allegations, evidence and arguments the parties have submitted to me, I refer in my determination only to those I consider relevant to my reasoning and decisions.

Two-Step Approach

- 8.3 To have its Objection considered, the Objector must have standing. As the first step in making my determination, I accordingly must review the Objection and decide whether the Objector has standing to object. Guidebook, Module 3 § 3.2.2.
- 8.4 To have standing to raise its Community Objection, the Objector must prove that (1) it is an “established institution” and (2) it has an “ongoing relationship with a clearly delineated community”. *Id.* § 3.2.2.4. And the community named by the Objector must be a community “strongly associated” with the new gTLD that is the subject of the Application. *Id.*

8.5 If I find that the Objector has standing, my second step is to determine the merits of the Objection in light of the standards set out in section 3.5.4 of Module 3 of the Guidebook applicable to Community Objections. Further to those standards, I am to apply a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, for a Community Objection to be successful, an objector must prove that (1) the community invoked by the objector is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association between the community invoked and the applied-for gTLD”; and (4) the application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Standing

8.6 The Objector contends that it has standing to object to the Application for the new gTLD “.HOTELS”. According to the Objector, its members include the world’s leading hotel companies – namely, Accor, Choice Hotels International (“Choice”), Hilton Worldwide (“Hilton”), Hyatt, Intercontinental Hotels Group (“IHG”), Marriott, Starwood Hotels and Resorts (“Starwood”) and Wyndham Hotel Group (“WHG”). By number of rooms, IHG, Marriott, Hilton, WHG, Accor, Choice and Starwood are the top seven hotel companies in the world, and Hyatt is the thirteenth. *See* Special Report: Hotels 325, Hotels Magazine, July/August 2012, Objection, Annex 1 at 2. Together, the Objector’s members provide more than 31,000 hotels offering more than four million hotel rooms in approximately 100 counties around the globe. Objection at 4; profiles of the Objector’s members, Objection, Annex 9. Their hotel brands – e.g., Sofitel, ibis, Comfort Inn, Waldorf Astoria Hotels & Resorts, Hilton Hotels & Resorts, Park Hyatt, InterContinental Hotels & Resorts, Holiday Inn Hotels & Resorts, Ritz-Carlton, Marriott Hotels & Resorts, Le Meridien, Westin, Sheraton, St. Regis, W – are among the most well-known and well-established in the world. Objection at 4-5.

8.7 The Objection is also formally supported by the American Hotel & Lodging Association (“AH&LA”), the only national association representing all sectors and stakeholders in the lodging industry in the United States with over 8,700 properties in membership with over 1.3 million rooms (*see* letter dated 4 March 2013 from AH&LA, Objection, Annex 5), and

HOTREC, the umbrella association of the hospitality sector in Europe, which brings together 44 national associations representing the interests of the hospitality industry in 27 European countries (*see* letter dated 6 March 2013 from HOTREC, Objection, Annex 6).

- 8.8 The Objector states it was established in 2006 – before the establishment of the new gTLD application process – to address “industry-wide problems arising from e-commerce practices that harm or mislead consumers, and in turn damage the reputation of coalition member companies, their brands and the hospitality industry as a whole.” Objection at 4; declaration dated 12 June 2013 of Andrew Kauffman, Additional Submission, Annex B. The Objector’s activities focus on researching and resolving unfair and misleading online practices and marketing-related activities. Objection at 4. The Objector also educates consumers about such practices and how to protect themselves and works with governmental authorities and others to reduce harmful e-commerce related activities. *Id.* Although most of its work is done outside the public arena and has been unrelated to the domain name system (the “DNS”), the Objector has publicly commented on ICANN issues on several occasions. *See, e.g.*, letter dated 22 June 2006 from the Objector to ICANN (regarding the purpose of Whois and the Whois contacts), Objection, Annex 2; letter dated 12 January 2007 from the Objector to ICANN (regarding the Preliminary Task Force Report on Whois Services), Objection, Annex 3.
- 8.9 In light of the above, the Objector considers that it is (1) an “established institution” with (2) an “ongoing relationship with a clearly delineated community” – namely, the “hotel community” (Objection at 5)² – that is “strongly associated” with the new gTLD “.HOTELS” that is the subject of the Application, and that it therefore has standing to bring its Objection. For the reasons explained below, I agree.
- 8.10 Section 3.2.2.4 of Module 3 of the Guidebook sets forth a series of non-exclusive factors I may consider in determining whether the Objector is an “established institution”. These non-exclusive factors are (1) the level of global recognition of the institution; (2) the length

² In its Response, the Applicant attempts to redefine the community at issue as the “Limited Hotel Community”, which it defines as the Objector’s members. *See, e.g.*, Response ¶¶ 3.2-3.4; *see also* Additional Response at 5. It is not clear to me, however, on what basis the Applicant considers it can redefine the community the Objector considers to be at issue. Moreover, the Applicant’s position appears to be based on the idea that the Objector cannot represent the interests of a community beyond its membership. As associations frequently represent the interests of communities far larger than their membership, I do not see any basis for the Applicant’s position.

of time the institution has been in existence; and (3) public historical evidence of the institution's existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. In all events, however, the institution must not have been established solely in conjunction with the gTLD application process.

- 8.11 That same section also sets forth a series of non-exclusive factors that I may consider in determining whether the Objector has an “ongoing relationship with a clearly delineated community”. These non-exclusive factors are (1) the presence of mechanisms for participation in activities, membership and leadership; (2) an institutional purpose related to the benefit of the associated community; (3) the performance of regular activities that benefit the associated community; and (4) the level of formal boundaries around the community.
- 8.12 In determining whether the Objector has standing, I am to “perform a balancing of the factors listed above, as well as other relevant information”. Guidebook, Module 3 at 3-8. It is not expected that the Objector must satisfy each and every factor considered in order to satisfy the standing requirements. *Id.*
- 8.13 Based on the record in this case, I find that the Objector is an “established institution”. The Objector was established in 2006³ and was not created in conjunction with the gTLD application process, which opened for user registration and application submission in January 2012. *See* Guidebook, Module 1 at 1-2. Although the Objector does not have a high public profile, it necessarily enjoys global recognition within the hotel community by virtue of the international character of its members, who operate hotels in over 100 countries in Africa, Asia, Australia, Europe, North America and South America. That both AH&LA and HOTREC – which together represent the hospitality industry in 28 countries in Europe and North America – have formally supported its Objection, also reflects the global recognition the Objector enjoys in the hotel community.⁴

³ The Applicant contends that the Objector has failed to prove that it was in fact established in 2006. Response ¶ 1.3; *see also* Additional Response at 3. I disagree and consider the declaration of Mr. Kauffman (Additional Submission, Annex B) sufficient evidence on this score.

⁴ The Applicant considers that the Objector has failed to prove that it has received a “level of global recognition” and that the Objector has in fact conceded that it is not widely known. Response ¶ 1.4. In making this statement, the Applicant appears to read “global

- 8.14 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the hotel community. Though it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what constitutes a “clearly delineated community”. When evaluating the merits of an objection, the Guidebook suggests that I could balance a number of factors to determine whether the community at issue can be considered “clearly delineated”. These factors include (1) the level of public recognition of the group as a community at a local or global level; (2) the level of formal boundaries around the community and what persons or entities are considered to form the community; (3) the length of time the community has been in existence; (4) the global distribution of the community; and (5) the number of people or entities that make up the community. *Id.* § 3.5.4.
- 8.15 The Guidebook does not suggest any factors I could consider when considering what constitutes a “clearly delineated community” for purposes of standing. But there is nothing in the Guidebook that suggests that the words “clearly delineated community” should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. In light of this, I consider that the five factors listed above may be helpful to my analysis of whether the hotel community is a “clearly delineated community” for purposes of assessing whether the Objector has standing.
- 8.16 In considering these factors, the Objector has suggested that I take into consideration the views of the Independent Objector (the “IO”) on what constitutes a “clearly delineated community”. *See* Objection at 5; comments of the IO regarding the application for “.WTF”, Objection, Annex 7. For its part, the Applicant has not objected to my doing so, nor taken issue with the views the IO has expressed. Under these circumstances, I consider it appropriate to take the IO’s views into account for purposes of this case.

recognition” to mean global recognition *by the general public*. I do not see any basis to read “global recognition” this way. For purposes of evaluating an objector’s standing to bring a Community Objection, the more pertinent issue would seem to be whether the objector has received a level of global recognition within the community whose interests it purports to serve.

- 8.17 The IO has noted that the “notion of ‘community’ is wide and broad” and can include a community of interests.⁵ *Id.* at 5. It is a group of individuals who have something in common or who “share common values, interests or goals (i.e. the health, legal, internet or ICANN community).” *Id.* “[W]hat matters is that the community invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.” *Id.*
- 8.18 With this approach in mind, I find that the hotel community – like the legal community or the health community – is a “clearly delineated community” composed of people and entities operating hotels. It is common knowledge that this community has many thousands of members around the world and has existed for centuries. The Objector necessarily has an ongoing relationship with the hotel community because its current members include the seven largest hotel companies in the world with tens of thousands of hotels across the globe. And the Objector’s work related to unfair and misleading online practices and marketing-related activities is designed to help protect consumers and the reputation of its members, their brands and the hospitality industry as a whole. That the hotel community is “strongly associated” with the gTLD “.HOTELS” cannot be gainsaid.⁶
- 8.19 I accordingly find that the Objector has standing to bring the Objection at issue here.
- 8.20 The Applicant resists this conclusion on the grounds that the Objector is not an “established institution” and therefore cannot have standing. Response ¶¶ 1.1-1.9. The Applicant’s primary argument in this regard is that the Objector cannot have standing because it does not

⁵ The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who uses the global Internet. The IO may, among other things, file Community Objections against “highly objectionable” gTLD applications to which no Community Objection has otherwise been filed. The IO is granted standing to file Community Objections, notwithstanding the regular standing requirements for such objections. Guidebook, Module 3 § 3.2.5.

⁶ Although it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what it means for a community to be “strongly associated” with the applied-for gTLD. When evaluating the merits of an objection, the Guidebook suggests several factors I could balance to determine whether there is such a “strong association”. These include (1) statements contained in the application; (2) other public statements by the applicant; and (3) associations by the public. *Id.* § 3.5.4. While these factors could also be potentially helpful in the context of evaluating the term “strongly associated” for purposes of standing, I do not consider a factor-by-factor analysis necessary on the facts presented here, where the applied-for gTLD effectively names the community at issue.

exist as a “legal entity and has no right to be a party in legal proceedings, including these objection procedure”. *Id.* ¶ 1.2; *see also* Additional Response at 2; Bing.com printout dated 1 May 2013, Response, Annex 2; HTTP Request and Response Header, Response, Annex 4; letter dated 21 May 2013 from Hawkins Parnell Thackston & Young to Kennedy Van der Laan, Response, Annex 5. I disagree.

- 8.21 As detailed above (¶ 8.10), Module 3 of the Guidebook sets forth a non-exclusive list of factors that I may consider when evaluating whether the Objector is an “established institution”. None of these factors suggest that an objector may only be an “established institution” if it is a legal entity that can be a party to “legal proceedings”, and I see no reason to import such a requirement here. In this regard, I note that the Applicant has not explained on what basis this expertise procedure under the Procedure and the Rules should be considered “legal proceedings” and I am not aware of any. Moreover, on a practical level, the Applicant’s argument that the Objector must have legal personality might have more appeal if these proceedings could result in a decision directing the Objector to do or refrain from doing something. As noted above (¶ 3), however, they cannot. The remedies available to the Applicant or the Objector under the Procedure are limited to the success or dismissal of the Objection and to the refund by the Centre to the prevailing party of its advance payment of costs. In these circumstances, I see no reason to limit standing to objectors who are legal entities as the Applicant proposes.
- 8.22 The Applicant also contends that the Objector does not have standing because it does not have “an ongoing relationship with a clearly delineated community” that is “strongly associated” with the new gTLD that is the subject of the Application (i.e., “.HOTELS”). *See* Response ¶¶ 2.1-2.2, §§ 4-8, 10; Additional Response at 4. For the reasons noted above (¶ 8.18), I disagree. I also note that the Applicant’s arguments in this regard appear principally to be responding to arguments raised in the Objection (at 5-8), where the Objector conflates itself with the hotel community – arguments I have not adopted in reaching my conclusion that the Objector has standing. Indeed, the Objector conflates itself with the hotel community at numerous points throughout its Objection, a matter I return to when discussing the merits of the Objection below. *See infra* ¶ 8.45.

Merits

- 8.23 Having found that the Objector has standing, I must now turn to the merits of its Objection. As noted above (¶ 8.5), with respect to Community Objections, the Guidebook sets forth a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, to succeed, the Objector must prove that (1) the community it invokes – the hotel community – is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association” between the hotel community and the gTLD “.HOTELS”; and (4) the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community.
- 8.24 In the context of deciding standing, I have already found that the hotel community is a “clearly delineated community” and that there is a “strong association” between the hotel community and the gTLD “.HOTELS”. *See supra* ¶ 8.18. It therefore remains for me to determine whether the hotel community’s opposition to the Application is “substantial” and whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community.
- 8.25 The Objector contends, among other things, that the hotel community’s opposition to the Application is “substantial” by virtue of the fact that its members – who provide tens of thousands of hotels offering millions of hotel rooms in approximately 100 countries around the globe – oppose the Application. Objection at 8. In addition, as noted above (¶ 8.7), both HOTREC and AH&LA have filed letters formally supporting the Objection, and other travel-related companies have likewise filed comments against the Application. *Id.* at 8-9; new gTLDs application comments dated August/September 2012 (raising concerns about the Application), Objection, Annex 12.
- 8.26 In light of the above, the Objector contends that the hotel community’s opposition to the Application is “substantial”. For the reasons set forth below, I agree.
- 8.27 Section 3.5.4 of Module 3 of the Guidebook suggests that I “could balance a number of factors to determine whether there is substantial opposition” by the hotel community to the

Application. These factors include (1) the number of expressions of opposition relative to the composition of the community; (2) the representative nature of the entities expressing opposition; (3) the level of recognized stature or weight among sources of opposition; (4) the historical defence of the community in other contexts; and (5) the costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

- 8.28 Through the Objector, the Application is opposed by seven of the world’s top-ten hotel operators. The stature and weight of the Objector’s members in the hotel community cannot be overstated. In addition, both HOTREC (which brings together 44 national associations representing the interests of the hospitality industry, including hotels, in 27 European countries) and AH&LA (which represents both individual hotel property members and hotel companies in the US) formally support the Objection. Together, these entities represent the interests of a broad range of hotel community members doing business in about 100 countries around the globe. In light of this, I consider the hotel community’s opposition to the Application to be “substantial”.
- 8.29 The Applicant opposes this conclusion on the grounds that the Objector has failed to quantify the number of expressions of opposition relative to the composition of the community. In light of this, the Applicant notes that it is impossible to compare the number of expressions of opposition to the total number of entities within the community and assess what proportion of the community they represent. Response ¶¶ 9.1, 9.5, 9.6; Additional Response at 5. While the Guidebook suggests that such numbers could be a factor in my analysis, it does not require that they be, and I consider the facts discussed above (¶ 8.28) sufficient to establish the hotel community’s “substantial” opposition to the Application.
- 8.30 The Applicant likewise contends that the Objector has failed to put on sufficient evidence of the historical defence of the hotel community in other contexts and the costs it has incurred in expressing opposition. *Id.* ¶ 9.2. While the Guidebook likewise lists these as factors that could be relevant to assessing whether community opposition is “substantial”, in the context of this case, I do not find them so, as the facts discussed above (¶ 8.28) are sufficient to establish the hotel community’s “substantial” opposition to the Application. The Objector’s alleged failure to put on sufficient evidence with respect to these factors is accordingly immaterial to my decision. The Applicant also objects to the Objector’s reliance on opposition to the Application from entities that are not part of the hotel community. *Id.*

¶ 9.3. This, however, I have not relied on in reaching my decision. The Applicant also contends that the Objector has failed to put on evidence that each of its individual members objects to the Application. *Id.* ¶ 9.4. As the Objector speaks on behalf of its members, I see no basis to require such evidence. I note, however, that some of its members have in fact directly expressed opposition to the Application in their own names. *See* Objection, Annex 12; Additional Submission at 3-4.

- 8.31 This brings me to the last element the Objector must prove to succeed on its Objection – namely, that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. Broadly speaking, the Objector contends that it does for two reasons. The first has to do with concerns over cybersquatting and similar intellectual property infringements, and the second with concerns that members of the hotel community would not be able to register domain names in “.HOTELS”.
- 8.32 With respect to the Objector’s first concern, the Objector contends that “ICANN’s gTLD program and its expansion of the number of gTLDs will likely exacerbate the problems that its members have been fighting online for many years, including cybersquatting.” Objection at 9; World Intellectual Property Organization (“WIPO”) statistics dated 18 February 2013 on areas of complaint activity, Objection, Annex 10; WIPO statistics dated 27 February 2013 on decided cases, Objection, Annex 11; WIPO Administrative Panel Decision, Case No. D2009-1661, *Inter-Continental Hotels Corp. v. Kirchhof*, Objection, Annex 15.
- 8.33 The Objector understands ICANN’s commitment to expand the number of gTLDs, however, and does not object to all applications. Should ICANN decide to approve any of the ten “.HOTEL” or similar gTLD applications that have been filed, the Objector would prefer the application for “.HOTEL” that has been filed by HOTEL Top-Level-Domain SARL (“HTLDS”) because the application proposes to operate “.HOTEL” as a “closed registry limited only to [. . .] the ‘hotel community’”. Objection at 10. The Objector states that HTLDS has assured it that (1) “hotel community” is defined to exclude “any entity other than a hotel, hotel chain, or organization or association that is not formed or controlled by individual hotels or hotel chains”; (2) HTLDS staff will respond immediately to reports of infringement and immediately suspend clear violations, including typosquatting and cybersquatting; and (3) HTLDS will reach out to the Objector’s members to more fully protect their trademarks. *Id.*; *see also* new gTLDs comments dated 11 August 2012 (where

the Objector conditionally supports the application of HTLDS), Objection, Annex 4; GAC Early Warning dated 20 November 2012 from France (proposing that “.HOTELS” and similar strings be reserved to hotel businesses), Objection, Annex 20; letter dated March 2012 from International Hotel & Restaurant Association to ICANN (endorsing the application of HTLDS), Objection, Annex 21; letter dated 20 March 2012 from AH&LA to ICANN (same), Objection, Annex 22.

- 8.34 The Objector contends that, by contrast, the Applicant has taken the “preposterous position” that it “would have the right to engage in cybersquatting on the long-standing and famous hotel brands owned by Objector’s members.” Objection at 12. In support of this contention, the Objector quotes from a section of the Application that states as follows:

[The Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.

Application, Response, Annex 1 § 18(c); *see* Objection at 12.

- 8.35 With respect to the Objector’s second concern, the Objector contends that the Applicant’s Application would harm the hotel community because the Applicant proposes to operate “.HOTELS” as a “single registrant TLD”. *Id.* at 10. In this regard, the Objector points to a section of the Application that states in pertinent part as follows:

At least during the initial months or even years following the delegation of the .hotels gTLD to [the Applicant], this extension is likely going to be a so-called “single registrant TLD” [. . .]. [A] “single registrant TLD” is a TLD where (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, and (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator.

Therefore, parties who are not [the Applicant] or – insofar and the extent [the Applicant] deems appropriate – an Affiliate within the meaning of the Registry Operator Agreement will not be entitled to register domain names in the .hotels gTLD.

Response, Annex 1 § 18(c); *see* Objection at 10.

- 8.36 While single registrant TLDs may be appropriate in the case of a “dot-brand” (e.g., “.GUCCI”), the Objector contends that they are inappropriate in the case of generic words – such as “hotels” – because they would make the gTLD “unavailable for the community it should serve, to the community’s detriment.” *Id.* at 10. In other words, if the Applicant were allowed to operate “.HOTELS” as proposed, the Objector and its members would be unable to register domain names such as “sofitel.hotels” or “hyatt.hotels” or “marriott.hotels” and would therefore “be unable to conduct business in the one gTLD that is most directly related and beneficial to its business.” *Id.* at 10-11. *See also* Objection, Annex 12 (raising concerns about the Applicant’s proposal to operate “.HOTELS” as a closed gTLD); GAC Early Warnings dated 20 November 2012 from Australia and Germany (same), Objection, Annex 20. It is for this reason that such “closed” gTLDs have received critical comment. *See* letter dated 31 January 2013 from Microsoft to ICANN (raising concerns with respect to closed gTLDs), Objection, Annex 16; letter dated 15 February 2013 from Retail Council of Canada to ICANN (same), Objection, Annex 18; letter dated 25 September 2012 from Kathryn Kleiman to ICANN (same), Objection, Annex 19.
- 8.37 The Objector contends that the Applicant’s proposal to operate “.HOTELS” as a closed gTLD shows that it does not intend to act in accordance with the interests of the hotel community, but rather only in accordance with its own interests. Objection at 13. The Objector considers that such a situation would damage the reputation of the hotel community. *Id.* at 12. Specifically, the Objector alleges that the Applicant’s operation of “.HOTELS” would “directly damage Objector and its members by excluding them from the most appropriate gTLD for their community, forcing Objector and its members to incur significant additional expenses to properly inform the public about its official Internet presences.” *Id.* The Objector contends that this is especially so as the hotel community depends heavily on the DNS, as so many consumers now make their travel arrangements online. *Id.* at 13; *U.S. Consumer Online Travel Spending Surpasses \$100 Billion for First Time in 2012*, 20 February 2012, comScore.com, Objection, Annex 23; *The Evolution of Online Travel (Infographic)*, 28 February 2012, hotelmarketing.com, Objection, Annex 24; *Top 10 Hospitality Industry Trends for 2012*, 22 December 2011, hotelmarketing.com, Objection, Annex 25.
- 8.38 In light of the above, the Objector considers that it has proven that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. For the reasons set out below, I disagree.

- 8.39 Section 3.5.4 of Module 3 of the Guidebook suggests that I could use several non-exclusive factors in determining whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the hotel community. These non-exclusive factors are (1) the nature and extent of damage to the reputation of the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; (2) evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the hotel community or users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests; (3) interference with the core activities of the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; (4) dependence of the hotel community on the DNS for its core activities; (5) the nature and extent of concrete or economic damage to the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; and (6) the level of certainty that the alleged detrimental outcomes would occur. In all events, an allegation of detriment that consists only of an applicant being delegated the gTLD instead of an objector will not be sufficient for a finding of material detriment.
- 8.40 With respect to the Objector's first concern about cybersquatting and the like, there is no evidence in the record that suggests that the Applicant considers it can engage in cybersquatting at all, much less cybersquatting that would infringe the trademarks of the Objector's members. On the contrary, section 29 of the Application (Response, Annex 1) sets forth the Applicant's commitment to the protection of intellectual property rights and how it intends to implement the mandatory rights protection mechanisms contained in the Guidebook and detailed in Specification 7 of the draft New gTLD Registry Agreement – mechanisms that are specifically designed to combat cybersquatting, among other infringements.
- 8.41 Moreover, the quotation from the Application that the Objector sets forth to support its cybersquatting allegation (*supra* ¶ 8.34) is taken out of context and does not support the Objector's position. In fact, taken in context, the quotation is further evidence of the steps the Applicant would take to minimize the potential for trademark disputes with third parties regarding domain names registered in the ".HOTELS" gTLD:

[E]ven if only [the Applicant] will be entitled to register domain names, this does not exclude the hypothesis that disputes may arise with one or more third parties as regards domain names that are registered in the .hotels gTLD.

In order to avoid these risks, [the Applicant] intends to implement the following policies and processes:

First, the domain names to be registered by [the Applicant] could relate to the following:

- * registered trademarks of [the Applicant];*
- * names of affiliates and/or hotel partners of [the Applicant];*
- * names of departments within [the Applicant], and its subsidiaries;*
- * etc.*

Furthermore, [the Applicant] envisages registering a fair number of generic words that are directly or indirectly related to the day-to-day business activities and operations of [the Applicant] and its Affiliates.

Prior to effectively registering such domain names in the .hotels gTLD, [the Applicant] will require its legal department to review the list of these domain names on a regular basis in order to satisfy itself that they will not infringe the rights of third parties.

In any case, [the Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.

Response, Annex 1 § 18(c).

- 8.42 The Objector has similarly failed to prove any likely material detriment to the hotel community flowing from the Applicant’s proposal to operate “.HOTELS” as a closed gTLD. As a preliminary matter, I note that, in trying to prove material detriment, the Objector has contended that the “.HOTEL” application filed by HTLDS is preferable to other applications for identical or similar gTLDs – including the Application at issue here for “.HOTELS” – because the former will better serve the interests of the hotel community. *See supra* ¶ 8.33. A Community Objection, however, is not the avenue for determining the relative merits of different gTLD applications, and nothing in the four-part test set out in section 3.5.4 of Module 3 of the Guidebook suggests that it is. The alleged relative merits of other gTLD applications are accordingly not material to my determination of the Objection at issue here.

8.43 More importantly, since the Objector filed its Objection, Specification 11 of the draft New gTLD Registry Agreement has been revised. Specifically, paragraphs 3(c) and 3(d) of that Specification now provide in pertinent part as follows:

- (c) *Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.*
- (d) *Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” [. . .]. “Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others.*

Draft New gTLD Registry Agreement dated 2 July 2013. These provisions cast considerable doubt on whether the Applicant would be able to operate “.HOTELS” as a closed gTLD, as it has proposed. It is accordingly far from certain that the Applicant would be able to exclude members of the hotel community from registering domain names in “.HOTELS” and cause them the alleged detriment the Objector foresees.

8.44 In addition, the Objector has failed to prove any material detriment the hotel community would likely suffer in the (unlikely) event the Applicant were permitted to operate “.HOTELS” as a closed gTLD. The most the Objector has done in this regard is to allege that, if the Objector and its members cannot register domain names in “.HOTELS”, this will force the “Objector and its members to incur significant additional expenses to properly inform the public about its official Internet presences.” Objection at 12. This is insufficient to meet the Objector’s burden of proof on this issue.

8.45 In this regard, it is unclear to me why the Objector contends that the Applicant’s operating “.HOTELS” as a closed gTLD would likely cause material detriment to itself. To make out its Objection, the Objector must prove that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community, not to itself. And while the Objector serves the interests of the hotel community, it is not synonymous with that community and does not operate any hotels. It is therefore not clear why it would want to register a domain name in “.HOTELS” or how its inability to do so would cause it additional expense. I also note that, although the Objector registered the domain name “hotelconsumerprotectioncoalition.org” in 2006 (*see* Whois

output dated 6 June 2013, Additional Submission, Annex A), the Objector does not seem to use it. Moreover, users trying to access that domain name bounce to “ihg.com” – the website for IHG. *See* Response, Annex 4. In these circumstances, the Objector’s alleged desire to “properly inform the public about its official Internet presences” is far from clear.

8.46 The Objector has similarly failed to prove that the Applicant’s operating “.HOTELS” as a closed gTLD would likely cause material detriment to its members. Again, the issue is whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. However, even assuming that the Objector’s members themselves constitute a “significant portion” of the hotel community, the Objector has not even explained (much less proven) how their inability to register domain names in “.HOTELS” would cause them to incur additional expense with respect to their Internet presences. The absence of any evidence in this regard is striking, particularly as it would seem that, if anything, the opposite is true: the Objector’s members would incur additional expense if they were to expand their Internet presences by registering domain names in “.HOTELS”.

8.47 Having said this, I agree with the Objector that the Applicant’s proposal to operate “.HOTELS” as a closed gTLD indicates that it intends to act in accordance with its own interests, not those of the hotel community. But the Objector’s members and other members of the hotel community already have many avenues through the DNS to have a presence on the Internet – avenues the Objector’s members and many others in the hotel community already exploit. So while the Objector’s members and others in the hotel community might want to register domain names in “.HOTELS” if it is delegated, it is not clear what the marginal benefit of doing this would be worth to them, if anything.⁷ The Objector has simply put on no evidence of the nature or extent of any concrete or economic damage to the hotel community that would result from the Applicant’s operating “.HOTELS” as a closed gTLD.

8.48 The Objector has similarly failed to offer any evidence to support its conclusory allegation that the Applicant’s operating “.HOTELS” as a closed gTLD would damage the reputation of the hotel industry. Nor has it alleged what the nature and extent of that purported damage

⁷ In this regard, I note that the fact that the Objector would prefer that ICANN not have a new gTLD program suggests that it does not see much benefit to the hotel community in being able to register domain names in new gTLDs. *See* Objection at 9-10.

would be. Similarly, the Objector has also not alleged that the Applicant's operating ".HOTELS" as a closed gTLD would interfere with the core activities of the hotel community, even though the hotel community is increasingly dependent on the DNS.

8.49 For these reasons, I find the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the hotel community.

9. COSTS

9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).

9.2 As I have decided to dismiss the Objection, the Applicant is the prevailing party in these proceedings. The Centre shall accordingly refund to the Applicant its advance payment of costs.

10. DETERMINATION

- 10.1 For the reasons set out above, the Expert makes the following determination:
- 10.2 The Objection is dismissed and the Applicant accordingly prevails;
- 10.3 The Centre shall refund to the Applicant its advance payment of costs.

Date: 19 November 2013



Jennifer Kirby
Expert

Reference Material 25.

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/430/ICANN/47

TELECOMMUNICATIONS REGULATORY AUTHORITY OF THE UNITED ARAB
EMIRATES

(UAE)

vs/

ASIA GREEN IT SYSTEM BILGISAYAR SAN. VE TIC. TLD. STI.

(TURKEY)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**INTERNATIONAL CENTRE FOR EXPERTISE
OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE NO. EXP/430/ICANN/47

TELECOMMUNICATIONS REGULATORY AUTHORITY
OF THE UNITED ARAB EMIRATES
(UNITED ARAB EMIRATES)

OBJECTOR

v.

ASIA GREEN IT SYSTEM BILGISAYAR
SAN. VE TIC. LTD. STI.
(REPUBLIC OF TURKEY)

RESPONDENT

**EXPERT DETERMINATION BY
BERNARDO M. CREMADES
OCTOBER 24, 2013**

Parties' Representatives:

Telecommunications Regulatory Authority of the
United Arab Emirates

*Talal Abu Ghazaleh Legal Member to Talal Abu
Ghazaleh Organization*
Mr. Badr El-Dein Abdel Khalek
Contact Information Redacted

Asia Green IT System Bilgisayar San. ve Tic. Ltd.
Sti.

Rodenbaugh Law
Mr. Mike Rodenbaugh
Contact
Information
Redacted

TABLE OF CONTENTS

	Page #
I. THE PARTIES AND THE EXPERT	1
A. Objector.....	1
B. Respondent.....	2
C. Expert	2
II. APPLIED-FOR GTLD	3
III. PROCEDURAL MATTERS	3
IV. OBJECTOR’S STANDING	5
A. Objector’s Position	5
B. Respondent’s Position	6
C. Expert’s Conclusion	8
(a) Standard.....	8
(b) Analysis.....	9
V. SUBSTANCE OF THE OBJECTION.....	13
A. Standard.....	13
B. Is the Community Invoked by the Objector Clearly Defined?	14
(a) Objector’s Position	14
(b) Respondent’s Position	15
(c) Expert’s Conclusion	15
C. Is the Community Opposition to the Application Substantial?	17
(a) Objector’s Position	17
(b) Respondent’s Position	20
(c) Expert’s Conclusion	23
D. Is there a Strong Association between the Applied-for gTLD and the Community Represented by the Objector?	29
(a) Objector’s Position	29
(b) Respondent’s Position	30
(c) Expert’s Conclusion	31
E. Does the Application Create a Likelihood of Material Detriment?	33
(a) Objector’s Position	33
(b) Respondent’s Position	34
(c) Expert’s Conclusion	35
VI. COSTS	40
VII. SUMMARY OF FINDINGS	40
VIII. DECISION	40

LIST OF ABBREVIATIONS

Term	Meaning
Appendix III	Means Appendix III to the Rules for Expertise of the International Chamber of Commerce, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
Applicant	Means Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.
Centre	Means the International Centre for Expertise of the International Chamber of Commerce
DNS	Means Domain Name System
Expert	Means Bernardo M. Cremades
Expert Determination	Means this expert determination rendered on October 24, 2013
gTLD	Means generic top level domain
Guidebook	Means the gTLD Applicant Guidebook
ICANN	Means Internet Corporation for Assigned Names & Numbers
ICC	Means International Chamber of Commerce
ICC Practice Note	Means the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
ICCIA	Means Islamic Chamber of Commerce, Industry and Agriculture
ICRIC	Means Islamic Chamber Research and Information Center
Objection	Means the community objection filed by the Objector against Respondent's application for the String on March 13, 2013
Objector	Means the Telecommunications Regulatory Authority of the United Arab Emirates
OIC	Means the Organization of Islamic Cooperation
OIC's Letter	Means the letter from the OIC dated January 29, 2013 (attached as Annex 1 to the Objection in English and as Annex 10 to the Reply in both Arabic and French)
Procedure	Means the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure
Rejoinder	Means the rejoinder to the Reply filed by the Respondent on August 12, 2013

Reply	Means the reply to the Response filed by the Objector on August 1, 2013
Respondent	Means Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.
Response	Means the response to the Objection filed by the Respondent on May 15, 2013
Rules	Means the Rules for Expertise of the International Chamber of Commerce
String	Means the applied-for gTLD “.ISLAM” by the Applicant (Application No. 1-2130-23450)
Telecom Law	Means the UEA’s Federal Law by Decree No. 3 of 2003
UAE	Means the United Arab Emirates

1. This expert determination (the “**Expert Determination**”) is issued under the Rules for Expertise of the International Chamber of Commerce (the “**Rules**”), supplemented by the ICC Practice Note on the Administration of Cases (the “**ICC Practice Note**”), and under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (the “**Procedure**”) of the gTLD Applicant Guidebook (the “**Guidebook**”).

I. THE PARTIES AND THE EXPERT

A. Objector

2. The Objector is:

Name	Telecommunications Regulatory Authority of the United Arab Emirates
Contact person	Mr. Abdulrahman Almarzouqi
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

3. The Objector is represented herein by:

Name	Talal Abu Ghazaleh Legal Member to Talal Abu Ghazaleh Organization
Contact person	Mr. Badr El-Dein Abdel Khalek
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

4. The Objector has appointed its legal representative to receive all communications and notifications in the present proceeding.

B. Respondent

5. The Respondent (also referred to as the Applicant) is:

Name	Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.
Contact person	Mr. Mehdi Abbasnia
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

6. The Respondent is represented herein by:

Name	Rodenbaugh Law
Contact person	Mr. Mike Rodenbaugh
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

7. The Respondent has appointed its legal representative to receive all communications and notifications in the present proceeding.

C. Expert

8. The Expert is:

Name	Mr. Bernardo M. Cremades
Firm	B. Cremades & Asociados
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

II. APPLIED-FOR GTLD

9. The applied-for generic top level domain (“**gTLD**”) is “.ISLAM” (the “**String**”).

III. PROCEDURAL MATTERS

10. On March 13, 2013, the Objector filed a community objection against Respondent’s application for the String in accordance with Article 3.2.1 of the Guidebook and Article 2 of the Procedure (the “**Objection**”).¹

11. According to Article 3.2.1 of the Guidebook, a community objection is filed when “[t]here is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted”.

12. Prior to filing the Objection, the Respondent had secured funding from the Internet Corporation for Assigned Names & Numbers (“**ICANN**”) to cover the objection filing fees and the advance payment costs payable to the International Centre for Expertise of the International Chamber of Commerce (the “**Centre**”).²

13. On May 15, 2013, the Respondent filed a response disputing “both standing and grounds for the Objection” and “pray[ed] that it be dismissed” (the “**Response**”).³

14. On June 12, 2013, the Chair of the Standing Committee of the Centre appointed Mr. Bernardo M. Cremades as Expert in accordance with Article 7 and Article 3(3) Appendix I of the Rules. On July 17, 2013, the Centre transferred the file to the Expert and confirmed in writing that: (i) the estimated costs had been paid in full by each Party; and (ii) the full constitution of the Expert Panel had taken effect as of that same day.⁴

15. On July 18, 2013, the Expert issued Procedural Order No.1 directing both Parties to submit their views on certain procedural matters. The Parties replied on July 22, 2013. On July 23, 2013, the Expert issued Procedural Order No. 2 directing the Parties to submit additional evidence and allegations on very limited matters (Articles 17(a) and 18 *in fine* of the Procedure). The Expert also found that no hearing was necessary in this

¹ Objection, p. 3.

² Email from ICANN to Mr. Abdulrahman Almarzouqi, dated March 12, 2013.

³ Response, p. 4.

⁴ Letter from the Centre to the Parties and Expert, dated July 17, 2013.

proceeding (Article 19 of the Procedure) and that the Expert Determination should be published in full (Article 21(g) of the Procedure).

16. On August 1, 2013, the Objector filed its reply memorial together with the additional evidence requested by the Expert (the “**Reply**”). On August 12, 2013, the Respondent filed its second memorial, together with the supporting evidence, in response to the Reply (the “**Rejoinder**”).

17. In the Rejoinder, the Respondent requested the Expert to disregard the section “Further points raised in the response” of the Reply because, in its opinion, it was outside the scope of Procedural Order No. 2.⁵ Alternatively, the Respondent requested additional time to reply to the new allegations of the Objector.⁶ On August 20, 2013, the Expert invited the Objector to comment on the Respondent’s request. The Objector submitted its comment on August 21, 2013. On August 22, 2013, the Expert issued Procedural Order No. 3 and refused to accept the section “Further points raised in the response” of the Reply. In the Expert’s opinion, the Objector did not sufficiently justify the reasons to disobey the Expert’s instructions contained in Procedural Order No. 2. For this reason, such portion of the Reply will not be taken into consideration by the Expert to render the Expert Determination. However, as will be seen below, the Expert’s reasoning would not be affected by such disregarded allegations.

18. In accordance with Articles 5(a) and 6(a) of the Procedure, as well as Articles 3.3.1 and 3.3.3 of the Guidebook, all of the Parties’ communications were submitted electronically in English, which is the official language of this proceeding. The Expert notes, however, that Annex 9 to the Response and Annex 3 to the Rejoinder contain portions in languages other than English. Likewise, the Objector filed with the Reply the Arabic and French versions of Annex 1 to the Objection. In all cases, the Expert does not consider it necessary to provide certified or official translations pursuant to Article 5(b) of the Procedure.

19. For all purposes, the place of the proceedings is Paris (France), where the Centre is located (Article 4(d) of the Procedure).

⁵ Rejoinder, p. 1.

⁶ *Id.*

IV. OBJECTOR'S STANDING

20. In this section, the Expert will summarize the Parties' positions as to the Objector's standing to file the Objection. Thereafter, the Expert will draw his conclusions in this regard.

A. Objector's Position

21. As described in section I.A above, the Objector is the Telecommunications Regulatory Authority of the United Arab Emirates ("**UAE**"), which claims to be a governmental agency representing both the people and Government of said country.⁷ The Objector asserts that it is acting following an "invitation" of the Organization of Islamic Cooperation ("**OIC**"), of which the UAE is member, to file the Objection that triggered the present proceeding.⁸ Such "invitation" was furnished by the Objector in English as Annex 1 to the Objection and in both Arabic and French as Annex 10 to the Reply (collectively, "**OIC's Letter**"). The English version of the OIC's Letter provides in its relevant portion as follows:

[T]he OIC would like to draw the attention to the fact that new applications were already submitted for new gTLDs and these new applications are being evaluated according to the consensus-based mechanism determined by ICANN. The period for submitting any objections, if any, has been expanded until 13th March 2013 for any group and/or community that holds objection on religious or ethical values. The OIC Member States may kindly like to avail of this opportunity to act quickly through their representation in the organs of the ICANN, to avoid any misuse and misrepresentation of gTLDs of concern to them, including the ones like .ISLAM or .HALAL.⁹

22. Together with the Reply, the Objector submitted a draft resolution of the OIC and letters of support from governmental agencies of Bahrain, Qatar, Kuwait, Egypt, Oman

⁷ Objection, p. 4.

⁸ *Id.*

⁹ Annex 1 to the Objection, p. 1.

Turkey and Malaysia, as well as from the Gulf Cooperation Council.¹⁰ For these reasons, the Objector claims to represent a substantial portion of the Muslim community.

23. The Objector was incorporated by Federal Law by Decree No. 3 of 2003 (the “**Telecom Law**”).¹¹ The Objector argues that, since its inception, it has been charged with a “wide range of responsibilities related to the Telecommunications and Information Technology Sector, both within and outside the UAE.”¹² The Objector lists a number of its “functions and powers” – none of which relate to religious or public policy matters – but fails to provide documental support.¹³ The Expert notes, however, that such functions and powers are contained in Article 13 of the Telecom Law.

24. In light of the foregoing, the Objector claims to be “an established institution associated with the Arabian and Islamic UAE community having an institutional purpose related to the benefit of the community”.¹⁴

25. For the Objector, because the Respondent allegedly gained neither the support of the Muslim Community nor of the OIC, it lacks legitimacy to register the String.¹⁵ The Objector concludes by stating that, since religious matters are very sensitive, the Respondent – a commercial entity – should not be authorized to register or control a new gTLD of a religious nature.¹⁶

B. Respondent’s Position

26. The Respondent takes the opposite view regarding the Objector’s standing to file the Objection. First, the Respondent sustains that the Objector is the regulatory authority of just one Islamic country – namely, the UAE – which “demonstrates no

¹⁰ Reply, p. 1. See also Annexes 1-9 to the Reply.

¹¹ Objection, p. 4 (*citing* Federal Law by Decree No. 3 of 2003). The Expert notes that the Objector has not provided an electronic copy of the Telecom Law. However, the Expert has been able to obtain a copy of the Telecom Law by following a link included in the Objection (p. 4). The incorporation of the Objector is set forth in Chapter 3 (Part 1) of the Telecom Law under the official name “General Authority for Regulating the Telecommunication Sector”.

¹² Objection, p. 4.

¹³ *Id.*, p. 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

relevance to the global Muslim population”.¹⁷ The Respondent adds that the Objector merely provides a domestic technical function within the UAE and that, far from defending a community interest, is pursuing its own commercial interest.¹⁸

27. Second, the Respondent advances an argument based on Article 3.2.2.4 of the Guidebook,¹⁹ which provides in the part quoted by Respondent as follows:

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.

28. For the Respondent, the Objector has “no association whatsoever with any Muslim community, other than it is one of 57 member states of the [OIC]”.²⁰ Furthermore, the Respondent criticizes the Objector for grasping support from OIC’s Letter, specifically because such letter does not contain an invitation from the OIC to its members to file an objection (but is rather a simple instruction to review ICANN’s new gTLD program and act if necessary).²¹

29. Third, the Respondent points out that the OIC did not file an objection itself and that only the regulatory authority of one of its members (of a total of 57) filed an objection. Accordingly, for the Respondent, this represents no “semblance of the global Muslim community” and thus the Objector lacks standing.²² Had there been substantial opposition, either the OIC itself or a significant number of States would have filed an objection.

30. Fourth, the Respondent asserts that all the functions and powers mentioned by the Objector are circumscribed to the territory of the UAE and that, in any case, they are of technical nature without relationship whatsoever to the global community of Muslim

¹⁷ Response, p. 4.

¹⁸ *Id.* See also *id.*, p. 6.

¹⁹ *Id.*, p. 4.

²⁰ *Id.*

²¹ *Id.*, p. 5.

²² *Id.*

individuals.²³ The Respondent adds that, even if the Objector were to have governmental authority within the UAE, it would only represent a small percentage (*i.e.*, 0.01%) of the Muslims of the world as of 2009.²⁴ In addition, the Respondent notes that the OIC did not entrust the Objector to act on its behalf or in the name of any other of its remaining 56 members.²⁵ For this reason, in the Respondent’s opinion, the Objector only “purport[s] to represent less than 2% of the OIC’s collective weight”, which does not amount to a representation of the “global Muslim community to which the .Islam TLD will be targeted”.²⁶

31. Finally, the Respondent argues that one of the OIC’s most relevant affiliates – the Islamic Chamber Research and Information Center (“**ICRIC**”) – has endorsed Respondent’s application to register the String, which would support its argument that the Objector is not backed by the OIC, that the Objector does not represent any greater Muslim community than the UAE and, in sum, that it lacks standing overall.²⁷

C. Expert’s Conclusion

(a) Standard

32. Article 3.2.2.4 of the Guidebook provides guidance on who may file a community objection. As the Respondent has correctly quoted in its Response, such article provides in its very first paragraph as follows:

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. . . .²⁸

33. The Guidebook provides some explanation regarding the main requirements set forth in the quoted passage. In this regard, the Guidebook states that, “[t]o qualify for standing for a community objection, the objector must prove both of the following”, which

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, pp. 5-6.

²⁸ Guidebook, Article 3.2.2.4 (emphasis added).

makes abundantly clear that the two requirements that follow must be met.²⁹ These two requirements are: (i) the objector must be an “established institution”; and (ii) the objector must have “an ongoing relationship with a clearly delineated community”.³⁰ Each of them will be analyzed separately below.

34. For each requirement, the Guidebook lists some “factors” to steer the Expert’s judgment. As a threshold matter, the Expert will analyze the value of the “factors” outlined in Article 3.2.2.4 of the Guidebook. In this regard, the Guidebook states that the “[f]actors that may be considered [by the Expert] in making its determination include, but are not limited to. . . .” The use of the optional term “may” instead of any other mandatory term clearly implies that the Expert has absolute discretion to apply or not the factors expressly included in the Guidebook. In addition, the final portion of the quoted passage – “but are not limited to” – opens the door to other factors not expressly listed in the Guidebook. This conclusion is also supported by the last paragraph of Article 3.2.2.4 of the Guidebook, which states that the Expert “will perform a balancing of the factors listed above, as well as other relevant information, in making its determination”.³¹ The reference to “other relevant information” eliminates any doubt as to the orientative nature of the factors contained in the Guidebook.

35. All the above is consistent with the last phrase of Article 3.2.2.4 of the Guidebook, which provides that “[i]t is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements”.

(b) Analysis

36. As advanced, according to Article 3.2.2.4 of the Guidebook, only “[e]stablished institutions associated with clearly delineated communities are eligible to file a community objection”.

37. In relation to the question of whether the Objector is an established institution, the Expert will take into consideration several factors. First, the orientative factors outlined

²⁹ *Id.* (emphasis added).

³⁰ *Id.*

³¹ Emphasis added.

in Article 3.2.2.4 of the Guidebook include “validation by a government” of the objector. In this case, the Objector was incorporated under Article 6 of the Telecom Law, which states as follows:

It is hereby established an independent public authority, called the “General Authority for Regulating the Telecommunication Sector” for the purpose of performing the functions and implementing the duties given to it under this Federal Law by Decree and its Executive Order.³²

38. Furthermore, it is worthwhile noting that the Telecom Law was signed by Mr. Zayed bin Sultan Al Nahyan, the UAE’s President at the time.³³

39. According to the Telecom Law, the Objector “shall have an independent legal personality and shall have full capacity to act accordingly and to perform legal actions in accordance with this Federal Law by Decree, including the capacity to enter into contracts of all types and to own and lease movable and immovable assets of all types and the capacity to sue”.³⁴ Therefore, the Objector has an independent legal personality under UAE’s law and the capacity to sue, which most certainly includes the capacity to file the Objection.

40. Second, the Telecom Law was enacted in 2003, which is almost a decade ago. In the Expert’s view, this period of time is sufficient to consolidate a governmental agency. More importantly, this evidences that the Objector was not “established solely in conjunction with the gTLD application process”.³⁵

41. For the foregoing reasons, the Expert finds that the Objector is an established institution for the purposes of filing the Objection.

42. The Expert will now turn to analyze whether the Objector is “associated with clearly delineated communities” or, in other words, whether it “has an ongoing relationship with a clearly delineated community”, such as the Muslim community.³⁶ The Expert notes

³² Telecom Law, Article 6.

³³ *Id.*, p. 34.

³⁴ *Id.*, Article 7.

³⁵ Guidebook, Article 3.2.2.4.

³⁶ *Id.*

that, as opposed to Article 3.5.4 of the Guidebook, the word association in Article 3.2.2.4 is not preceded by the adjective “strong”.³⁷ As a consequence, in the Expert’s opinion, the threshold is lower for the purposes of Article 3.2.2.4 than for Article 3.5.4 of the Guidebook.

43. The question of whether the Muslim community is “clearly delineated” will be dealt with in section V.B below. For the time being and for the sake of argument, the Expert will assume that it is a clearly delineated community, an assumption that will be confirmed below (see ¶¶ 62-67 below).

44. Each Party places a great deal of emphasis on its association or relationship with the relevant community. In a few words, the Objector claims to represent a number of Muslim countries and to have been invited by the OIC to file the Objection whereas the Respondent sustains that the Objector is acting solely on behalf of the Muslims of the UAE and that, on the contrary, the Respondent’s position is the one endorsed by the OIC though one of its affiliates (*i.e.*, ICRIC). Additionally, the Respondent asserts that the Objector provides domestic technical functions with no relevance whatsoever to the relevant community.

45. In the Expert’s view, the threshold requires a “relationship” or an “association” with a clearly delineated community but does not require an objector – for the purpose of establishing standing – to represent a substantial portion, not to mention the majority, of the members of such community. Therefore, the discussion regarding whether the Objector represents a wider Muslim community than the one circumscribed to the UAE is irrelevant for the purpose of analyzing the Objector’s standing. The important question is whether the “relationship” or “association” between the Objector and UAE’s Muslim community in fact exists.

46. A few issues should be taken into consideration. First, under public international law, the government of a nation is entitled to represent the interests of its constituents. Second, it has been established that the Objector is a governmental entity with certain functions and powers.³⁸ Among these functions and powers, the Objector has

³⁷ According to Article 3.5.4 of the Guidebook, there should be “a strong association between the community invoked and the applied-for gTLD string”. Emphasis added.

³⁸ See ¶¶ 37-41, *supra*. See also Telecom Law, Article 13.

been charged with registering and managing the UAE's country code top-level domains (ccTLD).³⁹ For these reasons, the Objector is undoubtedly a relevant governmental agency to represent the people of the UAE in proceedings dealing with the registration of domain names, including the String.

47. Indeed, the Objector provides services to the people of the UAE, a country with a population of 4.7 million (as of 2010).⁴⁰ There is no doubt that the UAE is a Muslim country. This is evidenced by its membership to the OIC and Article 7 of the UAE's Constitution:

Islam is the official religion of the Union. The Islamic Shari'ah shall be a main source of legislation in the Union. The official language of the Union is Arabic.⁴¹

48. The telecommunication services provided by the Objector in the UAE certainly benefit the people of the UAE, including its Muslim community. For this reason, the Expert is of the view that there is a relationship with the Muslim community. As a result, in the Expert's opinion, two of the factors listed in the relevant subsection of Article 3.2.2.4 of the Guidebook are satisfied:

- "Institutional purpose related to the benefit of the associated community"; and
- "Performance of regular activities that benefit the associated community".

49. In addition, the Expert is convinced that the Objector takes a leadership role in matters related to domain names within the territory of the UAE, which is part of another factor listed in the same subsection of the Guidebook.⁴² Hence, the Expert finds that three out of four factors of the relevant subsection of Article 3.2.2.4 of the Guidebook favor the Objector's position.

³⁹ Annex 1 to the Response.

⁴⁰ Annex 3 to the Response.

⁴¹ See Constitution of the UAE at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=category&category=LEGAL&publisher=&type=&coi=ARE&docid=48eca8132&skip=0>. See also Annex 4 to the Response (map showing demographics of Islam at p. 19) and Annex 1 to the Rejoinder.

⁴² Guidebook, Article 3.2.2.4 ("The presence of mechanisms for participation in activities, membership, and leadership").

50. In sum, in the Expert's view, the Objector can be considered an established institution with an ongoing relationship with the Muslim community in the UAE. In section V.B below, the Expert will analyze whether the relevant community is "clearly delineated" for the purpose of this community objection.

V. SUBSTANCE OF THE OBJECTION

51. In this section, the Expert will consider the substance of the Objector's community objection. First, the Expert will set the applicable standard. Thereafter, the Expert will analyze the Parties' submissions point by point and will reach a number of conclusions.

A. Standard

52. Article 3.5.4 of the Guidebook establishes the four tests that enable the Expert to "determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted". Article 3.5.4 expresses the four tests as follows:

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.⁴³

53. The Expert notes that each one of the four tests transcribed is separated by the term "and", which implies that each one of them must be met in order to sustain an objection. This is further confirmed by the last sentence of Article 3.5.4 of the Guidebook, which states that "[t]he objector must meet all four tests in the standard for the objection to

⁴³ *Id.*, Article 3.5.4 (emphasis added).

prevail”. This leaves no room for interpretation and evidences the high threshold that a community objection must satisfy.

54. The Expert observes that the Guidebook provides some explanation of the above-transcribed four tests. For each test, the Guidebook lists some “factors” to steer the Expert’s judgment. However, as with the factors relating to the standing discussed in ¶¶ 34-35 above, the language of the factors relating to each of the four tests is open. In particular, all factors set forth in Article 3.5.4 of the Guidebook are introduced with an optional language, such as “a panel could balance a number of factors to determine this” or “[f]actors that could be balanced by a panel to determine this include”. Once again, this proves the mere orientative nature of these factors.

55. Additionally, in all instances the Guidebook mentions that the factors included therein are not exhaustive (*i.e.*, the Guidebook uses language in the fashion of “including but limited to” or “include but are not limited to”). Therefore, the Expert may weigh other factors if considered appropriate.

B. Is the Community Invoked by the Objector Clearly Defined?

(a) Objector’s Position

56. The Objector sustains that the “notion of ‘community’ is wide and broad, and is not precisely defined by ICANN’s guidebook for the new gTLD program”.⁴⁴ For the Objector, such notion “can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community”.⁴⁵ In short, the Objector argues that a “community is a group of individuals who have something in common . . . or share common values. . . .”⁴⁶

57. Hence, the notion of community includes the world’s total number of Muslims, which the Objector claims to be 1.4 to 1.6 billion people.⁴⁷ For the Objector, these Muslims

⁴⁴ Objection, p. 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

are adherent to Islam and share common religious values and interests.⁴⁸ As a result, they form a clearly delineated community.

(b) Respondent’s Position

58. The Respondent’s argument begins with the following caveat:

While Applicant would concede that the .Islam TLD is targeted generally to Muslim individuals throughout the globe, it will prove that there is no delineated community of global Muslims, there is no substantial opposition to the applications, and there is no likelihood of material detriment to anyone.⁴⁹

59. The Respondent quotes the factors set forth in Article 3.5.4 of the Guidebook (“Community” subsection) to support the position that “[t]here are no formal boundaries around who can claim faith in Islam” and adds that “Islam is a religion open to anyone”.⁵⁰

60. The Respondent then draws a distinction between Catholicism and Islam in an attempt to evidence that there is no global hierarchy in Islam, mainly because there are different branches of Islam.⁵¹ Additionally, the Respondent points out that nobody “can claim to speak for all Muslims, or even a majority of them, particularly on such a topic as new gTLD applications”.⁵²

61. For these reasons, the Respondent concludes that the global Muslim community is not “clearly delineated”.⁵³

(c) Expert’s Conclusion

62. The subsection of Article 3.5.4 of the Guidebook regulating the issue at bar provides that “[t]he objector must prove that the community expressing opposition can be regarded as a clearly delineated community”. The same subsection expresses that “[i]f opposition by a number of people/entities is found, but the group represented by the

⁴⁸ *Id.*

⁴⁹ Response, p. 7.

⁵⁰ *Id.*

⁵¹ *Id.*, pp. 7-8.

⁵² *Id.*, p. 8.

⁵³ *Id.*

objector is not determined to be a clearly delineated community, the objection will fail". Therefore, the threshold for this test is not whether a great number of people or entities oppose, as the Objector appears to suggest, but rather whether the community may in fact be clearly delineated.

63. Both the Objector and the Respondent concede that the world's total population of Muslims is around 1.6 billion.⁵⁴ This figure is confirmed by the Wikipedia articles submitted by Respondent.⁵⁵

64. The Expert finds that Muslims in general – regardless of the different branches of Islam – form a large group of individuals which share at least certain core values. Support for this consensus is found in a document submitted by Respondent, which evidences that all Muslims share at least the Five Pillars of Islam:

The Pillars of Islam (*arkan al-Islam*; also *arkan ad-din*, "pillars of religion") are five basic acts in Islam, considered obligatory for all believers. The Quran presents them as a framework for worship and a sign of commitment to the faith. They are (1) the shahadah (creed), (2) daily prayers (salat), (3) almsgiving (zakah), (4) fasting during Ramadan and (5) the pilgrimage to Mecca (hajj) at least once in a lifetime. The Shia and Sunni sects both agree on the essential details for the performance of these acts.⁵⁶

65. The Respondent agrees with the Expert in this regard, as evidenced in its application for the String ("[Muslims] are a disparate group, yet they are united through their core belief").⁵⁷ For this reason, the Respondent expressly recognized that the String will be "targeted" to the "the global Muslim community".⁵⁸ Therefore, even the Respondent

⁵⁴ Objection, p. 6 ("All over the world there are approximately 50 countries having Muslim-majority. With over 1.4 to 1.6 billion followers amounting to approximately 25% of the earth's population, Islam is the second-largest and one of the fastest-growing religions in the world."); Response, p. 5 ("Whereas there were an estimated 1.57 billion Muslims in the world as of 2009. (Annex 4, Wikipedia article, p. 19.)").

⁵⁵ Annex 4 to the Response, p. 1; Annex 1 to the Rejoinder, p. 1.

⁵⁶ Annex 4 to the Response, p. 6 (emphasis added, footnotes omitted).

⁵⁷ Annex 13 to the Response, section 18(a). The Respondent further develops this point by expressly recognizing the following: "Religious concepts and practices include the five pillars of Islam, which are basic concepts and obligatory acts of worship, and following Islamic law, which touches on virtually every aspect of life and society, providing guidance on multifarious topics from banking and welfare, to warfare and the environment". *Id.*

⁵⁸ Response, p. 5.

acknowledges that the String will affect the Muslim community exclusively. On its part, the Objector has also recognized that all branches of Islam share certain common beliefs.⁵⁹

66. In view of the above, the Expert has no hesitation in finding that all Muslims, regardless of the branch of their faith, form a large, clearly delineated community of approximately 1.6 billion people. As a result, the Expert concludes that the community invoked by the Objector is clearly delineated.

67. As a final check, the above discussion supports the conclusion that all factors included in Article 3.5.4 of Guidebook (“Community” subsection) are fulfilled:

Factor	Compliance with Factor
The level of public recognition of the group as a community at a local and/or global level.	Yes. Islam enjoys global recognition and is the second-largest religion in the world. ⁶⁰
The level of formal boundaries around the community and what persons or entities are considered to form the community.	Yes. Although there are different branches of Islam, all branches share the same core principles. ⁶¹
The length of time the community has been in existence.	Yes. Islam was founded around approximately 1400 years ago. ⁶²
The global distribution of the community (this may not apply if the community is territorial).	Yes. Islam is widespread across the world, with special emphasis in certain areas of the globe. ⁶³
The number of people or entities that make up the community.	Yes. The community is formed of approximately 1.6 billion individuals. ⁶⁴

C. Is the Community Opposition to the Application Substantial?

(a) Objector’s Position

68. The Objector sustains that “[a] substantial portion of the Muslim community is opposing the string .Islam”.⁶⁵ Without providing documentary evidence in the Objection, the

⁵⁹ Reply, p. 1 (“Though all the Islamic groups share main common beliefs such as the reality of one God (Allah) and the existence of angels of Allah ... etc.”).

⁶⁰ Annex 4 to the Response, p. 1.

⁶¹ *Id.*, p. 6.

⁶² See Annex 4 to the Response, p. 11; Annex 13 to the Response, section 18(a).

⁶³ Annex 4 to the Response, p. 19.

⁶⁴ *Id.*, p. 1; Annex 1 to the Rejoinder, p. 1.

Objector mentions that most of the one hundred comments regarding Respondent's application for the String are against its registration.⁶⁶ In addition, the Objector states that there have been early warnings from the UAE and India, together with expressions of concern by the Communications and Information Technology Commission (CITC) of the Kingdom of Saudi Arabia.⁶⁷ The Objector does not provide any evidence in support of such allegations.

69. Furthermore, as mentioned earlier, the Objector submitted together with the Reply letters of support from governmental agencies of Bahrain, Qatar, Kuwait, Egypt, Oman, Turkey and Malaysia, as well as from the Gulf Cooperation Council.⁶⁸

70. The Objector also claims to have the support of the OIC. In this regard, the Objector heavily relies on the OIC's Letter, which claims to be an "invitation" from the OIC urging all its members to oppose and act against the registration of the String.⁶⁹ For the Objector, the OIC "is the collective voice of the Muslim world and ensur[es] to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world".⁷⁰

71. In addition, the Objector submitted with the Reply a draft resolution of the OIC (to be voted in November 2013) pursuant to which the OIC will presumably oppose the registration of the String by the Respondent.⁷¹

72. Per the Expert's request in Procedural Orders No. 1 and 2, the Objector explained in the Reply the relation between the OIC and both ICRIC and HalaWorld (because, as discussed below, the Respondent claims that the latter two institutions support its position). As to ICRIC, the Objector sustains that "no 'subsidiary' or even 'affiliation' relation ever existed between OIC and ICRIC".⁷² The Objector mentions that

⁶⁵ Objection, p. 6 (emphasis omitted).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Reply, p. 1. See also Annexes 1-8 to the Reply.

⁶⁹ Objection, pp. 4, 6. As noted, this "invitation" has been provided as Annex 1 to the Objection (in English) and as Annex 10 to the Rejoinder (in both French and Arabic).

⁷⁰ Objection, p. 4.

⁷¹ Annex 9 to the Reply.

⁷² Reply, p. 1.

ICRIC neither appears listed as a subsidiary or affiliate of the OIC in the latter's official website nor is there a link to ICRIC included in the section "OIC Organs and Institutions" of such webpage.⁷³ Further, the Objector sustains that ICRIC's website does not introduce the organization as an affiliate of the OIC, but rather merely mentions that ICRIC was "established through a Memorandum of Understanding between [the Islamic Chamber of Commerce, Industry and Agriculture (ICCIA)] and the Iran Chamber of Commerce, Industries and Mines. . . ."⁷⁴ The Objector recognizes that ICCIA "is an affiliate organ of the OIC and represents the private sector of 57 member countries".⁷⁵ For the Objector, the fact that ICRIC was established through a Memorandum of Understanding between an affiliate of the OIC and a national chamber of commerce does not make ICRIC an affiliate of OIC and does not place ICRIC under OIC's umbrella.⁷⁶ On the contrary, for the Objector, ICRIC is an organization closely related to Iran.⁷⁷

73. For the Objector, after analyzing the Charter of the OIC, unless OIC's Islamic Summit or the Council of Foreign Ministers recognize ICRIC as an affiliate or member of the OIC family, the Respondent cannot claim such relation.⁷⁸ For the Objector, the same is true for HalalWorld.

74. As to HalalWorld, the Objector points out that it has not provided its support for the registration of the String (HalalWorld has only supported the string ".Halal").⁷⁹ The Objector sustains that HalalWorld is nothing more than an affiliate of ICRIC with no connection with OIC.⁸⁰ For the Objector, neither the OIC nor the Islamic countries have entrusted HalalWorld with the task of issuing Halal certifications.⁸¹ Instead, there are many

⁷³ *Id.* See Annexes 10-12 to the Reply.

⁷⁴ Reply, p. 1 (emphasis omitted). See Annex 14 to the Reply. ICCA was formerly known as "ICCI". Both Parties agree on this point. See Reply p. 2 and Rejoinder, p. 2.

⁷⁵ Reply, p. 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*, pp. 1-2. The Objector supports this statement on Articles 23 and 25 of the Charter of the OIC. See Annex 5 to the Response, Articles 23, 25.

⁷⁹ Reply, p. 2.

⁸⁰ *Id.*

⁸¹ *Id.* See Annex 17 to the Reply.

Halal certification bodies and the requirements for Halal food labeling vary from one country to another (which may differ from HalalWorld's standards).⁸²

75. For these reasons, the Objector claims to represent a substantial portion of the relevant community.

(b) Respondent's Position

76. The Respondent, on its part, relies on the language of the Guidebook to support its position.⁸³ First, the Respondent alleges to have presented "voluminous evidence and documented support from many community leaders and leadership organizations", as well as a letter from the Ministry of ICT of Iran (Information Technology Organization), in support of its application for the String.⁸⁴ These documents have been provided as Annexes 6 through 9 to the Response and Annexes 2 through 4 to the Rejoinder. The Respondent argues that support for its application generally comes from the following categories of entities:

1. Major Organizations / Associations / Leaders representing Muslim populations throughout the world -- from Belarus to Brazil, such as the ICRIC, HalaWorld, The Management Center for Islamic Schools of Thought, the ECO Cultural Institute, and Dr. Mahatir Bin Mohamed.
2. Islamic Institutes / NGOs in Muslim Countries -- some 17 of them, such as Islamic Unity Magazine, and The Association of Development, Promotion, Production and Trade of Halal, and Brasil Halal Foods.
3. Famous Muslim Researchers / Academic people -- three well-respected academics.
4. Newspapers / Media / Publications -- eleven different popular media outlets.⁸⁵

77. Among the letters of support, the Respondent argues that the most relevant entity within the OIC -- ICRIC -- has fully endorsed the Respondent's new gTLD

⁸² Reply, p. 2.

⁸³ Response, p. 8.

⁸⁴ *Id.*; Annex 4 to the Rejoinder.

⁸⁵ Response, p. 6.

application.⁸⁶ In this regard, the Respondent has furnished a letter of support to its application signed by ICRIC's Director General.⁸⁷ Therefore, "by logical extension, the [Objector] effectively admits that a majority of the global Muslim community supports the Applicant".⁸⁸ In addition, the Respondent claims to have furnished a positive letter from HalalWorld, a widespread Halal certification body operated by ICRIC.⁸⁹

78. Pursuant to the Expert's instructions in Procedural Orders No. 1 and 2, the Respondent further explained in the Rejoinder the relation between the OIC and both ICRIC and HalalWorld. The Respondent places emphasis on the fact that ICRIC was established via a Memorandum of Understanding between ICCIA – an affiliate of OIC – and a local chamber of commerce in order to evidence ICRIC's affiliation with the OIC.⁹⁰ In addition, the Respondent points out that ICCIA's Secretary General is a Vice Chairman of ICRIC and that ICRIC's Board Members are appointed by ICCIA.⁹¹ As to HalalWorld, the Respondent first mentions that ICRIC operates HalalWorld.⁹² Then, citing Annex 17 to the Reply, the Respondent claims that HalalWorld's "mandate stems from the OIC adoption of Halal Food Standards".⁹³

79. Second, for the Respondent, the Objector refers in its Objection to around one hundred "unspecified public comments", which are "unsupported with evidence of [the] same".⁹⁴ For this reason, the Respondent argues that the Expert should disregard such comments.⁹⁵

80. Third, the Respondent points out that neither India nor the Kingdom of Saudi Arabia – or anyone else besides the Objector – has filed objections to Respondent's

⁸⁶ *Id.*, pp. 6, 8.

⁸⁷ Annex 6 to the Response.

⁸⁸ Response, p. 8.

⁸⁹ *Id.*, p. 6. See also Annex 7 to the Response.

⁹⁰ Rejoinder, p. 2. As mentioned earlier, ICCA was formerly known as "ICCI". Both Parties agree on this point. See *id.* and Reply p. 2.

⁹¹ Rejoinder, p. 2 (*citing* Annex 6 to the Response, p. 7).

⁹² *Id.*

⁹³ *Id.* Notably, the Respondent does not attempt to evidence any direct relationship between HalalWorld and the OIC.

⁹⁴ Response, p. 9.

⁹⁵ *Id.*

application.⁹⁶ The Respondent adds that only one of the 57 members of the OIC – namely, the UAE – has formally filed a community objection through the Objector, which would clearly indicate the lack of support for the Objection from the OIC.⁹⁷

81. In the Rejoinder, the Respondent argues that Bahrain, Kuwait, Oman, Qatar, Turkey, Malaysia and the Gulf Cooperation Council, all of which have submitted letters of support to UAE’s objection, amount to a “small fraction of the global Muslim population”.⁹⁸ As to Malaysia, the Respondent asserts that the email from the Malaysian representative does not even clearly support the Objection.⁹⁹ In any case, the Respondent argues that all these countries cannot be deemed “substantial opposition”.¹⁰⁰ In addition, for the Respondent, many Muslims live in non-OIC countries.¹⁰¹

82. Moreover, the Respondent points out that the OIC is composed of 57 members and these 7 countries only amount to just over 10% of the OIC member countries (or roughly 6% of the Global Muslim population).¹⁰²

83. Finally, as to the OIC’s draft resolution submitted with the Reply, the Respondent elaborates a few arguments. For the Respondent, such draft is yet to be voted.¹⁰³ In this regard, the Respondent points out that the OIC will presumably not reach a consensus. For this reason, a vote will be taken with no guarantees that the draft resolution will eventually be approved.¹⁰⁴

84. In sum, for Respondent, the Objection should fail because the Objector has failed to evidence substantial opposition to Respondent’s application.

⁹⁶ *Id.*, pp. 8-9.

⁹⁷ *Id.*, p. 9.

⁹⁸ Rejoinder, p. 1. Surprisingly, the Respondent omits that Egypt also filed a letter of support to the Objector’s position (see Annex 1 to the Reply). However, the Expert considers this omission a *bona fide* error and not an attempt to mislead.

⁹⁹ *Id.*, n. 1.

¹⁰⁰ *Id.*, p. 1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*, pp. 1-2.

(c) Expert's Conclusion

85. According to Article 3.5.4 of the Guidebook (“Substantial Opposition” subsection), “[t]he objector must prove substantial opposition within the community it has identified itself as representing”. The key element of this provision is “substantial opposition”. For this reason, quite unsurprisingly, the Guidebook concludes the same subsection by stating that, “[i]f some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail”.

86. The Expert agrees with the Respondent in that the OIC is a political organization and not a religious one.¹⁰⁵ However, the OIC is the second largest international organization after the United Nations,¹⁰⁶ and among OIC’s objectives is “[t]o disseminate, promote and preserve the Islamic teachings and values based on moderation and tolerance, promote Islamic culture and safeguard Islamic heritage”.¹⁰⁷ Therefore, the Expert agrees with the Objector that the OIC is a valid speaker for the world’s Muslim population.¹⁰⁸

87. The first question presented to the Expert is whether the OIC has urged its members to file an objection to Respondent’s application or has simply invited its members to review such application and act if necessary.

88. Article 38 of the Charter of the OIC states that the “[l]anguages of the Organisation shall be Arabic, English and French”.¹⁰⁹ This Article does not establish that any language should prevail over the others and thus all of them are equally valid. As a consequence, if the versions of the OIC’s Letter written in two official languages are identical, but differ from the one written in a third official language, the former versions should prevail over the latter one.

¹⁰⁵ See Rejoinder, p. 2.

¹⁰⁶ Annex 2 to the Response, p. 1.

¹⁰⁷ Annex 5 to the Response, Article 1(11).

¹⁰⁸ See Objection, p. 4 (“The [OIC] is the collective voice of the Muslim world and ensur[es] to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world”).

¹⁰⁹ Annex 5 to the Response, Article 38.

89. The Expert will now turn to analyze the versions of the OIC’s Letter written in the three official languages. At the outset, the Expert notes that the English and French versions of the OIC’s Letter are identical. As a result, regardless of the wording of the Arabic version, the language of the English and French versions must control the Expert’s findings. The English and French versions of OIC’s Letter say:

English	French
<p>“[T]he OIC would like to draw the attention to the fact that new applications were already submitted for new gTLDs and these new applications are being evaluated according to the consensus-based mechanism determined by ICANN. The period for submitting any objections, if any, has been expanded until 13th March 2013 for any group and/or community that holds objection on religious or ethical values. <u>The OIC Member States may kindly like to avail of this opportunity to act quickly through their representation in the organs of the ICANN, to avoid any misuse and misrepresentation of gTLDs of concern to them, including the ones like .ISLAM or .HALAL</u>”.¹¹⁰</p>	<p>“[L]’OIC voudrait attirer l’attention sur le fait que de nouvelles demandes ont déjà été soumises pour les nouveaux gTLD et ces nouvelles demandes sont en cours d’évaluation selon mécanisme de consensus établi par l’ICANN. Le délai pour la présentation d’éventuelles objections a été étendu jusqu’au 13 Mars 2013 pour tous les groupes et / ou communautés qui ont une objection sur des valeurs religieuses ou éthiques. <u>Les Etats membres de l’OCI peuvent bien profiter de cette occasion pour agir rapidement à travers leur représentation dans les organes de l’ICANN, afin d’éviter toute utilisation abusive et fausse déclaration de gTLD qui les concernent, y compris celles comme : ISLAM ou HALAL</u>”.¹¹¹</p>

90. After a careful review of the transcribed passage, the Expert concludes that the OIC directed its members to review Respondent’s application and, in case of concern, act through their representation in the organs of the ICANN. Ergo, the OIC neither endorsed nor opposed Respondent’s application and certainly did not openly instruct its members to file an objection thereto. Hence, the Expert is of the opinion that the OIC’s letter is not a statement of policy against Respondent’s application.

91. As a result of the above, there would be no need to analyze the Arabic version. However, for the sake of completeness, the Expert will briefly look into the Arabic version of the OIC’s Letter, which is slightly different to the other two. The literal translation into English of the relevant portion of the Arabic version is:

¹¹⁰ Emphasis added.

¹¹¹ Emphasis added.

The OIC member States should seize this important opportunity to act quickly against any party that wishes to own the gTLDs that end with (.ISLAM) or (.HALAL). And encourages the member States to file within the time limit specified their objections, if any, to prevent any company or private institution from buying or registering the gTLD (.ISLAM) or (.HALAL) to avoid any complications that could lead to any disputes or the misuse of these gTLDs.¹¹²

92. This language is clearly stronger than the English and French versions. However, by including the underlined words “if any”, the Expert finds that the OIC left to the member States the ultimate decision of filing an objection or not. Hence, the OIC anticipated that no objections may be filed by the member States should none of them chose to do so. This may be indicative of the intention behind this version of the letter, but the drafting could have easily been less ambiguous. In any case, a detailed discussion and analysis of this wording is irrelevant, as the Expert has already found that the English and French versions of the OIC Letter shall prevail.

93. As to OIC’s draft resolution submitted with the Reply, two points should be addressed in this Expert Determination. First, the Expert is of the opinion that it is a mere draft with no binding power. In this regard, the Expert agrees with the Respondent in that the approval of OIC’s draft resolution is yet to be seen.¹¹³ The resolution may not be adopted by a unanimous vote because it may find the opposition of at least Iran.¹¹⁴ Since the Objector has not furnished letters of support from the necessary majority of OIC’s members to pass such resolution, it is not evidenced that it will be approved for sure. Second, OIC’s draft resolution refers to a report from OIC’s General Secretariat on the matter which has not been submitted to the Expert by either Party.¹¹⁵ Without such report, the Expert cannot assess the recommendation of OIC’s General Secretariat to its member States on the position they should take when voting the OIC’s draft resolution. For these reasons, it remains unclear whether OIC’s draft resolution will finally be approved.

¹¹² The Expert sought an independent translation of this passage from another member of his firm. Emphasis added.

¹¹³ Rejoinder, p. 1.

¹¹⁴ Annex 4 to the Rejoinder.

¹¹⁵ Annex 9 to the Reply.

94. The Respondent has provided a letter of support from ICRIC.¹¹⁶ The Parties disagree as to the relationship between ICRIC and the OIC, but both Parties agree that ICRIC was established by a Memorandum of Understanding between ICCIA – an affiliate of OIC – and a local chamber of commerce.¹¹⁷ In the Expert’s opinion, the Respondent has failed to evidence that ICRIC is a subsidiary, an affiliate or is otherwise under the umbrella of the OIC. This is also confirmed by the fact that nowhere does the OIC refer to ICRIC as a subsidiary or an affiliate thereof. Nor does ICRIC hold itself as a subsidiary or an affiliate of the OIC.

95. As to the letter from HalalWorld, the Expert agrees with the Objector that it only refers to the string “.Halal” and thus cannot be considered as a valid letter of support for the String.¹¹⁸ Therefore, there is no need to analyze the relationship between HalalWorld and the OIC.

96. In light of the foregoing, it has not been established whether the OIC favors or disfavors the Respondent’s application for the String. Consequently, the Expert is of the opinion that the OIC remains neutral as to the registration of the String by the Respondent.

97. Notably, the OIC itself has not filed an objection. Dr. Alain Pellet, the Independent Objector, expressed in a report discussed by both Parties that

In the present case, the [Independent Objector] is of the opinion that the Organization of Islamic Cooperation is an established institution representing and associated with a significant part of the targeted community. The Organization of Islamic Cooperation is already fully aware of the controversial issues and is better placed than the IO to file an objection, if it deems it appropriate.¹¹⁹

¹¹⁶ Annex 6 to the Response.

¹¹⁷ At the time, ICCIA was known as ICCL.

¹¹⁸ See Annex 7 to the Response

¹¹⁹ Annex 12 to the Response, last paragraph (emphasis added). The Independent Objector may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The Independent Objector is limited to filing two types of objections: (i) Limited Public Interest objections and (ii) Community objections. The Independent Objector acts solely in the best interests of the public who use the global Internet. See Article 3.2.5 of the Guidebook.

98. In our case, as it is plainly evident, the OIC did not deem it appropriate to file a community objection itself. In the Expert's opinion, this is a confirmation of OIC's neutrality in this matter.

99. On a separate note, the Respondent places great emphasis on the number of letters of support to its position from individuals and organizations. However, regardless of the level of endorsement to Respondent's application, the ultimate test under the Guidebook is whether there is substantial opposition and not whether there is a substantial level of support. Therefore, the Expert will focus exclusively on the letters of support to the Objector's position.

100. The Expert observes that only the Objector has filed an objection against Respondent's application. No other individual, organization or country – whether member of the OIC or not – has opposed Respondent's application within ICANN's relevant channel.

101. Some countries – such as India and Saudi Arabia – inquired about Respondent's application and raised some early concerns in this regard.¹²⁰ However, since such countries neither filed a separate objection nor subscribed that of the Objector, the Expert can draw the conclusion that they finally did not officially back a community objection to Respondent's application. In fact, in Procedural Order No. 2 the Objector was instructed to submit additional letters of support but did not submit letters from these two countries. This is highly indicative of their lack of official support to the Objector's community objection.

102. The Objector filed with the Reply letters of support from governmental agencies of Bahrain, Qatar, Kuwait, Egypt, Oman, Turkey and Malaysia, as well as from the Gulf Cooperation Council.¹²¹ The Gulf Cooperation Council is composed of the UAE, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.¹²² Therefore, the Gulf Cooperation

¹²⁰ Objection, pp. 5-6; Annexes 10 and 11 to the Response.

¹²¹ Reply, p. 1. See *also* Annexes 1-8 to the Reply. For the avoidance of doubt, the Expert is satisfied that the email of the Malaysian representative sufficiently supports the Objector's position. See Annex 4 to the Reply ("I would like to express my support [to] the UAE and other Islamic countries with regards to the application of .islam and .halal.").

¹²² See www.gcc-sg.org/eng/. See *also* Annex 8 to the Reply.

Council would only add to the list of supporting countries, at best, Saudi Arabia. However, the Expert has previously found in ¶ 101 above that the opposition of Saudi Arabia has not been evidenced. Consequently, the Objector has only evidenced support from 8 countries (including itself and excluding Saudi Arabia) out of a total of 57 which form the OIC.

103. Furthermore, the Objector has referred to around one hundred comments to Respondent's application of which, allegedly, the majority are against such application. However, no evidence of such comments has been provided to the Expert and thus the Objector has failed to meet its burden of proof in this regard.

104. In accordance with the foregoing, the Expert finds that the "[n]umber of expressions of opposition relative to the composition of the community", which is the first factor in the "substantial opposition" subsection of Article 3.5.4 of the Guidebook, favors Respondent's position.

105. The same is true for the second factor listed in the same subsection of the Guidebook. More precisely, the Guidebook finds relevant "[t]he representative nature of entities expressing opposition". As has been evidenced, the Objector cannot speak for the OIC or any other member thereof. At best, the Objector could speak for the citizens of the UAE and the other 7 supporting countries only. There are around 1.6 billion Muslims worldwide,¹²³ but the total Muslim population of the 8 opposing countries is 207 million, representing roughly 13% of the Muslims of the world.¹²⁴ In the Expert's opinion, this is not a substantial portion of the Muslims around the world for the purposes of sustaining a community objection. Therefore, the Expert finds that this factor favors the Respondent.

106. As to the "[l]evel of recognized stature or weight among sources of opposition", which is the third factor listed in the Guidebook, the Expert wishes not to minimize the authority of the Objector. However, Article 13 of the Telecom Law generally circumscribes the Objector's functions and power's within the territory of the UAE. Therefore, the Expert finds that the Objector does not have sufficient international weight – without the support of a substantial number of Muslim countries or the OIC itself – to globally represent the interests of the Islamic community throughout the world. For the

¹²³ Annex 4 to the Response, p. 1; Annex 1 to the Rejoinder, p. 1.

¹²⁴ Calculation made using data from Annex 1 to the Rejoinder.

avoidance of doubt, for the reasons given in ¶ 105 above, the Expert is of the opinion that the other 7 supporting countries cannot be considered as a substantial number.

107. Finally, as to the factor related to costs incurred by the Objector in expressing opposition,¹²⁵ no other costs have been evidenced besides those related to the Centre's filing fee and request for deposit of the estimated costs, which have been paid by ICANN.¹²⁶ The Expert will also assume some costs related with the Objector's legal representation in this proceeding. All these costs do not appear to be excessive in relation to the potential impact of a decision affecting a community of around 1.6 billion people. Additionally, the Objector has furnished no evidence of pursuing any "other channels the objector may have used to convey opposition".¹²⁷ Thus, this factor disfavors the Objector.

108. The Expert does not need to consider any other factors and is confident in reaching the conclusion that there is opposition to Respondent's application to some extent, but such opposition is not substantial. Accordingly, the Objection must fail.

D. Is there a Strong Association between the Applied-for gTLD and the Community Represented by the Objector?

(a) Objector's Position

109. The Objector sustains that the applied-for gTLD explicitly targets the Islamic community.¹²⁸ In this regard, the Objector quotes the following passage from the Respondent's application:

There are hundreds of millions of Muslims worldwide, practicing their faith in a huge variety of different ways. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found some 1400 years in the past, their ethnicity often inextricably linked with their faith. Hitherto, however, there has been no way to easily unify them and their common

¹²⁵ Guidebook, Article 3.5.4 ("Substantial Opposition" subsection) ("Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition").

¹²⁶ See ¶ 12, *supra*. See also Email from ICANN to Mr. Abdulrahman Almarzouqi, dated March 12, 2013.

¹²⁷ Guidebook, Article 3.5.4 ("Substantial Opposition" subsection).

¹²⁸ Objection, p. 6.

appreciation of Islam. The .ISLAM gTLD will change this.¹²⁹

110. The Objector cites substantively Dr. Alain Pellet's report, which mentions that the Respondent had acknowledged the sensitivity of the String.¹³⁰ Moreover, in the Objector's opinion, the governance platform designed by the Respondent for the String – which purports to include the OIC – is evidence that the String targets the Muslim community.¹³¹

111. For the Objector, the fact that the Respondent is gathering letters of support from Islamic communities throughout the world is additional evidence that the String is targeting the Muslim community.¹³² In addition, the Objector argues that the letters of support furnished by Respondent:¹³³ (i) come from a minority of the Islamic population and represent less than 5% of the world's total Muslims; (ii) do not include many of the branches of Islam; and (iii) are not signed by current officials of governments or of International Organizations (such as the OIC).

(b) Respondent's Position

112. In page 7 of the Response, the Respondent lists the four tests contained in Article 3.5.4 of the Guidebook and thereafter analyzes them one-by-one, except for the one that requires "a strong association between the community invoked and the applied-for gTLD string".¹³⁴ The Expert takes note of this omission.

113. In addition, in the conclusion of the Response, the Respondent stresses that the Objector has failed to "prove standing or three of the four elements of a Community Objection".¹³⁵ The omitted fourth element seems to be the association between the applied-for gTLD and the community represented by the Objector.

¹²⁹ *Id.* (quoting Annex 13 to Response, section 18(a)).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Response, pp. 7-12.

¹³⁵ *Id.*, p. 12 (emphasis added).

114. This is confirmed by the Respondent in another section of the Response, where it expressly acknowledges that the Objector “does not represent the global Muslim community to which the .Islam TLD will be targeted”.¹³⁶

(c) Expert’s Conclusion

115. The Respondent appears not to dispute the association between the String and the community represented by the Objector. However, this does not prevent the Expert from analyzing the issue.

116. According to Article 3.5.4 of the Guidebook (“Targeting” subsection), “[t]he objector must prove a strong association between the applied-for gTLD string and the community represented by the objector”. The last sentence of such subsection stipulates that, “[i]f opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail”.

117. In section V.B(c) above, the Expert found that the relevant community is clearly defined. The question now is whether the String has a “strong association” with such community. The first salient fact is the identity of the terms. Indeed, the String is precisely the word “Islam”. It is patently clear that Muslims in general will be identified by the String.

118. According to the foregoing, the last factor listed in the corresponding subsection of the Guidebook is met (*i.e.*, “[a]ssociations by the public”). It is hard to imagine anyone who will not associate the String with Islam.

119. Moreover, according to the corresponding subsection of Article 3.5.4 of the Guidebook, another factor that the Expert may analyze is the “[s]tatements contained in application”. The statements contained in the application are very clarifying in this regard. In addition to the passage quoted at ¶ 109 above, Respondent’s application contains many other references that unequivocally result in that the targeted audience is the Islamic community. Indeed, other instances of statements in Respondent’s application that support the conclusion that there is a strong association between the String and the Muslim community are:

¹³⁶ *Id.*, p. 5 (emphasis added).

- “A robust gTLD has the power to bring together Muslims across national borders in a free-flowing exchange of information and commerce. There is not a .COM or .ORG equivalent of .ISLAM--a domain that has universal appeal across a common religion”.¹³⁷
- “The .ISLAM gTLD will increasingly open up the vast resources of the Internet and the interconnectedness it brings to the Muslims community [*sic*], while stimulating the introduction of more information and resources among Muslims online”.¹³⁸
- “The benefits of the .ISLAM gTLD will be manifold, not just to registrants but also to tens of millions of Muslim internet users, as well as many others with an interest in or curiosity regarding Islam”.¹³⁹
- “As it is rolled out, the .ISLAM gTLD will rapidly develop as the gTLD of choice among Muslims in all countries. The demand for Islamic content from this group isn’t and won’t be satisfied by .COM or .ORG offerings within the current gTLDs and in fact has hampered collaboration and innovation. The Islamic people demand content that is tailored to their own unique needs and wants, under the umbrella of a dedicated gTLD”.¹⁴⁰
- “The history of .COM will be of interest here, because .ISLAM should grow quickly and face demand as high among the Muslim community as .COM has in the English-language online community”.¹⁴¹

120. Another factor contained in the “Targeting” subsection, namely the “[o]ther public statements by the applicant”, sheds light in this regard.¹⁴² In the Response, the Respondent explicitly acknowledges that the String will specifically target the Muslim community:

The ICRC has provided a letter of support to the Applicant with respect to both the .Halal and .Islam TLDs. (Annex 6.) ICRC operates the only Halal certification body to be recognised by all Islamic countries, HalalWorld, which provided a separate letter of support. (Annex 7.) This is a strong sign of support from this TLD’s target community.¹⁴³

¹³⁷ *Id.*, section 18(a).

¹³⁸ *Id.*

¹³⁹ *Id.*, section 18(b).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, section 18(c).

¹⁴² Guidebook, Article 3.5.4 (“Targeting” subsection).

¹⁴³ Response, p. 6.

121. Elsewhere in the Response, the Respondent makes a similar concession when it states that the Objector “does not represent the global Muslim community to which the .ISLAM TLD will be targeted”.¹⁴⁴ Additionally, the Respondent “concede[s] that the .Islam TLD is targeted generally to Muslim individuals throughout the globe”.¹⁴⁵

122. The Respondent even provides letters of support from different Islamic organizations.¹⁴⁶ Therefore, the Respondent has conceded that the String will have effects in the Muslim community.

123. In sum, the Expert finds that there is a strong association between the String and the community represented by the Objector, which is the Muslim community.

E. Does the Application Create a Likelihood of Material Detriment?

(a) Objector’s Position

124. For the Objector, “there is clearly a level of certainty that the alleged detrimental outcome[] will occur” because of the “obvious lack of community involvement and support” to Respondent’s application.¹⁴⁷ The Objector explains that the obvious lack of support from the majority of the community will “most probably” result in that the String will “be dominated by a subgroup from the religion and will ignore the interests of the remaining majority”.¹⁴⁸

125. The Objector highlights that religion is an “extremely sensitive subject”.¹⁴⁹ Since Islam includes different subgroups and sects, it would be very difficult to unite all of them under the same gTLD unless an organization that represents the community (or its majority) runs and supports said domain.¹⁵⁰ For the Objector, the Respondent’s application fails to evidence any mechanisms that will effectively prevent abuses or misuses of the String, which is further exacerbated by the fact that the Respondent is not supported by the

¹⁴⁴ *Id.*, p. 5 (emphasis added).

¹⁴⁵ *Id.*, p. 7.

¹⁴⁶ *Id.*, p. 5. See also Annexes 6-9 to the Response and Annexes 2-3 to the Rejoinder.

¹⁴⁷ Objection, p. 7.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, p. 8.

¹⁵⁰ *Id.*

majority of the Muslim community.¹⁵¹ The Objector concludes that all this will result in damage to the reputation of the Muslim community.¹⁵²

(b) Respondent's Position

126. The Respondent relies on the factors included in Article 3.5.4 of the Guidebook ("Detriment" subsection).¹⁵³ For the Respondent, the Objector "wholly fails to provide any evidence by which the Applicant or the Panel could assess these factors".¹⁵⁴ The Respondent argues that the Objector mistakenly places emphasis on the lack of support and that it merely speculates on a possible dominance by a religious subgroup, which is totally unsupported because (i) Respondent has furnished substantial community support to its application; and (ii) allowing a dominance by a subgroup will make no sense from a business perspective.¹⁵⁵

127. Furthermore, the Respondent argues that it has repeatedly promised to operate the String "in the best interests of the community as a whole" and quotes its response to ICANN's Government Advisory Committee's Beijing Communiqué.¹⁵⁶ In such response, the Respondent pledged to implement measures "to limit second-level domain registrations to those of Muslim faith or with a positive interest in the Muslim community" and expressed that it "will not tolerate radical content or criticism of Islam and the Muslim faith".¹⁵⁷ The Respondent "will take immediate and severe action" if necessary and will establish "safeguards, keyword alerts, name selection polices, all governed by an Acceptable Use Policy and post registration protections".¹⁵⁸

128. The Respondent points out that it has drafted a "Governance Model for its TLDs",¹⁵⁹ which led the Indian Government to withdraw its concerns about the String.¹⁶⁰ In

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Response, p. 9.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* p. 10.

¹⁵⁶ *Id.* (attached to the Response as Annex 11).

¹⁵⁷ *Id.* (quoting Annex 11 to the Response).

¹⁵⁸ *Id.* (quoting Annex 11 to the Response).

¹⁵⁹ Annex 10 to the Response.

¹⁶⁰ Response, p. 10.

addition, the Respondent explains that, as mentioned in the String application, it “will endeavor to the utmost in order to minimize the social costs to registrants of a .ISLAM second-level domain”.¹⁶¹ The Respondent highlights the adoption of a policy matrix and other recommendations, as well as a complaint resolution service, all of which are geared towards minimizing harm in TLDs.¹⁶²

129. The Respondent also explains that it has made a binding public interest commitment whereby certain requirements are imposed on the registry operator to foster transparency and to avoid misuses and abuses of the String.¹⁶³

130. For the Respondent, all the above “documented efforts and intentions must outweigh [Objectors]’ rank speculation as to the applicant’s intentions”.¹⁶⁴

131. On a separate note, the Respondent places strong emphasis on the fact that Dr. Alain Pellet, ICANN’s Independent Objector, “thoroughly reviewed the purported public opposition to the .Islam TLD, and found no basis for any objection”.¹⁶⁵

132. Finally, the Respondent sustains that the “global Muslim community is not dependent upon the DNS for its core activities”, which stands for “**Domain Name System**”, and that there “will be no damage to anyone, but instead the TLDs will operate to the benefit of the global Muslim community”.¹⁶⁶

(c) Expert’s Conclusion

133. Article 3.5.4 of the Guidebook (“Detriment” subsection) requires that the “objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted”. Notably, the Guidebook adds that “[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment”.

¹⁶¹ *Id.*, p. 11 (*quoting* Annex 13, section 18(c)).

¹⁶² *Id.*

¹⁶³ *Id.*, pp. 11-12.

¹⁶⁴ *Id.*, p. 12.

¹⁶⁵ *Id.*, p. 10.

¹⁶⁶ *Id.*, p. 12. “DNS” means “**Domain Name System**”.

134. The Guidebook sets a high bar in order for the Expert to find any detriment:

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.¹⁶⁷

135. In this case, as discussed in section V.C(c) above, there is some opposition from the community but such opposition is not substantial. The question now presented is the likelihood of material detriment to the targeted community. To reach an answer, the Expert will analyze the factors included in the relevant subsection of Article 3.5.4 of the Guidebook.

136. The first factor in the Guidebook is:

Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string

137. The Expert finds particularly illustrating Dr. Pellet's report to address this point.¹⁶⁸ Dr. Pellet reviewed a number of binding and non-binding international instruments, both at global and regional levels, which deal with the freedom of religion.¹⁶⁹ The Expert notes that a common denominator of these instruments is the protection of freedom of religion and the freedom to manifest one's religion. Of particular relevance is the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948. Notably, the UAE has been a member of the United Nations since 1971.¹⁷⁰

138. As Dr. Pellet correctly mentions, the Universal Declaration of Human Rights explicitly says:

¹⁶⁷ Guidebook, Article 3.5.4 ("Detriment" subsection) (emphasis added).

¹⁶⁸ A copy of this report is attached to the Response as Annex 12.

¹⁶⁹ Annex 12 to the Response (Limited Public Interest Objection section, ¶¶ 5-10).

¹⁷⁰ See www.un.org/en/members/.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁷¹

139. For the Expert, the registration of the String will contribute to promoting this objective, as it will become a vehicle for Muslims to express themselves and expand their faith across the world.

140. The possible damages asserted by the Objector, which have not been sufficiently evidenced, are outweighed by the necessity of promoting human rights, such as the freedom of religion and the opportunity for every individual to manifest his or her own religion. Therefore, this factor favors the Respondent.

141. The second factor in the Guidebook is:

Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests

142. The Objector has certainly not provided any evidence that the Respondent is not acting or does not intend to act in accordance with the interests of the Muslim community. On the contrary, the Respondent has promised to operate the String in a manner that will prevent “radical content or criticism of Islam and the Muslim faith”, and the Respondent “will take immediate and severe action against this should it occur”.¹⁷²

143. It has been evidenced that the Respondent intends to implement security measures to avoid the misuse or abuse of the String.¹⁷³ In this regard, the Guidebook does

¹⁷¹ Universal Declaration of Human Rights, Article 18 (emphasis added) (*quoted* in Dr. Pellet’s report at Limited Public Interest Objection section, ¶ 6).

¹⁷² Annex 11 to the Response, p. 2. See also Annex 13 to the Response, section 18(b) (“Equally, AGITSys will not tolerate radical content, nor will it tolerate content that criticizes Islam and the Muslim faith. Immediate and severe action will be taken against registrants promulgating either, and a black list will be created in an attempt to pre-empt any such attempts.”).

¹⁷³ Annex 10 to the Response, pp. 13-18; Annex 2 to the Rejoinder, pp. 31-38; Annex 11 to the Response, p. 2; Annex 13 to the Response, section 18(b). The Respondent has furnished a new version of Annex 10 to the Response as Annex 2 to the Rejoinder. See Annex 2 to the Rejoinder.

not require that the measures be in place at this time, but rather that such measures be proposed (or an appearance of an intention to propose or implement them in the future).

144. Among these measures already proposed, the Respondent intends to:

- Design a multi stakeholder governing system (a/k/a “Policy Advisory Council), where Islamic governments, organizations and individuals will have representatives that will participate in the management of the String under direct supervision of a multinational Islamic organization or institute.¹⁷⁴
- Implement a strict policy under which not everyone will be eligible to apply for a second-level “.Islam” domain, but only those who meet certain requirements.¹⁷⁵ Additionally, certain second-level domains will be restricted and all second-level domains will be subject to a policy of use.¹⁷⁶
- Impose penalties and suspensions upon violators of the user’s policy.¹⁷⁷
- Include one addendum to its Registry Agreement with ICANN whereby certain requirements will be imposed on the registry operator in order to promote transparency and avoid misuses or abuses.¹⁷⁸

145. In accordance with the above, the second factor favors the Respondent.

146. The third factor in the Guidebook is:

Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string

147. The key language in this factor is “core activities”. In ¶ 64 above the Expert transcribed the five pillars or core principles of Islam. The Expert is of the opinion that the operation of the String will not, on its face, interfere with any of them. Nonetheless, as discussed above, the Respondent intends to implement policies and mechanisms to ensure that the integrity of Islam is preserved. Consequently, this factor favors the Respondent.

148. The fourth factor in the Guidebook is:

Dependence of the community represented by the objector on the DNS for its core activities

¹⁷⁴ Annex 10 to the Response, pp. 13-15; Annex 2 to the Rejoinder, pp. 31-33.

¹⁷⁵ Annex 10 to the Response, pp. 16-17; Annex 2 to the Rejoinder, p. 34.

¹⁷⁶ Annex 10 to the Response, pp. 17-18; Annex 2 to the Rejoinder, p. 35.

¹⁷⁷ Annex 10 to the Response, p. 18; Annex 2 to the Rejoinder, p. 36. See also Annex 13 to Response, section 18(b).

¹⁷⁸ Response, pp. 11-12; Annex 14 to the Response.

149. The Respondent has stated that “[t]he global Muslim community is not dependent upon the DNS for its core activities”.¹⁷⁹ The Objector has remained silent in this regard.

150. Islam originated around 1400 years ago, long before Internet was created.¹⁸⁰ Therefore, the Islamic community is not dependent on the DNS. As a result, this factor favors the Respondent.

151. The fifth factor in the Guidebook is:

Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string

152. Neither of the Parties has argued a concrete or economic damage to the Islamic community. In fact, the Expert is of the opposite view. In line with ¶ 139 above, the Expert agrees with the Respondent in that the String may serve as a platform for the expansion of online Islamic resources.¹⁸¹

153. The sixth factor in the Guidebook is:

Level of certainty that alleged detrimental outcomes would occur

154. The Objector has not evidenced any immediate or imminent detriment. Rather, the Objector has speculated with some possible outcomes. In light of the foregoing, the Expert finds that the likeliness of detriment to the Muslim community, though possible, is remote. As a consequence, this factor favors the Respondent.

155. In sum, the Expert concludes that the Objector has failed to prove the likelihood of any material detriment to the rights or legitimate interests of a significant portion of the Islamic community. For this reason, the Objection must fail.

¹⁷⁹ Response, p. 12.

¹⁸⁰ Annex 4 to the Response, p. 11.

¹⁸¹ Annex 18 to the Response, section 18(b).

VI. COSTS

156. In accordance with Article 14(e) of the Procedure, the Centre shall refund to the prevailing party its advance payment of costs.

VII. SUMMARY OF FINDINGS

157. Within the 45 day time-limit set forth in Article 21(a) of the Procedure, the Expert concludes as follows:

- (i) the Objector has standing to file the Objection;
- (ii) the community invoked by the Objector is clearly defined;
- (iii) there is not substantial opposition from the community to Respondent's application;
- (iv) there is a strong association between the String and the community represented by the Objector;
- (v) Respondent's application does not create a likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community;
- (vi) the Centre shall refund to the prevailing party its advance payment of costs; and
- (vii) this Expert Determination shall be published in full.

158. For these reasons, the prevailing party is the Respondent and thus the Objection shall be dismissed.

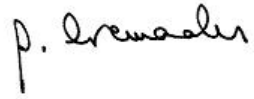
VIII. DECISION

159. For the above reasons and according to Article 21(d) of the Procedure, I hereby render the following Expert Determination:

- (i) The Objection of the Telecommunications Regulatory Authority of the United Arab Emirates is dismissed;
- (ii) Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. prevails; and
- (iii) Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.'s advance payment of costs shall be refunded by the Centre to Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.

* * * *

Date: 24/October/2013

A handwritten signature in black ink, appearing to read 'p. cremades', written in a cursive style.

Signature: _____
Bernardo M. Cremades
Expert

Reference Material 26.

Expert Witness Statement

Kurt Pritz

WITNESS STATEMENT OF KURT PRITZ

1. My name is Kurt Pritz. I am Executive Director of the Domain Name Association (“DNA”), a non profit global business association that represents the interests of the domain name industry. I make this witness statement in support of the request for Independent Review Process (“IRP”) submitted by Donuts Inc. (“Donuts”) pertaining to its New Generic Top Level Domain Name (“gTLD”) applications for .SPORTS, .SKI and .RUGBY.

Background and Qualifications

2. I am a citizen of the United States and reside in Thousand Oaks, California. I hold a Bachelor of Science in Physics from Rensselaer Polytechnic Institute, a Master of Science degree in Physics from Virginia Tech and an MBA from the University of Michigan. I am also a licensed attorney admitted to the California Bar.

3. I have extensive experience in the domain name industry. Currently with the A, I direct all activities designed to serve the interests of our domain industry members, comprised of country code and generic domain name registry operators and domain name registrars. I lead membership recruitment, and oversee the activities of our Technical, Marketing and Policy Committees, which all seek to improve the operation of the Domain name System and provide new choices for Internet users globally. More information about the organization appears at <http://www.thedna.org/>.

4. Prior to joining the DNA, I served as Chief Strategy Officer and Senior Vice President of Stakeholder Relations for ICANN for nearly ten years, where one of my primary responsibilities was to lead the introduction of the New gTLD Program, preparing and presenting many policy and implementation position papers to the ICANN Community and Board. I attach my current *curriculum vitae* for more information regarding my experience and expertise.

The New gTLD Program

5. As part of my work on the New gTLD Program, I engaged technology, business and policy leaders throughout the world on the safe, secure launch of the expansion of the namespace, and often served as the program's primary spokesperson. By way of example, in 2011 I served as a key witness during hearings conducted by the U.S. Senate and the U.S. House of Representatives' Energy and Commerce Subcommittee on Communications and Technology on New gTLDs.

6. Approximately 2000 new gTLD applications were received during the initial round. Applicants came in many varieties. Some are well known brands such as Amazon, Samsung and Volkswagen. Others report to represent geographic areas – e.g., “.NYC” for New York City. Some applied for one or a small number of TLDs, and some for a large number as a “portfolio.” Donuts’ portfolio focuses on generic TLDs.

The Applicant Guidebook

7. I led, with others, the creation of an “Applicant Guidebook” (“AGB” “Guidebook”) in order to memorialize the basic policies and procedures that would govern the process of submitting New gTLD applications and transitioning them to delegation. The Guidebook was drafted iteratively, there were nine versions, each amended as a result of discussion among a wide variety of stakeholder groups— governments, individuals, civil society, business and intellectual property constituencies, and the technologists. Some of the comments and questions concerned protection of intellectual property rights and community interests; the demand, benefits and risks of new TLDs; the selection criteria that should be applied; and the contractual conditions that should be required for new gTLD registries going forward. The ICANN Board approved final Guidebook was issued on June 4, 2012.

8. All applicants are required to demonstrate the technical and financial wherewithal to operate a domain name registry. Applicants must pass a stringent, live, operational test prior to delegation.

9. All New gTLD registries are required to offer a set of a number of trademark and community protection mechanisms not found in legacy registry operators. These are minimum requirements for security, IP protection and addressing abuse in the New gTLD space.

The Objection Process

10. One component of the AGB (*i.e.*, “Module 3”) describes the various “objection” processes whereby those who meet specific criteria for “standing” can voice concerns with respect to a particular domain extension (the characters to the right of the dot). The GB enumerates four types of objections, with only those brought on “community” grounds relevant here.

11. The objections are handled as a “dispute resolution” process, with the objector bearing the burden of proof. Each type of objection has its own “dispute resolution service provider” (“DRSP”), with community handled by the International Chamber of Commerce (“ICC”).

Community Objections

12. Community objections require a party with standing to prove all four elements of (i) a clearly delineated community, (ii) substantial opposition from the “community” explicitly or implicitly “targeted” by the string, (iii) a strong association between the alleged community and the string, and (iv) likelihood of material detriment to the rights or legitimate interests of the proffered community. To prove “material detriment,” a would be community objector must show that something tangible (and bad) will happen in the “real world.” Section 3.5.4 of the Guidebook lays out specific factors for panels to consider in order to find a “likelihood” of material detriment:

- The nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied for gTLD string;

- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely;
- Interference with the core activities of the community that would result from the applicant's operation of the applied for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

13. Importantly, the Guidebook at page 3 24 also specifies one thing that should *not* be considered "material:"

An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Inconsistency in Community Objection Results

14. There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. That fact is most easily demonstrated in the "string confusion," objections where challenges to exactly the same strings yielded different results. It is also appears throughout the category of community objections. One can read the decisions and see where, on essentially the same fact set, one panelist deems a "community" to exist or finds material detriment, and another panelist concludes the opposite. While some variance is to be expected, these frequent and material inconsistencies lead to unpredictable results.

15. Lack of consistency in results violates ICANN's adopted New gTLD Policy. First and foremost, the Policy states that, "new generic top level domains (gTLDs) must be introduced in an orderly, timely and predictable way... All applicants for a new gTLD

registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”¹

16. Violations of this Policy (absence of predictability and transparent criteria, and the addition of subsequent criteria) resulted for several reasons.

a. The number of objections far exceeds what ICANN expected. The New gTLD program was designed with 500 applications in mind; that was the figure most mentioned in public meetings. Four times the applications translates into four times the objections.

b. Compounding the problem is applicants’ used of the objection as an anti competitive weapon. When designed, it was thought and publicly stated that the “loser pays” aspect of the objection processes would deter frivolous objections or objections filed in an attempt to eliminate contending applicants. That assumption has proven significantly off the mark. Many objections have been filed by TLD applicants or current TLD operators.

17. The high number of applications means a geometrically greater number of “contention sets” – *i.e.*, situations where more than one party applies for the same TLD. Many contention sets get resolved by means of auction. Auctions have proven that new TLD registry ownership can worth millions of dollars (mid seven figures). That value will go up as more valuable, contending applications are auctioned. The high value means that the objection fees are a low cost gamble to eliminate a competitor – that is, if an applicant prevails on an objection it would save of millions in auction costs.

18. Thus, the greater number of applications and contention sets has had the effect of eliminating barriers to filing what might be considered a frivolous objection. Instead of a few community objections to protect, say, indigenous names such as

¹ http://gnso.icann.org/en/issues/new_gtlds/pdp_dec05_fr_parta_08aug07.htm#

.NAVAJO or religious communities such as .CATHOLIC, there have been well over a hundred community objections,² many by applicants for the singular purpose of turning the intended protection mechanism into an anti competitive device.

19. The several fold increase in the number of objections filed caused the system to fail with respect to the ICANN Policy. With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanisms put into place to rationalize or normalize the answers.³

20. Comparing the initial evaluation process of the gTLD applications themselves, ICANN put into place an oversight mechanism that developed procedures for ensuring evaluation panels arrived at consistent results based upon the standards provided in the Guidebook. This is because evaluators were facing up to 2000 applications. Using untried standards and providing consistent, predictable outcomes posed a difficult logistics and coordination problem. Accordingly, extensive measures were taken to ensure consistent results.

21. Facing a similar situation (*i.e.*, many objections/evaluations placed in front of panelists using brand new standards), no measures were published to: ensure that the panelists employed the new criteria in a consistent manner; ensure panelists used only the criteria published by ICANN in the Guidebook; and explain the Guidebook criteria to the panelists. In the cases of community objections, the category in which the number of objections was the largest, and the standards were the most complex

² See http://newgtlds.icann.org/en/program_status/odr/determination.

³ This despite the fact that the ICC made clear that it would not review or correct any expert determination on the merits. See http://newgtlds.icann.org/en/program_status/odr/webinar_icc_09jan14_en.pdf at .

and highly disputed when formulated, the likelihood for unpredictability was the greatest.

22. In the cases under review in this proceeding, panelists relied on, among other inapplicable sources, 2007 SO Implementation Guidelines to say that the term community should be interpreted “broadly.” The 2007 Implementation Guidelines are specifically not part of the standard. They were presented to the community as Guidelines – advice that could be taken into consideration when creating the standards and the rest of the Guidebook criteria. After four years of public discussion and argument, the community objection criteria looked nothing like that 2007 guideline. In its community agreed upon implemented form, the term “community” is defined *narrowly* to prevent abuses in the objection process – the type of abuse to which panelists opened the door when improperly altering the standard.

23. When faced with the surprise of many times the number of objections expected, a change should have occurred in the planning and administration of the objection process. Proper due diligence would have avoided the unpredictability and other policy violations. A bigger factory, churning out more product requires increased quality assurance measures to ensure all employees are using the right tools, the right measuring sticks, and are trained to use them properly.

24. These measures were not taken. When the applicants and others first complained of inconsistent results, DRSPs held a webinar where they stated that while they had put some oversight measures in place for *procedural* consistency, they implemented *none* to ensure *substantive* consistency or proper use of and adherence to standards.⁴ The results between pairs of objection results were often diametrically opposed: finding a clearly delineated, well bounded community in some cases but, not in others when the factual set was nearly the same or even slanted in a way opposite of

⁴ http://newgtlds.icann.org/en/program_status/odr/webinar_icc_09jan14_en.pdf at .

the result. Some panelists required only the possibility of detriment to satisfy the material detriment element where others required much more certainty. Some panelists found certain safeguards adequate to prevent detriment while others found the same safeguards did not.

25. It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the New gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning non-discrimination, application of documented policies neutrally, objectively and fairly, promotion of competition, and accountability.

Being in full agreement with the statements contained in this document, hereby sign it and acknowledge its contents as of this 8th day of October, 2014.

A handwritten signature in blue ink, appearing to read 'Kurt Pritz', is positioned above a horizontal line.

Kurt Pritz

KURT J. PRITZ

PROVEN OPERATIONS EXECUTIVE WITH 25+ YEARS EXPERIENCE

- *SKILLED COMMUNICATOR AND NEGOTIATOR* • *EFFECTIVE MANAGER OF LARGE AND COMPLEX PROJECTS* • *EXEMPLARY LEADER IN MULTI-STAKEHOLDER ENVIRONMENTS*
-

EXECUTIVE SKILLS

Leadership. Built and led successful teams that transformed three industries:

- Directed ICANN’s global policy effort that opened the door to an expansion of top level Internet domains, providing greater choice, innovation and competition to the world’s Internet users. In addition to .com and .net, here may soon be .bank, .shop, 公益 and hundreds of others.
- Developed state of the art surface mount manufacturing techniques that enabled reliable production of miniaturized avionics to support immediate delivery requirements and establish new industry methods.
- Grew Walt Disney Imagineering Production’s operations to design and deliver technically complex shows and rides for the “Disney Decade” to Disneyland, Walt Disney World, Disneyland Paris and Tokyo Disneyland.

Growth Management. Successfully managed start ups, rapid growth and company culture changes:

- Ensured stability of ICANN’s operations, increasing revenues from \$8 million to \$80 million in eight years by negotiating increased stakeholder contributions.
- Expanded engineering and production operations at Walt Disney Imagineering by 300% while controlling overhead spending and meeting all quality, schedule and cost goals.
- Directed automated production facility start up for Eaton Corporation, shipping product within 6 months of the start of construction to support critical schedule requirements of a \$2.2 billion program.

Policy Development and Stakeholder Relations. Developed solid relationships with business and government leaders around the world. Resolved difficult Internet policy issues through negotiation and public participation. Negotiated global supply chain agreements.

Systems Implementation. Implemented MRP/ERP, finance and earned value systems; integrated estimating, planning, product development and production processes. Successfully implemented ISO compliant systems, statistical process controls and six sigma methodologies.

Teambuilding and Organizational Design. Built powerful, cross functional and geographically diverse teams by focusing on customer satisfaction and frequent, effective communication, and by reducing direct reports and organizational layers.

PROFESSIONAL EXPERIENCE

Domain Name Association

Executive Director

Los Angeles, California; Boston, Massachusetts, 2013-present

Led start up of global trade association representing the Internet's Domain Name Industry members such as Google, Amazon, GoDaddy, Nominet (operator of .uk), and Verisign (operator of .com). In first six months: grew membership 200%; established Marketing, Technical and Policy Committees; influenced important, global Internet governance and policy discussions through public interventions and interactions with governments. Facilitated several business start ups: providing financial, strategy, legal and technical direction.

ICANN

Chief Strategy Officer; Senior Vice President, Services; and Vice President, Business Operations

Los Angeles, California, 2003-2012

ICANN is the not for profit responsible for development of global Internet policy, distribution of IP addresses worldwide, and oversight of the sale and use of domain names such as .com, .net. and .org. Drove the strategic planning process and business operations for the non profit organization responsible for the technical coordination and stability of the global Internet's domain name system. Led stakeholder relations with national governments, multinational corporations, intergovernmental organizations, Internet service providers, domain name managers, intellectual property interests and the world's Internet users.

- Headed the team responsible for major expansion of Internet namespace. Directed key Internet policy initiatives to create competition and choice for Internet users globally.
- Led formulation of strategy and operating budgets, approved by Board of Directors and key stakeholders.
- Named one of the 50 most influential people by *Managing Intellectual Property* magazine (2011 and 2012).
- Represented ICANN in testimony before U.S. Congress on three occasions.
- Negotiated and managed agreements with domain name service providers that: increased ICANN's revenues from \$16MM to \$70mm; and improved Internet stability, security and resiliency; and added protections for trademark owners and Internet users.
- Managed successful delivery of outcomes required in ICANN's agreement with the US Government.
- Reduced lead times for key services to governments and top level domain managers from 8 to 5 days.

Pritz & Associates

Consultant and Attorney

Westlake Village, California, 2000-2003

Partnered with clients Universal Studios, Wet Design and J. Robert Scott to create new business segments, build effective, cross functional teams and reduce product and operational costs.

- Developed contract maintenance business, increasing architectural services firm revenue by 10%.
- Reduced product lead times by up to 50% and operating costs by \$900K through enhanced teamwork and streamlined development/manufacturing processes, enabling company to pursue new markets.

Walt Disney Imagineering

Vice President, Engineering & Production

Glendale, California, 1991-2000

Led a staff of 500+ and a geographically diverse vendor base in the design, production and installation of highly technical theme park shows and rides worldwide.

- Grew production operations from \$25 million to \$100 million; created partnerships through worldwide supply chain; implemented flexible organization to accommodate demand; employed new technology.
- Improved team effectiveness by reducing direct reports 50% and eliminating management layers.
- Implemented earned value, activity based costing and other cost control metrics, enabling under budget production of an \$80+ million project involving 20,000 deliverables.
- Applied digital production processes, shortening development lead times from 4 weeks to 2 days.
- Injected real invention into *audio-animatronics figures*; reduced costs 30% and improved reliability.
- Implemented production management MRP/ERP) systems.

Eaton Corporation

Manager, Advanced Assembly Facility, and Quality Assurance Manager

Westlake Village, California; Athens, Georgia, 1982-1991

For provider of technically advanced electronic avionics sub systems, hybrid circuits, electronic sensors:

- Led plant start up; hired and directed staff of 100+.
- Shipped product within 6 months of construction start to meet critical delivery demands of \$2 billion contract.
- Implemented state of the art automated surface mount technology clean room assembly facility.
- Managed international supply chain quality, supplier relationships and customer service.
- Implemented automated test equipment, sell six sigma and lean manufacturing methodologies.
- Authored and implemented quality assurance manual, plant wide procedures and statistical process.

EDUCATION AND COMMUNICATION

Bachelor of Science, Physics	Rensselaer Polytechnic Institute	Troy, New York
Master of Science, Physics	Virginia Tech	Blacksburg, Virginia
Master of Business Administration	University of Michigan	Ann Arbor, Michigan
Juris Doctorate	University of LaVerne	Los Angeles, California

Admitted to California bar

Published in manufacturing, technology, physics, and law journals

Frequent speeches, keynotes, and presentations in Americas, Africa, Asia/Pacific, and Europe

Named one of the 50 most influential people by Managing Intellectual Property magazine (2011 and 2012)

Held USG Secret Clearance

Reference Material 27.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

PART ONE: INTRODUCTION

1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers ("ICANN").

2. ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law "in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization..." ICANN is charged with

"promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of

policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system..." (Claimant's Exhibits, hereafter "C", at C-4.)

ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN's headquarters.

3. ICANN, Article 4 of its Articles of Incorporation provides,

"shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

4. ICANN's Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment

"of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as "DNS", (b) ...Internet protocol ("IP") addresses and autonomous system ("AS") numbers and (c) Protocol port and parameter numbers". ICANN "coordinates the operation and evolution of the DNS root server system" as well as "policy development reasonably and appropriately related to these technical functions." (C-5.)

5. Section 2 of ICANN's Bylaws provides that, in performing its mission, core values shall apply, among them:

"1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

"2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

"3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.

"4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

...

"6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

...

"8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

...

"11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." (C-5.)

6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director". They specify that "ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN is to operate in an open and transparent manner "and consistent with procedures designed to ensure fairness" (Article III, Section 1.) In those cases "where the policy action affects public policy concerns," ICANN shall "request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request" (Article III, Section 6).

7. Article IV of the Bylaws, Section 3, provides that: "ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." Any person materially affected by a decision or action of the Board that he or she asserts "is inconsistent" with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel ("IRP"). That Panel "shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws". "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." The IRP shall have the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws" and "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall "specifically designate the prevailing party." The Section concludes by providing that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

8. The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.

9. Article XI of ICANN's Bylaws provides, *inter alia*, for a Governmental Advisory Committee ("GAC") to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues". It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually

acceptable solution." If no such solution can be found, the Board will state in its final decision the reasons why the GAC's advice was not followed.

PART TWO: FACTUAL BACKGROUND OF THE DISPUTE

10. The Domain Name System ("DNS"), a hierarchical name system, is at the heart of the Internet. At its summit is the so-called "root", managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The "root zone file" is the list of top-level domains. Top-level domains ("TLDs"), are identified by readable, comprehensible, "user-friendly" addresses, such as ".com", ".org", and ".net". There are "country-code TLDs" (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs ("gTLDs"), which are subdivided into sponsored TLDs ("sTLDs") and unsponsored TLDs ("gTLDs"). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world -- a string of numbers -- with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.

11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org, and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int. Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a "proof of concept" in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.

12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,

which would responsibly present “adult” entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the “proof of concept” round because “it did not appear to meet unmet needs”, there was “controversy” surrounding the application, and the definition of benefits of .XXX was “poor”. It observed that, “at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.” (C-127, p. 230.) In the event, the ICANN Board authorized ICANN’s President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were “subject to further Board approval or ratification.” (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.” (C-78.) It posted a “Request for Proposals” (“RFP”), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP’s explanatory notes provided that the sponsorship criteria required “the proposed sTLD [to] address the needs and interest of a ‘clearly defined community’...which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.” Applicants had to show that the Sponsored TLD Community was (a) “Precisely defined, so it can readily be determined which persons or entities make up that community” and (b) “Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community”. (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures. They additionally required the applicant to demonstrate “broad-based support” from the sponsored TLD community. None of the criteria explicitly addressed “morality” issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM’s application was posted on ICANN’s website. Its application stated that it was to

[REDACTED]

[REDACTED] and who are interested in the [REDACTED] [REDACTED] (C-Confidential Exh. B.) The International Foundation for Online Responsibility (“IFFOR”), a Canadian organization whose creation by ICM was in process, was proposed to be ICM’s sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

“significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of “.XXX” in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices.” (Lawley Witness Statement, para. 15.)

15. ICANN constituted an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant’s proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented “a clearly defined community”; it found that “the extreme variability of definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of the community”. The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and “did not agree that the application added new value to the Internet name space”. Its critical evaluation of ICM’s application concluded that it fell into the category of those “whose deficiencies cannot be remedied with the applicant’s proposed framework” (C-110.)

16. Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, the Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.

17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)

18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)

19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:

“Resolved...the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.”

“Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.” (C-120.)

20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that

“the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.”

In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board “for approval and authorization to enter into an agreement relating to the delegation of the sTLD”.

21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:

"The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the .xxx TLD.

"On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.

"Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.

"Denmark commented on the fact that the issue of the creation of the .xxx extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on .xxx that had concluded negatively.

"France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.

"USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.

"The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board." (C-139, p. 3.)

22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:

"Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.

"Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding .xxx.

"Dr. Cerf added, taking the example of .xxx that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.

"France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.

"Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.

"Chile and Denmark asked about the availability of the evaluation Report for .xxx and wondered if the process was in compliance with the ICANN Bylaws.

"Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.

"Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public

comments process. Spain suggested that ICANN should formally request GAC advice in such cases.

"The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for." (C-139, P. 5.)

23. When it came to drafting the GAC Communique, the following further exchanges were summarized:

"Brazil referred to the decision taken for the creation of .xxx and asked if anything could be done at this stage...

"On .xxx, USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...

"Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.

"Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...

"Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.

"Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.

"France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest."

"The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique." (C-139, p. 7.)

24. Finally, in respect of "New Top Level Domains"

"...the Chair recalled that members had made comments during the consultation period regarding the *.tel* and *.mobi* proposals, but not regarding other sTLD proposals.

"The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for *.xxx* was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.

"The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique." (C-139, p. 13.)

25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of "New Top Level Domains", the Communique stated:

"The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process." (C-159, p. 1.)

26. Negotiations on commercial and technical terms for a contract between ICANN's General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board's resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.

27. This expectation was overturned by ICANN's receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for

Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:

"I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.

"Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.

"It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain..." (C-162, p. 1.)

28. On August 12, 2005, Mohamed Sharil Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:

"As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...

"You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential

introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

“I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

“In this regard, I would like to bring to the Board’s attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

“Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.”

29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN’s approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called “religious right”, such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, “Web Neutrality vs. Morality” which said: “The flap over .xxx has put ICANN

in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. 'The politics of this are amazing,' said Cerf. 'We're damned if we do and damned if we don't.' (C-284.)

30. Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM's application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia's "strong opposition to the creation of a .XXX sTLD"), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM's monitoring all .XXX content from "day one", C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:

"Moreover, while the .xxx TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.

"I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report." (C-172, p. 1.)

31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:

"I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) .xxx. I appreciate that the Board has deferred further discussions on the

subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.

"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.

"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.

"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.

"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assured that ICANN's negative opinion on .xxx, expressed in 2000, would stand.

"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..

"Therefore we would ask ICANN to postpone conclusive discussions on .xxx until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that .xxx fulfills the criteria set in advance..." (C-168, p. 1.)

32. At its meeting by teleconference of September 15, 2005, the Board, "after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement," adopted a resolution providing that:

" ...

"Whereas the ICANN Board has expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership)...

"Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,

"Resolved...that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." (C-119, p. 1.)

33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board's resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:

"Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel's recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

"Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.

...

"It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

...

"Extensive Review of ICM Application

...

"On 3 May 2005, the Board held a 'broad discussion...regarding whether or not there was a 'sponsored community' . The Board agreed that it would discuss this issue again at the next Board Meeting.'

"Based on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization..." (C-175.)

34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be "in addition to the obligation to comply with all applicable law[s] and regulation[s]". (Claimant's Memorial on the Merits, pp. 128-129.)

35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the

ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC

“does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.

“...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC’s knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.”

“The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:

- Take appropriate measures to restrict access to illegal and offensive content;

- Support the development of tools and programs to protect vulnerable members of the community;

- Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and

“Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry’s commitments, and such information on the proposed contract being made available to member countries through the GAC.

“Nevertheless without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD.”

36. At the Board’s meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:

“Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies.” (C-184, p. 1.)

37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC’s request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams. The following extracts are of interest:

“It is important to note that the Board decision as to the .XXX application is still pending. The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. ...the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.

...

In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.” (C-188, pp. 1, 2.)

38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM’s by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those

who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)

39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available. (Claimant's Memorial on the Merits,

pp. 138-139.) The proposed agreement was revised to include, *inter alia*, provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.*, p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

"We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.

"In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed .xxx agreement would include enforceable provisions covering all of ICM Registry's commitments...

"...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proffered by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers “she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board.” (*Id.*, pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted “that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal.” Rita Rodin agreed; “there seems to be a ‘splintering of support in the adult on-line community.” She was also concerned “that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN’s technical decision-making remit...” (*Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, “and whether ICM had demonstrated to the Board’s satisfaction that it had met criteria against the RFP for sTLDs.” Dr. Cerf agreed that “the sponsorship grouping for a new TLD was difficult to define.”

44. Susan Crawford expressed the view that “no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant...if that test was applied to any sponsor group for a new sTLD, none would ever be approved.”

45. The Acting Chair conducted a “straw poll” of the Board as to whether members held “serious concerns” about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that “it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain”. (*Id.*) The following resolution was unanimously adopted:

"Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;

"Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.

"Resolved that:

- I. The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and
- II. ICANN staff consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is [sic] met for the creation of a new .XXX sTLD." (*Id.*, p. 4.)

46. The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued "formal advice to the Board". It reaffirmed the Wellington Communique as "a valid and important expression of the GAC's views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria." It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, "the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate." (C-200, pp. 4, 5.) It also adopted "Principles Regarding New TLDs" which contain the following provision in respect of delegation of new gTLDs:

"2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process." (*Id.*, p. 12.)

47. The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:

"...the board has determined that

"ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

"Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.

"Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.

"The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.

"The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied."

48. Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.

"Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral

patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain." (C-201, p. 6.)

49. Rita Rodin said that she did not believe

"that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet..." (*id.*, p. 7.)

50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,

"there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the

board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (*Id.*, pp. 7-8.)

51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." (*Id.*, p. 8.)

52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".

"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the

fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that’s an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia’s letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws.” (*Id.*, pp. 9-11.)

53. Demi Getschko declared that her vote in favor of the resolution was her own decision “without any kind of pressure”. (*Id.*, p. 12.) Alejandro Pisanty denied that “the board has been swayed by political pressure of any kind” and affirmed that, “ICANN has acted carefully and strictly within the rules.” He accepted “that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself.” (*Id.*

PART THREE: THE ARGUMENTS OF THE PARTIES

The Contentions of ICM Registry

54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a “deferential standard of review”; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.*, California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN’s Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN’s lack of accountability. It recalls that ICANN’s then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to “strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators...” (Claimant’s Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, “ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration.” (*Id.*, p. 163.) Article IV, Section 3, of ICANN’s Bylaws provides that: “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider.” Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association as the international arbitration provider

(which in turn appointed the members of the instant Independent Review Panel). The term "arbitration" imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term "arbitration" connotes a binding award. (*Id.*, pp. 168-169.) Article 27(1) of the ICDR Rules provides that "[a]wards...shall be final and binding on the parties. The parties undertake to carry out any such award without delay." (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that "the ICDR's International Arbitration Rules...will govern the Process in combination with these Supplementary Procedures." They provide that the "Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented." "The Declaration shall specifically designate the prevailing party." (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

The Standard of Review is Not Deferential

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN's assertion that the Panel must afford the ICANN Board "a deferential standard of review" has no support in the instruments governing this proceeding. The term "independent review" connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant's Memorial on the Merits, with citations, pp. 173-174.) ICANN's reliance on the "business judgment rule" and the related doctrine of "judicial deference" under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As California courts have explicitly stated, "the rule of judicial deference to board decision-making can be limited ... by the association's governing documents." The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a "final method of accountability."

The notion now advanced on behalf of ICANN, that this Panel should afford the Board “a deferential standard of review” and only “question” the Board’s actions upon “a showing of bad faith” is at odds with that purpose as well as with the plain meaning of “independent review”. (*Id.*, pp. 176-177.)

The Applicable Law of this Proceeding

57. Article 4 of ICANN’s Articles of Incorporation provides that, “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law...” (C-4). The prior version of the draft Articles had provided for ICANN’s “carrying out its activities with due regard for applicable local and international law”. This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, “to mak[e] it clear that ICANN will comply with relevant and applicable international and local law”. (*Id.*, p. 180.) As ICANN’s President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could “be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law.” (*Id.*, p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:

“...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with ‘relevant principles of international law’ and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN’s Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.” (*Id.*, p. 11.)

In ICM’s view, Article 4 of ICANN’s Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that “the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute.” (C-11.) It points out that the choice of a concurrent law clause – as in ICANN’s Articles providing for the application of relevant principles of both

international and domestic law – is not unusual, especially in transactions involving a public resource.

58. Professor Goldsmith observes that: "... "principles of international law and applicable international conventions and local law" refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. "The term 'principles of international law' includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and "the general principles of law recognized by civilized nations", the reference to "principles of international law" in ICANN's Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the "principles of commercial and international law" to include the general principles of law. ICSID tribunals similarly have interpreted "the rules of international law" to include general principles of law.

"It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The 'international' nature of this arbitration – ... is evidenced by the global impact of ICANN's decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the 'general principles' standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding." (*Id.*, pp. 15-16.)

59. Professor Goldsmith continues: "The general principle of good faith is 'the foundation of all law and all conventions'" (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and*

Tribunals, p. 105). "As the International Court of Justice has noted, 'the principle of good faith is a well established principle of international law'". (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 296, with many citations.) Applications of the principle are "the requirement of good faith in complying with legal restrictions" and "the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights..." as well as the requirement of good faith in contractual negotiations. (*Id.*, pp. 17-18.) The principle is "equally applicable to relations between individuals and to relations between nations." (Cheng, *loc. cit.*).

60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is

"most obvious is the clearly fictitious basis ICANN gave for denying ICM's application...the concern about 'law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application' applies to many top-level domains besides .XXX. The website 'pornography.com' would be no less subject to various differing laws around the world than the website 'pornography.xxx.' ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right..."

61. Professor Goldsmith further argues that "similarly pretextual is ICANN's claim that 'there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.'" He contends that the scenario is "unlikely", but, more importantly, "*the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM..."

ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws

62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.

63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, "upon the successful completion of the sTLD process" (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra*.) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied "based on principles of objectivity, non-discrimination and transparency". (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship - and authorized ICANN's President and General Counsel to enter into negotiations over the "commercial and technical terms" of a registry agreement with ICM. "The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria - including, specifically, sponsorship." (Claimant's Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board's resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:

- (a) recalls that ICANN's written announcement of applications received provided: "The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs." (C-82.)

- (b) emphasizes that ICANN's Chairman of the Board, Dr. Cerf, is recorded in the GAC's Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx "this time met the three main criteria, financial, technical and sponsorship". Sponsorship was

extensively discussed "and the Board reached a positive decision considering that ICANN should not be involved in content matters." (C-139; *supra*, para. 22.)

- (c) notes that a letter of ICANN's President of February 11, 2006. states that: "...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations...rests with the Board." (*Supra*, paragraph 33.)

- (d) notes that the GAC's Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN's President, that the GAC "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination" that ICM's application "had overcome the deficiencies noted in the Evaluation Report". (*Supra*, paragraph 35.)

- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: "If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval." (C-88.)

- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the "applicants that have been found to satisfy the baseline criteria and they're presently in negotiation for the designation of registries..." (C-140, p. 28).

- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, "ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN." (C-221.)

- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, "Internet Group OKs New Suffix for Porn Sites," which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a \$12 billion industry, "could begin buying .xxx addresses as early as fall or winter depending on ICM's plans." (C-283.)

- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief." (Burr Exhibit 35.)

ICM argues that ICANN's witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

"At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met..." (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf's testimony "is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg..." (Claimant's Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf's recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into "if" the parties were able to negotiate "commercial and technical terms"; therefore ICM should have known that all other issues also remained open. But, responds ICM, "Complete silence on an issue -- when other issues are specifically mentioned -- does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue." (*Id.*, pp. 15-16.)

67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were "quick" and "straightforward". (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.

68. But then came the intervention of the U.S. Department of Commerce described *supra*, paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. "What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government's intervention." ICM contends that: "The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it." (Claimant's Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey's having "suggested" to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra*, paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and *supra*, paragraphs 21-25.)

69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:

"The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no

reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee 'woke up' to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN's credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN's process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN's authority, competence, and entire reason for existence." (Witness Statement of Elizabeth Williams, pp. 26-28.)

70. ICM points out that the Wellington Communique of the GAC (*supra*, paragraph 35) referred to "the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report." ICM maintains that, at ICANN's staff prompting, ICM responded to all of the concerns raised in the GAC's Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).

71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net". It counters that ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net". "The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia*, to submit to technological tools to help tag and filter their sites; allow their sites to be 'crawled' for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited

promotional email, the 'capture' of visitors to their sites, *etc.*).” (Claimant’s Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique “in order to impose an impossible burden on ICM.” According to ICM, Dr. Twomey asserted that “the GAC was now insisting that ICM be responsible for ‘enforcing restrictions’ around the world on access to illegal and offensive content.” (*Id.*, pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was

“not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered ‘illegal and offensive’ in many countries. Some of its content is considered ‘illegal and offensive’ in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board’s determination that ICM had met the RFP criteria: ‘to the extent that governments do have concerns they relate to the issues across TLDs.’ ICANN has never suggested that the registries for those other TLDs must ‘enforce’ restrictions on access to illegal or offensive content for sites on their TLDs.” (*Id.*, pp. 43-44.)

72. ICM adds that if “the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so.” The GAC is no more than an advisory body supposed to provide “advice” on a “timely” basis. “ICANN is by no means under any obligation to do whatever the GAC tells it to do.” Indeed, ICANN’s Bylaws specifically contemplate that the Board may decide not to follow the GAC’s advice. (*Id.*, p. 44.)

73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:

“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state

in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities." (C-5, and *supra*, paragraph 9.)

74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that "ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content..." (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for "enforcing" the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites" (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or "representation to enforce the laws of the world on pornography" (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, "The TLD system is neutral, although filtering systems could be solutions promoted by governments." (C-139, p. 5.) "In other words," ICM argues, "the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided 'appropriate measures to restrict access to illegal and offensive content.'" (Claimant's Post-Hearing Submission, p. 47.)

76. ICM alleges that, "Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would 'ensure enforcement of these contractual terms' as they relate to various countries' individual laws

'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place." (*Id.*, p. 48.)

77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:

"The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...

"Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liaise with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.

"This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decision, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)

78. Dr. Twomey said this about Mr. Boyle's position:

"...the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law', would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract. The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position." (C-189, p. 6.)

79. ICM contends that "it is impossible to reconcile the points made in Mr. Boyle's letter - *i.e.*, that ICANN should ensure that ICM delivered from "day one" on the 'benefits and safeguards' promised in its contract, and that ICM should liase with the IWF - as a requirement 'to ensure enforcement of the contractual terms as they each individually interpret them against their own law concerning pornographic content'. And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mandate to impose it on ICM, and would have imposed a requirement on ICM that it has never imposed on any other registry." (Claimant's Post-Hearing Submission, p. 50.)

80. ICM however acknowledges that other members of the Board shared Dr. Twomey's analysis. It concludes that:

"...the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; and that - had it been included in the RFP - would have kept any applicant from applying for an sTLD dealing with adult content." (*Id.*, p. 51.)

81. ICM observes that, following the ICANN Board's rejection of the ICM registry agreement on May 10, 2006, and then its renewed consideration of it after ICM withdrew its request for reconsideration (*supra*, paragraph 39), ICM responded to further requests of ICANN staff. It agreed to conclude a contract with what is now known as the Family Online Safety Institute ("FOSI") specifying that FOSI was "to use an automated tool to scan" the .XXX domain and develop other ways to monitor ICM's compliance with its

commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.

82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately --- as described above (*supra*, paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of "broad-based support from the community". 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.

83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra*, paragraph 47), ICM makes the following allegations of inconsistency.

84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then "reapplied" the sponsorship criteria to ICM was "incoherent, discriminatory and pretextual". (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: "broad-based support from the community".

85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, "(m)embers of both .TEL and .MOBI communities are self-identified". Both sTLDs are now in the root.

86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.

87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.

88. In sum "ICANN's reopening of the sponsorship criteria - which it did *only* for ICM - was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause." (*Id.*, p. 65.)

89. Reason 2: based on the extensive comment and from the GAC's Communiques, ICM's agreement raises public policy issues. ICANN never precisely identified the "public policy" issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world's various and different laws and standards concerning pornography. That interpretation "was sufficiently absurd as to have been made in bad faith"; in any event it holds ICM to an "impossible standard", and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.*, that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate. ICANN's imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM's application on grounds that were not applied neutrally and objectively, which were suggestive of a "pretextual basis to 'cover' the real reason for rejecting .XXX, *i.e.*, that the U.S. government and several other powerful governments objected to its proposed content." (*Id.*, pp. 66-67.)

90. Reason 3: the ICM application and revised agreement do not resolve GAC's issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be

credibly resolved with the mechanisms proposed by the applicant. ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.

91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.

92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate. ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet - a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfill it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.

93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.

94. The "Relief Requested" by ICM Registry consists, *inter alia*, of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:

"i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;

"ii. Rejecting ICM's proposed agreement to serve as registry operator...

"iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;

"iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...

"v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations..." (Claimant's Memorial on the Merits, pp. 265-267.)

The Contentions of ICANN

95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, "Independent Review of Board Actions". Article IV, Section 3, provides that:

"1. ...ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

"2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action.

"3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles and Bylaws.

"4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators ...nominated by that provider.

"5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

...

"8. The IRP shall have the authority to:

...

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

...

"12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

"13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.

...

"15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." (C-5.)

97. ICANN contends that the foregoing terms make it clear that the IRP's declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to "consider" the declaration. "The direction to 'consider' the Panel's declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement." (ICANN's Response to Claimant's Memorial on the Merits, p. 32.) ICANN's Board is specifically directed to "review" the Panel's declarations, not to implement them. Moreover, the Board is "not even required to review or consider the declaration immediately, or at any particular time," but is encouraged to do so at the next Board meeting, where "feasible", reinforcing the fact that the Board's review and consideration of the Panel's declaration does not require its acceptance. The Panel may "recommend", but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. (*Id.*, p. 33.)

98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP's authority would be persuasive, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions". But "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations". (*Id.*, p. 34.) The primary pertinent document, "ICANN: A Blueprint for Reform," calls for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws". ICM Registry's counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing

the independent review process, observed that “decisions will be nonbinding, because the Board will retain final decision-making authority”. (*Ibid.*, p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a “Supreme Court” for ICANN, the Board changed the reference to “decisions” of the IRP to “declarations” precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.*, p. 38.)

99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association’s International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.

The Standard of Review is Deferential

100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra*, paragraph 5). Article 1, Section 2 of the Bylaws provides that, “In performing its mission, the following core values should guide the decisions and actions of ICANN”; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:

“These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and to determine, if necessary, an appropriate and defensible balance among competing values.” (C-5.)

101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board “shall exercise its judgment” in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, “the deference expressly

accorded to the Board in implementing the core values applies..." ICANN continues:

"Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto*, not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably 'exercise[s] its judgment' in determining that other relevant principles outweighed that value in the particular circumstances at hand."

While in the instant case, in ICANN's view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, "...because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct." (ICANN's Response to Claimant's Memorial on the Merits, pp. 45-47.)

102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, "strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner 'inconsistent with' the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN's conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse...independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board." (*Ibid.*, p. 48.)

103. ICANN contends, moreover, that,

"Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that 'there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation'...In California...these principles require deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests' of the corporation and 'exercised discretion within the scope of its authority'". This includes the boards of not-for-profit corporations." (*Ibid.*, pp. 49-50.)

The Applicable Law of This Proceeding

104. ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).

105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.

106. Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra*, paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.*) Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the

same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California -- governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.

107. Moreover, the specification of "relevant" principles of international law in Article 4 "must mean principles of international law that apply to a private entity such as ICANN" (*id.*, p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.

108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.

ICANN Acted Consistently with its Articles of Incorporation and Bylaws

109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were "difficult", ICANN's Board addressed them with "great care", and devoted "an enormous amount of time trying to determine the right course of action". ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, "with no hint whatsoever of the 'bad faith' ICM alleges." (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)

110. ICM's claims "begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications

proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application.” But the RFP refutes this contention. It does not suggest that the Board’s “allowance for an application to proceed to contract negotiations confirms the close of the evaluation process.” ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: “Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they’ll authorize staff to complete or execute the agreements with the sponsoring organizations...” (*Ibid.*, pp. 81-82.) It observes that Dr. Cerf affirmed that: “ICANN never intended that this would be a formal, ‘two-step’ process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship.” (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were “two overlapping phases in the evaluation of the sTLDs” and the Board always retained the right “to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole”. (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM’s application did not argue that the Board had already approved the .XXX sTLD. The following exchange with Dr. Cerf took place in the course of the hearing:

“Q. Now, ICM’s position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?”

“A. Not, it’s not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met.” (Tr. 601:4:13.)

111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." (*Ibid.*, p. 84.)

112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra*, paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.*, p. 86.)

113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.

114. The ICANN Board also permitted other applicants for sTLDs -- .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." (*Ibid.*, p. 87.)

115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship

shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.

116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed "some concerns about whether the [ICM] proposal met the criteria set forth in the RFP..." She said that she did not want to re-open issues if they had already been decided by the Board (*supra*, paragraphs 42-43). In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN'S Response to Claimant's Memorial on the Merits, p. 90.)

117. ICANN also draws attention to Dr. Twomey's letter of May 4, 2006 (*supra*, paragraph 37) in which he wrote that the Board's decision of June 1, 2005, was without prejudice to the Board's right to decide whether the contract reached with ICM meets all the criteria before the Board.

118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC's "diverse and wide-ranging concerns" with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that "some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography." (*Ibid.*, p. 102.)

119. ICANN points out that:

"In revising its proposed registry agreement to address the GAC's concerns...ICM took the position that it would install 'appropriate measures to restrict access to illegal and offensive content,' including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM's 'monitoring' would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) 'content-based' objections to Internet sites." (*Ibid.*, pp. 103-104.)

120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra*, paragraph 38) and February 12, 2007, (*supra*, paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were

or were not incorrect is “irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM’s application.” (*Ibid.*, p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.*).

121. The Board’s May 10, 2006 vote (*supra*, paragraph 38) rejected ICM’s then current draft, but provided ICM “yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board’s decision to allow ICM to continue to work the problem is directly at odds with ICM’s position that the Board decided ‘for political reasons’ to reject ICM’s application; if so, it would have been much easier for the Board to reject ICM’s application in its entirety in 2006.” (*Ibid.*, p. 106.)

122. At its meeting of February 12, 2007, (*supra*, paragraphs 41-45), concerns in the Board about whether ICM’s application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM’s application and agreement were definitively rejected, the majority was, first, concerned by ICM’s definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM’s application.

“Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM’s sTLD application.” (*Ibid.*, pp. 108-109.)

124. Second, ICM’s proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, “a uTLD, disguised as an sTLD, just as ICM had proposed in 2000.” (*Ibid.*, p. 209.)

125. Third, whatever community support ICM may have had at one time, it had “fallen apart by early 2007” (*ibid.*). During the final public comment period in 2007, “a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM’s .XXX sTLD...” (p. 110). “Broad-based support” was lacking. (P. 111.) 75,000 pre-registrations for .XXX... “Out of

the over 4.2 million adult content websites in operation" hardly represents broad-based support. (P. 115.)

126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. "In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD." (P. 112.)

127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation". But such measures "diluted the possibility that their policies would be 'primarily in the interests of the Sponsored TLD Community' as required by the sponsorship selection criteria." (Pp. 112-113.)

128. ICANN concludes that, "despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP." Reasonable people might disagree - as did a minority of the Board - "but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation." (P. 113.)

129. The treatment of ICM's application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC. ICANN did not reject ICM's application only for reasons of public policy (although they were important). ICM's application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM's application for "many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel." (*Ibid.*, p. 124.) It also rejected the application because ICM's proposed registry agreement "would have required ICANN to manage the content of the .XXX sTLD" (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. "Had the ICANN Board taken the view that the GAC's views must in every case be followed without independent judgment, the Board presumably would have rejected ICM's application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed." (*Ibid.*)

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

136. The Internet Corporation for Assigned Names and Numbers is a not-for-profit corporation established under the law of the State of California. That law embodies the “business judgment rule”. Section 309 of the California Corporations Code provides that a director must act “in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...” and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In “recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization” – including ICANN -- ICANN is charged with “promoting the global public interest in the operational stability of the Internet...” ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...” Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN’s sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and non-profit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.

The Applicable Law of this Proceeding

137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the “local law” referred to in the provision of Article 4 of the Articles of Incorporation – “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law” – is the law of California. But they differ on what are “relevant principles of international law” and their applicability to the instant dispute.

138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra*, paragraphs 53-54.) Principles of international law in ICM’s analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM’s expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.

139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are “relevant” in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra*, paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN’s Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.

140. In the view of the Panel, ICANN, in carrying out its activities “in conformity with the relevant principles of international law,” is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.

That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.

The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws

142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application’s request for delegation of the .XXX sTLD was or was not consistent with ICANN’s Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).

143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.

144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN’s President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.

145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.

146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.

147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.

148. Support on that aspect of the matter consists of the following:

- (a) The resolutions of June 1, 2005 (*supra*, paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.
- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to

the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.

- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair "confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so." (*Supra*, paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM's application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra*, paragraphs 21-25, 40).

- (d) At its teleconference of September 15, 2005, there was "lengthy discussion involving nearly all of the directors regarding the sponsorship criteria..." (*supra*, paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.

- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting

"that the Board decision as to the .XXX application is still pending...the Board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be

addressed by contractual obligations to be stated in a registry agreement." (C-188, and *supra*, paragraph 37.)

- (f) At a Board teleconference of February 12, 2007, ICANN's General Counsel asked the Board to consider "how ICM measures up against the RFP criteria," a request that implies that questions about whether such criteria had been met were not foreclosed. (*Supra*, paragraph 41.)
- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board's June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.
- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM's meeting of sponsorship criteria at the Board's teleconference of February 12, 2007, she said that she did "not wish to reopen issues if they have already been decided by the Board" and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board's debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM's application was not sufficient "to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.") (*Supra*, paragraph 52.)

149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM's application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue "applied documented policies, neutrally and objectively, with integrity and

fairness" (Bylaws, Section 2(8), the Panel finds instructive the documented policy stated in the Board's Carthage resolution of October 31, 2003 on "Finalization of New sTLD RFP," namely, that an agreement "reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process." (C-78, p. 4.) In the Panel's view, the sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC's proposals for new TLDs generally exclude consideration of new criteria (*supra*, paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board's disposition of the ICM Registry application, still less that of any of the Board's members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed. Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to "duly take into account" the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM's application because of governmental pressure. Certainly there are those, including Board members,

who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.

151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra*, paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra*, paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place (*supra*, paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.

PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL

152. The Panel concludes, for the reasons stated above, that:

First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.

Second, the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.

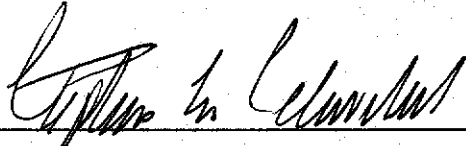
Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.

Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.

Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.

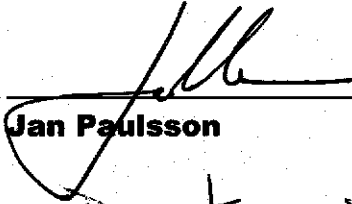
Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling \$4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling \$473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of \$241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.

Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.



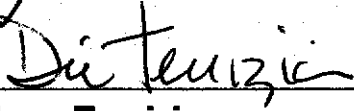
Stephen M. Schwebel

Date: February 19, 2010



Jan Paulsson

Date: 16 February 2010



Dickran Tevrizian

Date: February 18, 2010

CONCURRING AND DISSENTING OPINION

I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.

However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.

I

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.

ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.

Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.

Article 4 of ICANN's Articles of Incorporation specifically provide:

"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.

The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.

ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).

As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.

In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Blacks Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between

directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.

Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2d 828, 852. See also, Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.

The "business judgment rule" is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. See Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. See Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. See Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director "rationally believes that the business judgment is in the best interests of the corporation." See Lee v. Interinsurance Exch., (1996) 50 CA4th 694.

The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Cal. Corp. Code § 309(a); see also Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: "A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." Cal. Corp. Code § 309 (c).

II

THE ACTIONS OF THE ICANN BOARD OF DIRECTORS ARE ENTITLED TO SUBSTANTIAL DEFERENCE FROM THE INDEPENDENT REVIEW PANEL

ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:

"These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new

situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

The By-Laws make it clear that the core values must not be construed in a “narrowly prescriptive” manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.

III

PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY

Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a “choice-of-law provision” importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter “IRP”).

Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.

IV

THE ICANN BOARD OF DIRECTORS DID NOT ACT INCONSISTENTLY WITH ICANN’S ARTICLES OF INCORPORATION AND BY-LAWS IN CONSIDERING AND ULTIMATELY DENYING ICM REGISTRY, LLC’S APPLICATION FOR A SPONSORED TOP LEVEL DOMAIN NAME

On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter “ICM”), failed to satisfy the

Request For Proposal (“hereinafter “RFP”) posted June 24, 2003, in the following manner:

- “1. ICM’s definition of its sponsored TLD community was not capable of precise or clear definition;
2. ICM’s policies were not primarily in the interests of the sponsored TLD community;
3. ICM’s proposed community did not have needs and interests which are differentiated from those of the general global Internet community;
4. ICM could not demonstrate that it had the requisite community support; and,
5. ICM was not adding new and valuable space to the Internet name space.”

On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter “STLD”). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.

ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.

Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.

The fact that most ICANN Board members expressed significant concerns about ICM’s sponsorship shortcomings after the June 1, 2005,

resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.

The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.

Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.

By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.

Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.

The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.

Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and

numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

V

CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.

Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.

JUDGE DICKRAN TEVRIZIAN (Retired)

Dickran Tevrian
February 18, 2010

Reference Material 28.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NUCLEAR TESTS CASE
(AUSTRALIA v. FRANCE)

JUDGMENT OF 20 DECEMBER 1974

1974

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES
(AUSTRALIE c. FRANCE)

ARRÊT DU 20 DÉCEMBRE 1974

Official citation :

*Nuclear Tests (Australia v. France), Judgment,
I.C.J. Reports 1974, p. 253.*

Mode officiel de citation :

*Essais nucléaires (Australie c. France), arrêt,
C.I.J. Recueil 1974, p. 253.*

Sales number:

Nº de vente:

400

20 DECEMBER 1974

JUDGMENT

NUCLEAR TESTS CASE
(AUSTRALIA *v.* FRANCE)

AFFAIRE DES ESSAIS NUCLÉAIRES
(AUSTRALIE *c.* FRANCE)

20 DÉCEMBRE 1974

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 1974

1974
20 December
General List
No. 58

20 December 1974

NUCLEAR TESTS CASE

(AUSTRALIA v. FRANCE)

Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.

Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings.

Unilateral acts creative of legal obligations—Principle of good faith.

Resolution of dispute by unilateral declaration giving rise to legal obligation—Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGMENT

Present: President LACHS; Judges FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; Judge ad hoc Sir Garfield BARWICK; Registrar AQUARONE.

In the Nuclear Tests case,

between

Australia,

represented by

Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General's Department,

as Agent,

COUR INTERNATIONALE DE JUSTICE

ANNÉE 1974

20 décembre 1974

1974
20 décembre
Rôle général
n° 58

AFFAIRE DES ESSAIS NUCLÉAIRES

(AUSTRALIE c. FRANCE)

Questions de compétence et de recevabilité — Nécessité d'un examen préalable portant sur la question essentiellement préliminaire de l'existence d'un différend — Exercice d'un pouvoir inhérent de la Cour.

Analyse de la demande formulée dans la requête et détermination de son objet — Portée des conclusions et déclarations du demandeur pour la définition de la demande — Pouvoir de la Cour d'interpréter les conclusions — Déclarations publiques faites au nom du défendeur avant et après la clôture de l'instance.

Les actes unilatéraux comme sources d'obligations juridiques — Principe de la bonne foi.

Règlement du différend par l'effet d'une déclaration unilatérale créant une obligation juridique — Le fait que le demandeur n'exerce pas son droit de se désister n'empêche pas la Cour de parvenir à sa propre conclusion — La disparition du différend entraîne celle de l'objet de la demande — La Cour ne peut exercer sa compétence que s'il existe réellement un différend entre les Parties.

ARRÊT

Présents: M. LACHS, Président; MM. FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, sir Humphrey WALDOCK, MM. NAGENDRA SINGH, RUDA, juges; sir Garfield BARWICK, juge ad hoc: M. AQUARONE, Greffier.

En l'affaire des essais nucléaires,

entre

l'Australie,

représentée par

M. P. Brazil, membre du barreau d'Australie, membre du service de l'*Attorney-General* d'Australie,

comme agent,

assisted by

H.E. Mr. F. J. Blakeney, C.B.E., Ambassador of Australia,
as Co-Agent,

Senator the Honourable Lionel Murphy, Q.C., Attorney-General of
Australia,

Mr. M. H. Byers, Q.C., Solicitor-General of Australia,

Mr. E. Lauterpacht, Q.C., of the English Bar, Lecturer in the University of
Cambridge,

Professor D. P. O'Connell, of the English, Australian and New Zealand
Bars, Chichele Professor of Public International Law in the University of
Oxford,

as Counsel,

and by

Professor H. Messel, Head of School of Physics, University of Sydney,

Mr. D. J. Stevens, Director, Australian Radiation Laboratory,

Mr. H. Burmester, of the Australian Bar, Officer of the Attorney-General's
Department,

Mr. F. M. Douglas, of the Australian Bar, Officer of the Attorney-General's
Department,

Mr. J. F. Browne, of the Australian Bar, Officer of the Department of
Foreign Affairs,

Mr. C. D. Mackenzie, of the Australian Bar, Third Secretary, Australian
Embassy, The Hague,

as Advisers,

and

the French Republic,

THE COURT,

composed as above,

delivers the following Judgment:

1. By a letter of 9 May 1973, received in the Registry of the Court the same day, the Ambassador of Australia to the Netherlands transmitted to the Registrar an Application instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. In order to found to the jurisdiction of the Court, the Application relied on Article 17 of the General Act for the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court, and alternatively on Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the French Government. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

assisté par

S. Exc. M. F. J. Blakeney, C.B.E., ambassadeur d'Australie aux Pays-Bas,
comme coagent,

l'honorable Lionel Murphy, Q.C., sénateur, *Attorney-General* d'Australie,

M. M. H. Byers, Q.C., *Solicitor-General* d'Australie,

M. E. Lauterpacht, Q.C., membre du barreau d'Angleterre, *lecturer* à
l'Université de Cambridge,

M. D. P. O'Connell, membre des barreaux d'Angleterre, d'Australie et de
Nouvelle-Zélande, professeur de droit international public à l'Université
d'Oxford (chaire Chichele),

comme conseils,

et par

M. H. Messel, directeur de l'école de physique de l'Université de Sydney,

M. D. J. Stevens, directeur du laboratoire australien des radiations,

M. H. Burmester, membre du barreau d'Australie, membre du service de
l'*Attorney-General*,

M. F. M. Douglas, membre du barreau d'Australie, membre du service de
l'*Attorney-General*,

M. J. F. Browne, membre du barreau d'Australie, fonctionnaire du départe-
ment des affaires étrangères,

M. C. D. Mackenzie, membre du barreau d'Australie, troisième secrétaire
à l'ambassade d'Australie aux Pays-Bas,

comme conseillers,

et

la République française,

LA COUR,

ainsi composée,

rend l'arrêt suivant :

1. Par lettre du 9 mai 1973 reçue au Greffe de la Cour le même jour l'ambassadeur d'Australie aux Pays-Bas a transmis au Greffier une requête introduisant une instance contre la France au sujet d'un différend portant sur des essais d'armes nucléaires dans l'atmosphère auxquels le Gouvernement français procéderait dans l'océan Pacifique. Pour établir la compétence de la Cour, la requête invoque l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, rapproché de l'article 36, paragraphe 1, et de l'article 37 du Statut de la Cour, et subsidiairement l'article 36, paragraphe 2, du Statut de la Cour.

2. Conformément à l'article 40, paragraphe 2, du Statut, la requête a été immédiatement communiquée au Gouvernement français. Conformément au paragraphe 3 du même article, les autres Etats admis à ester devant la Cour ont été informés de la requête.

3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the Government of Australia chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge *ad hoc* in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case, and that it could not accept the Court's jurisdiction; and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. Nor has an agent been appointed by the French Government.

5. On 9 May 1973, the date of filing of the Application instituting proceedings, the Agent of Australia also filed in the Registry of the Court a request for the indication of interim measures of protection under Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes and Article 41 of the Statute and Article 66 of the Rules of Court. By an Order dated 22 June 1973 the Court indicated, on the basis of Article 41 of the Statute, certain interim measures of protection in the case.

6. By the same Order of 22 June 1973, the Court, considering that it was necessary to resolve as soon as possible the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application, and fixed 21 September 1973 as the time-limit for the filing of a Memorial by the Government of Australia and 21 December 1973 as the time-limit for a Counter-Memorial by the French Government. The Co-Agent of Australia having requested an extension to 23 November 1973 of the time-limit fixed for the filing of the Memorial, the time-limits fixed by the Order of 22 June 1973 were extended, by an Order dated 28 August 1973, to 23 November 1973 for the Memorial and 19 April 1974 for the Counter-Memorial. The Memorial of the Government of Australia was filed within the extended time-limit fixed therefor, and was communicated to the French Government. No Counter-Memorial was filed by the French Government and, the written proceedings being thus closed, the case was ready for hearing on 20 April 1974, the day following the expiration of the time-limit fixed for the Counter-Memorial of the French Government.

7. On 16 May 1973 the Government of Fiji filed in the Registry of the Court a request under Article 62 of the Statute to be permitted to intervene in these proceedings. By an Order of 12 July 1973 the Court, having regard to its Order of 22 June 1973 by which the written proceedings were first to be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application, decided to defer its consideration of the application of the Government of Fiji for permission to intervene until the Court should have pronounced upon these questions.

8. On 24 July 1973, the Registrar addressed the notification provided for in Article 63 of the Statute to the States, other than the Parties to the case, which were still in existence and were listed in the relevant documents of the League of Nations as parties to the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928, which was invoked in the Application as a basis of jurisdiction.

9. The Governments of Argentina, Fiji, New Zealand and Peru requested that the pleadings and annexed documents should be made available to them

3. En application de l'article 31, paragraphe 2, du Statut, le Gouvernement australien a désigné le très honorable sir Garfield Barwick, *Chief Justice* d'Australie, pour siéger comme juge *ad hoc* en l'affaire.

4. Dans une lettre de l'ambassadeur de France aux Pays-Bas datée du 16 mai 1973 et remise par celui-ci au Greffier le même jour, le Gouvernement français a fait savoir que, pour les motifs exposés dans la lettre et dans une annexe jointe à celle-ci, il estime que la Cour n'a manifestement pas compétence en l'espèce, qu'il ne peut accepter sa juridiction, et qu'en conséquence le Gouvernement français n'a pas l'intention de désigner un agent et demande à la Cour d'ordonner que l'affaire soit rayée de son rôle. Le Gouvernement français n'a pas désigné d'agent.

5. En même temps que la requête introductive d'instance, l'agent de l'Australie a déposé au Greffe le 9 mai 1973 une demande en indication de mesures conservatoires fondée sur l'article 33 de l'Acte général de 1928 pour le règlement pacifique des différends internationaux, l'article 41 du Statut et l'article 66 du Règlement de la Cour. Par ordonnance du 22 juin 1973, la Cour a indiqué, sur la base de l'article 41 du Statut, certaines mesures conservatoires en l'espèce.

6. Par la même ordonnance du 22 juin 1973, la Cour, considérant qu'il était nécessaire de régler aussi rapidement que possible les questions relatives à sa compétence et à la recevabilité de la requête, a décidé que les pièces écrites porteraient d'abord sur ces questions et a fixé la date d'expiration des délais au 21 septembre 1973 pour le dépôt du mémoire du Gouvernement australien et au 21 décembre 1973 pour le dépôt du contre-mémoire du Gouvernement français. Le coagent de l'Australie ayant demandé que soit prorogé au 23 novembre 1973 le délai dans lequel le mémoire devait être déposé, la date d'expiration des délais fixés par l'ordonnance du 22 juin 1973 a été reportée par ordonnance du 28 août 1973 au 23 novembre 1973 pour le mémoire du Gouvernement australien et au 19 avril 1974 pour le contre-mémoire du Gouvernement français. Le mémoire du Gouvernement australien a été déposé dans le délai ainsi prorogé et il a été communiqué au Gouvernement français. Le Gouvernement français n'a pas déposé de contre-mémoire et, la procédure écrite étant ainsi terminée, l'affaire s'est trouvée en état le 20 avril 1974, c'est-à-dire le lendemain du jour où expirait le délai fixé pour le dépôt du contre-mémoire du Gouvernement français.

7. Le 16 mai 1973, le Gouvernement fidjien a déposé au Greffe, conformément à l'article 62 du Statut, une requête à fin d'intervention dans l'instance. Par ordonnance du 12 juillet 1973, la Cour, eu égard à son ordonnance du 22 juin 1973 prescrivant que les pièces écrites porteraient d'abord sur les questions relatives à sa compétence et à la recevabilité de la requête, a décidé de surseoir à l'examen de la requête par laquelle le Gouvernement fidjien demandait à intervenir jusqu'à ce qu'elle eût statué sur ces questions.

8. Le 24 juillet 1973, le Greffier a adressé la notification prévue à l'article 63 du Statut aux Etats, autres que les Parties à l'instance, qui existaient encore et étaient indiqués dans les documents pertinents de la Société des Nations comme parties à l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, qui était invoqué dans la requête comme l'un des fondements de la compétence de la Cour.

9. Les Gouvernements de l'Argentine, de Fidji, de la Nouvelle-Zélande et du Pérou ont demandé que les pièces de la procédure écrite soient tenues à

in accordance with Article 48, paragraph 2, of the Rules of Court. The Parties were consulted on each occasion, and the French Government having maintained the position stated in the letter of 16 May 1973, and thus declined to express an opinion, the Court or the President decided to accede to these requests.

10. On 4-6, 8-9 and 11 July 1974, after due notice to the Parties, public hearings were held, in the course of which the Court heard the oral argument, on the questions of the Court's jurisdiction and of the admissibility of the Application, advanced by Mr. P. Brazil, Agent of Australia and Senator the Honourable Lionel Murphy, Q.C., Mr. M. H. Byers, Q.C., Mr. E. Lauterpacht, Q.C., and Professor D. P. O'Connell, counsel, on behalf of the Government of Australia. The French Government was not represented at the hearings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Australia:
in the Application:

"The Government of Australia asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.

And to Order

that the French Republic shall not carry out any further such tests."

in the Memorial:

"The Government of Australia submits to the Court that it is entitled to a declaration and judgment that:

- (a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and*
- (b) the Application is admissible."*

12. During the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of Australia:

"The final submissions of the Government of Australia are that:

- (a) the Court has jurisdiction to entertain the dispute the subject of the Application filed by the Government of Australia on 9 May 1973; and*
- (b) the Application is admissible*

and that accordingly the Government of Australia is entitled to a declaration and judgment that the Court has full competence to proceed to entertain the Application by Australia on the Merits of the dispute."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the

leur disposition conformément à l'article 48, paragraphe 2, du Règlement. Les Parties ont été consultées dans chaque cas et, le Gouvernement français maintenant la position prise dans la lettre du 16 mai 1973 pour refuser de donner un avis, la Cour, ou le Président, a décidé de faire droit à ces demandes.

10. Les Parties ayant été dûment averties, des audiences publiques ont eu lieu les 4, 5, 6, 8, 9 et 11 juillet 1974, durant lesquelles la Cour a entendu M. P. Brazil, agent de l'Australie, et l'honorable Lionel Murphy, Q.C., sénateur, M. M. H. Byers, Q.C., M. E. Lauterpacht, Q.C., et M. D. P. O'Connell, conseils, plaider pour le Gouvernement australien sur les questions relatives à la compétence de la Cour et à la recevabilité de la requête. Le Gouvernement français n'était pas représenté aux audiences.

11. Dans la procédure écrite, les conclusions ci-après ont été déposées au nom du Gouvernement australien :

dans la requête :

«Le Gouvernement australien prie la Cour de dire et juger que, pour l'un quelconque ou l'ensemble des motifs exposés ci-dessus ou pour tout autre motif jugé pertinent par la Cour, la poursuite des essais atmosphériques d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international et

Ordonner

à la République française de ne plus faire de tels essais.»

dans le mémoire :

«Le Gouvernement australien s'estime fondé à ce que la Cour dise et juge que :

a) la Cour a compétence pour connaître du différend qui fait l'objet de la requête déposé par le Gouvernement australien le 9 mai 1973 ;

b) la requête est recevable. »

12. A l'issue de la procédure orale, les conclusions écrites ci-après ont été déposées au Greffe au nom du Gouvernement australien :

«Les conclusions finales du Gouvernement australien sont les suivantes :

a) la Cour a compétence pour connaître du différend qui fait l'objet de la requête déposée par le Gouvernement australien le 9 mai 1973 ;

b) la requête est recevable ;

Et en conséquence le Gouvernement australien s'estime fondé à ce que la Cour dise et juge qu'elle a pleine compétence pour connaître de la requête de l'Australie sur le fond du différend.»

13. Aucune pièce écrite n'ayant été déposée par le Gouvernement français, et celui-ci ne s'étant pas fait représenter à la procédure orale, aucune conclusion n'a été prise formellement par ce gouvernement. Toutefois l'attitude du Gouvernement français en ce qui concerne la question de la compétence de la Cour a été définie dans la lettre précitée de l'ambassadeur de France aux

Netherlands, and the document annexed thereto. The said letter stated in particular that:

“... the Government of the [French] Republic, as it has notified the Australian Government, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction”.

*
* *
*

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government “respectfully requests the Court to be so good as to order that the case be removed from the list”. At the opening of the public hearing concerning the request for interim measures of protection, held on 21 May 1973, the President announced that “this request . . . has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court”. In its Order of 22 June 1973, the Court stated that the considerations therein set out did not “permit the Court to accede at the present stage of the proceedings” to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

*
* *
*

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

*
* *
*

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric tests of nuclear weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the *Fisheries Jurisdiction* cases, as follows:

Pays-Bas en date du 16 mai 1973, et dans le document qui y était joint en annexe. La lettre de l'ambassadeur contenait notamment ce passage:

« ainsi qu'il en a averti le Gouvernement australien, le Gouvernement de la République estime que la Cour n'a manifestement pas compétence dans cette affaire et qu'il ne peut accepter sa juridiction ».

*
* * *

14. Comme il a été indiqué (paragraphe 4), l'ambassadeur de France déclarait aussi dans sa lettre du 16 mai 1973 que le Gouvernement français « demande respectueusement à la Cour de bien vouloir ordonner que cette affaire soit rayée de son rôle ». Au début de l'audience publique consacrée à la demande en indication de mesures conservatoires qui s'est tenue le 21 mai 1973, le Président a annoncé: « Il a été dûment pris acte de cette demande ... et la Cour l'examinera le moment venu, conformément à l'article 36, paragraphe 6, de son Statut. » Dans son ordonnance du 22 juin 1973, la Cour a dit que, pour les raisons énoncées dans cette ordonnance, elle ne pouvait « faire droit, au stade actuel de la procédure, » à la demande du Gouvernement français. Ayant eu depuis lors la possibilité d'examiner cette demande compte tenu de la suite de la procédure, la Cour estime que la présente affaire n'est pas de celles auxquelles il conviendrait d'appliquer la procédure sommaire de radiation du rôle.

*
* * *

15. Il est regrettable que le Gouvernement français ne se soit pas présenté pour développer ses arguments sur les questions qui se posent en la phase actuelle de la procédure et qu'ainsi la Cour n'ait pas eu l'aide que l'exposé de ces arguments et toute preuve fournie à l'appui auraient pu lui apporter. La Cour doit cependant poursuivre l'affaire pour aboutir à une conclusion et, ce faisant, doit tenir compte non seulement des preuves et des arguments qui lui sont présentés par le demandeur, mais aussi de toute documentation ou preuve pertinente. Elle doit sur cette base s'assurer en premier lieu qu'il n'existe aucun obstacle à l'exercice de sa fonction judiciaire et en second lieu, s'il n'existe aucun obstacle de ce genre, que la requête est fondée en fait et en droit.

*
* * *

16. La présente affaire concerne un différend entre le Gouvernement australien et le Gouvernement français au sujet d'essais d'armes nucléaires effectués en atmosphère par ce dernier dans l'océan Pacifique Sud. Attendu que, dans la phase actuelle de l'instance, la Cour ne doit traiter que de questions préliminaires, il convient de rappeler que, dans une phase de cette nature, elle doit se placer dans l'optique qu'elle a définie en ces termes dans les affaires de la *Compétence en matière de pêcheries*:

“The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits.” (*I.C.J. Reports 1973*, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique, in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururoa atoll some 6,000 kilometres to the east of the Australian mainland. The French Government has created “Prohibited Zones” for aircraft and “Dangerous Zones” for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these “zones” have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequent dissipation in varying degrees throughout the world, of measurable quantities of radioactive matter. It is asserted by Australia that the French atmospheric tests have caused some fall-out of this kind to be deposited on Australian territory; France has maintained in particular that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible, and that such fall-out on Australian territory does not constitute a danger to the health of the Australian population. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

*
* *
*

19. By letters of 19 September 1973, 29 August and 11 November 1974, the Government of Australia informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute (*inter alia*) that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on Australian territory which, according to the Australian Government, was clearly attributable to these tests,

« La question étant ainsi limitée, la Cour s'abstiendra non seulement d'exprimer une opinion sur des points de fond, mais aussi de se prononcer d'une manière qui pourrait préjuger ou paraître préjuger toute décision qu'elle pourrait rendre sur le fond. » (*C.I.J. Recueil 1973*, p. 7 et 54.)

Il y a lieu cependant de résumer les principaux faits qui sont à l'origine de l'affaire.

17. Avant le dépôt de la requête introductive d'instance en l'espèce, le Gouvernement français avait procédé à des essais atmosphériques d'engins nucléaires à son centre d'expérimentations du Pacifique, dans le territoire de la Polynésie française, en 1966, 1967, 1968, 1970, 1971 et 1972. Le lieu utilisé pour les explosions a été principalement l'atoll de Mururoa, situé à quelque 6000 kilomètres à l'est du continent australien. Le Gouvernement français a institué des « zones interdites » aux aéronefs et des « zones dangereuses » pour la navigation aérienne et maritime, afin d'empêcher les avions et les navires d'approcher du centre d'expérimentations; ces zones ont été établies chacune des années où des essais ont eu lieu, pour la durée de ces essais.

18. Comme le Comité scientifique des Nations Unies pour l'étude des effets des rayonnements ionisants l'a indiqué dans ses rapports successifs à l'Assemblée générale, les essais d'engins nucléaires effectués dans l'atmosphère ont libéré dans celle-ci et disséminé ensuite dans le monde entier à des degrés variables des quantités mesurables de matières radioactives. L'Australie affirme que les essais atmosphériques français ont provoqué des retombées de cette nature en territoire australien. La France soutient entre autres que les éléments radioactifs produits par ses expériences sont si minimes qu'ils ne peuvent être considérés que comme négligeables et que les retombées sur le territoire australien qui en résultent ne constituent pas un danger pour la santé de la population australienne. Ces points litigieux intéressant manifestement le fond de l'affaire, la Cour doit s'abstenir, pour les raisons précédemment indiquées, d'exprimer une opinion à leur sujet.

*
* *

19. Par lettres du 19 septembre 1973 et des 29 août et 11 novembre 1974, le Gouvernement australien a informé la Cour que, après l'ordonnance du 22 juin 1973 qui, à titre de mesures conservatoires prises en vertu de l'article 41 du Statut, indiquait notamment que le Gouvernement français devait s'abstenir de procéder à des essais nucléaires provoquant le dépôt de retombées radioactives sur le territoire de l'Australie, deux nouvelles séries d'essais atmosphériques ont eu lieu au centre d'expérimentations du Pacifique en juillet et août 1973 et de juin à septembre 1974. Ces lettres indiquaient aussi que l'on avait enregistré sur le territoire australien des retombées qui, selon le Gouvernement australien,

and that “in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973”.

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

*
* *
*

21. The Application finds the jurisdiction of the Court on the following basis:

- “(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931 . . .
- (ii) Alternatively, Article 36 (2) of the Statute of the Court. Australia and the French Republic have both made declarations thereunder.”

22. The scope of the present phase of the proceedings was defined by the Court’s Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character” (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial

étaient manifestement attribuables à ces essais, et que, « de l'avis du Gouvernement australien, l'attitude du Gouvernement français constitue une violation claire et délibérée de l'ordonnance rendue par la Cour le 22 juin 1973 ».

20. Un certain nombre de déclarations autorisées ont été récemment faites au nom du Gouvernement français, concernant les intentions de celui-ci au sujet de ses futures expériences nucléaires dans l'océan Pacifique Sud. La portée de ces déclarations et leur incidence sur la présente instance seront examinées en détail dans la suite de l'arrêt.

*
* *

21. La requête invoque, comme base de la compétence de la Cour :

- « i) l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux (1928) rapproché de l'article 36, paragraphe 1, et de l'article 37 du Statut de la Cour. L'Australie et la République française ont toutes deux adhéré à l'Acte général le 21 mai 1931...
- ii) subsidiairement, l'article 36, paragraphe 2, du Statut de la Cour. L'Australie et la République française ont toutes deux déposé des déclarations aux termes de cet article. »

22. La portée de la présente phase de la procédure a été définie dans l'ordonnance rendue par la Cour le 22 juin 1973, qui demandait aux Parties de traiter d'abord des questions relatives à la compétence de la Cour et à la recevabilité de la requête. Pour cette raison, ainsi qu'il a été indiqué, non seulement les Parties mais la Cour elle-même doivent s'abstenir d'aborder la demande au fond. Cependant, quand elle examine ces questions de caractère préliminaire, la Cour a le droit et, dans certaines circonstances, peut avoir l'obligation de prendre en considération d'autres questions qui, sans qu'on puisse les classer peut-être à strictement parler parmi les problèmes de compétence ou de recevabilité, appellent par leur nature une étude préalable à celle de ces problèmes.

23. A cet égard, il convient de souligner que la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue, d'une part pour faire en sorte que, si sa compétence au fond est établie, l'exercice de cette compétence ne se révèle pas vain, d'autre part pour assurer le règlement régulier de tous les points en litige ainsi que le respect des « limitations inhérentes à l'exercice de la fonction judiciaire » de la Cour et pour « conserver son caractère judiciaire » (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963, p. 29*). Un pouvoir inhérent de ce genre, sur la base duquel la Cour est pleinement habilitée à adopter toute conclusion éventuellement nécessaire aux fins qui viennent d'être indiquées, découle de l'existence même de la Cour, organe judiciaire établi par le consente-

organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of Australia. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law"—the Application having specified in what respect further tests were alleged to be in violation of international law—and should order "that the French Republic shall not carry out any further such tests".

26. The diplomatic correspondence of recent years between Australia and France reveals Australia's preoccupation with French nuclear atmospheric tests in the South Pacific region, and indicates that its objective has been to bring about their termination. Thus in a Note dated 3 January 1973 the Australian Government made it clear that it was inviting the French Government "to refrain from any further atmospheric nuclear tests in the Pacific area and formally to assure the Australian Government that no more such tests will be held in the Pacific area". In the Application, the Government of Australia observed in connection with this Note (and the French reply of 7 February 1973) that:

"It is at these Notes, of 3 January and 7 February 1973, that the Court is respectfully invited to look most closely; for it is in them that the shape and dimensions of the dispute which now so sadly divides the parties appear so clearly. The Government of Australia claimed that the continuance of testing by France is illegal and called for the cessation of tests. The Government of France asserted the legality of its conduct and gave no indication that the tests would stop." (Para. 15 of the Application.)

That this was the object of the claim also clearly emerges from the request for the indication of interim measures of protection, submitted to the Court by the Applicant on 9 May 1973, in which it was observed:

"As is stated in the Application, Australia has sought to obtain from the French Republic a permanent undertaking to refrain from

ment des Etats, et lui est conféré afin que sa fonction judiciaire fondamentale puisse être sauvegardée.

24. Eu égard à ces considérations, la Cour doit examiner d'abord une question qu'elle estime essentiellement préliminaire, à savoir l'existence d'un différend, car que la Cour ait ou non compétence en l'espèce la solution de cette question pourrait exercer une influence décisive sur la suite de l'instance. Il lui incombe donc d'analyser de façon précise la demande que l'Australie lui adresse dans sa requête. La présente phase de l'instance n'ayant été consacrée qu'à des questions préliminaires, le demandeur n'a pas eu l'occasion de développer complètement ses thèses sur le fond. Il reste que c'est par rapport à la requête, laquelle doit, d'après l'article 40 du Statut, indiquer « l'objet du différend », que la Cour doit examiner la nature et l'existence du différend porté devant elle.

25. La Cour rappelle que la demande présentée dans la requête (paragraphe 11 ci-dessus) tend à ce que la Cour dise et juge que « la poursuite des essais atmosphériques d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international » — la requête spécifiant en quoi de nouveaux essais violeraient le droit international — et ordonne « à la République française de ne plus faire de tels essais ».

26. La correspondance diplomatique échangée ces dernières années entre l'Australie et la France montre les préoccupations que les expériences nucléaires françaises effectuées en atmosphère dans la région du Pacifique Sud suscitent en Australie et indique que celle-ci a eu pour objectif la cessation des essais. Ainsi, dans une note du 3 janvier 1973, le Gouvernement australien pria le Gouvernement français « de s'abstenir de tous nouveaux essais nucléaires en atmosphère dans la région du Pacifique et de lui donner l'assurance formelle qu'il n'y sera procédé à aucun nouvel essai de ce genre ». Dans la requête, le Gouvernement australien a dit à propos de cette note et de la réponse du Gouvernement français en date du 7 février 1973 :

« Ce sont ces notes, des 3 janvier et 7 février 1973, que la Cour est respectueusement invitée à examiner avec la plus grande attention car ce sont elles qui mettent en pleine lumière la nature et l'ampleur du différend qui oppose maintenant les Parties de façon si regrettable. Le Gouvernement australien soutenait que la poursuite des essais par la France était illégale et demandait leur cessation. Le Gouvernement français affirmait la légalité de son comportement et ne laissait pas entrevoir l'arrêt des essais » (par. 15).

Que tel ait été l'objet de la demande, c'est ce que confirme avec netteté la demande en indication de mesures conservatoires que le requérant a présentée à la Cour le 9 mai 1973 et où figure cette remarque :

« Ainsi qu'il est indiqué dans la requête, l'Australie a cherché à obtenir de la République française qu'elle s'engage en permanence à

further atmospheric nuclear tests in the Pacific. However, the French Republic has expressly refused to give any such undertaking. It was made clear in a statement in the French Parliament on 2 May 1973 by the French Secretary of State for the Armies that the French Government, regardless of the protests made by Australia and other countries, does not envisage any cancellation or modification of the programme of nuclear testing as originally planned.” (Para. 69.)

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific Ocean. In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General’s comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government’s view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that “Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted ... but no such assurance was given”. The Attorney-General continued, with reference to the communiqué of 8 June:

“The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests.” (Hearing of 4 July 1974.)

It is clear from these statements that if the French Government had given what could have been construed by Australia as “a firm, explicit and binding undertaking to refrain from further atmospheric tests”, the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 26 September 1974, the Attorney-General of Australia, replying to a question put in the Australian Senate with regard to reports that France had announced that it had finished atmospheric nuclear testing, said:

“From the reports I have received it appears that what the French Foreign Minister actually said was ‘We have now reached a stage in

ne plus procéder dans le Pacifique à de nouveaux essais nucléaires dans l'atmosphère. La République française a expressément refusé de prendre un tel engagement. Il ressort clairement d'une déclaration du ministre des armées faite devant le Parlement français le 2 mai 1973 que le Gouvernement français, passant outre aux protestations de l'Australie et d'autres pays, n'envisage pas d'annuler ni de modifier le programme d'expérimentation nucléaire prévu. » (Par. 69.)

27. La nature de la demande australienne se trouve précisée encore par la manière dont l'Australie, par l'intermédiaire de son *Attorney-General*, a réagi aux déclarations mentionnées au paragraphe 20 qui ont été faites au nom du Gouvernement français en ce qui concerne les expériences nucléaires dans l'océan Pacifique Sud. Lors de la procédure orale, l'*Attorney-General* d'Australie a esquissé l'historique du différend depuis l'ordonnance du 22 juin 1973 et rappelé un communiqué de la présidence de la République française en date du 8 juin 1974. Dans les observations qu'il a formulées sur ce document, l'*Attorney-General* a indiqué qu'on pouvait peut-être à l'analyse y voir la preuve d'une certaine évolution de la controverse entre les Parties, tout en soulignant que, de l'avis de son gouvernement, cette évolution n'était pas de nature à résoudre le différend à sa satisfaction. Plus particulièrement, il a rappelé à la Cour que « l'Australie a maintes fois répété qu'elle souhaite obtenir de la France l'assurance qu'il ne sera pas procédé à de nouvelles explosions nucléaires dans l'atmosphère ... mais cette assurance n'a pas été donnée ». L'*Attorney-General* a poursuivi en ces termes à propos du communiqué du 8 juin :

« Le but du Gouvernement australien est d'exclure complètement les expériences atmosphériques. Il a maintes fois demandé l'assurance que les essais dans l'atmosphère prendraient fin. Il n'a pas obtenu cette assurance. On ne saurait voir dans la récente déclaration présidentielle française un engagement ferme, explicite et de caractère obligatoire de s'abstenir de procéder à de nouveaux essais dans l'atmosphère. Le Gouvernement français se réserve donc toujours le droit d'effectuer des essais nucléaires en atmosphère. » (Audience du 4 juillet 1974.)

Il ressort de ces déclarations que, si le Gouvernement français avait pris ce que l'Australie aurait pu interpréter comme « un engagement ferme, explicite et de caractère obligatoire de s'abstenir de procéder à de nouveaux essais dans l'atmosphère », le Gouvernement demandeur aurait considéré qu'il avait atteint son objectif.

28. Plus tard, le 26 septembre 1974, répondant à une question posée au Sénat australien sur les informations d'après lesquelles la France avait annoncé qu'elle avait terminé ses essais nucléaires dans l'atmosphère, l'*Attorney-General* d'Australie a dit :

« D'après les renseignements en ma possession, il semble que le ministre des Affaires étrangères de France ait dit en fait : « Parvenus

our nuclear technology that makes it possible for us to continue our program by underground testing, and we have taken steps to do so as early as next year' . . . this statement falls far short of a commitment or undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre . . . There is a basic distinction between an assertion that steps are being taken to continue the testing program by underground testing as early as next year and an assurance that no further atmospheric tests will take place. It seems that the Government of France, while apparently taking a step in the right direction, is still reserving to itself the right to carry out atmospheric nuclear tests. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests should the French Government subsequently decide to hold them."

Without commenting for the moment on the Attorney-General's interpretation of the French statements brought to his notice, the Court would observe that it is clear that the Australian Government contemplated the possibility of "an assurance that no further atmospheric tests will take place" being sufficient to protect Australia.

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contended that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (*P.C.I.J., Series A, No. 7, p. 35*), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision"

désormais, dans la technologie nucléaire, à un degré où il nous devient possible de poursuivre nos programmes par des essais souterrains, nous avons pris nos dispositions pour nous engager dans cette voie dès l'année prochaine » ... cette déclaration est fort loin de représenter un engagement suivant lequel le Gouvernement français n'effectuerait plus d'essais dans l'atmosphère à son centre d'expérimentations du Pacifique... Il existe une différence fondamentale entre une affirmation selon laquelle des dispositions sont prises pour poursuivre le programme d'expérimentation par des essais souterrains dès l'année prochaine et l'assurance qu'il n'y aura plus d'essais dans l'atmosphère. Il semble que, bien qu'il fasse apparemment un pas dans la bonne direction, le Gouvernement français continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère. D'un point de vue juridique, l'Australie n'a rien obtenu du Gouvernement français qui la protège contre de nouveaux essais atmosphériques au cas où le Gouvernement français déciderait par la suite d'y procéder. »

Sans commenter pour le moment l'interprétation que l'*Attorney-General* a donnée des déclarations françaises portées à sa connaissance, la Cour voudrait faire observer qu'il est clair que, selon le Gouvernement australien, « l'assurance qu'il n'y aura plus d'essais dans l'atmosphère » pourrait suffire à protéger l'Australie.

29. Compte tenu de ces déclarations, il est essentiel d'examiner si le Gouvernement australien sollicite de la Cour un jugement qui ne ferait que préciser le lien juridique entre le demandeur et le défendeur par rapport aux questions en litige, ou un jugement conçu de façon telle que son libellé obligerait l'une des Parties ou les deux à prendre ou à s'abstenir de prendre certaines mesures. C'est donc le devoir de la Cour de circonscrire le véritable problème en cause et de préciser l'objet de la demande. Il n'a jamais été contesté que la Cour est en droit et qu'elle a même le devoir d'interpréter les conclusions des parties; c'est l'un des attributs de sa fonction judiciaire. Assurément, quand la demande n'est pas formulée comme il convient parce que les conclusions des parties sont inadéquates, la Cour n'a pas le pouvoir de « se substituer [aux Parties] pour en formuler de nouvelles sur la base des seules thèses avancées et faits allégués » (*C.P.J.I. série A n° 7*, p. 35), mais tel n'est pas le cas en l'espèce et la question d'une formulation nouvelle des conclusions par la Cour ne se pose pas non plus. En revanche, la Cour a exercé à maintes reprises le pouvoir qu'elle possède d'écarter, s'il est nécessaire, certaines thèses ou certains arguments avancés par une partie comme élément de ses conclusions quand elle les considère, non pas comme des indications de ce que la partie lui demande de décider, mais comme des motifs invoqués pour qu'elle se prononce dans le sens désiré. C'est ainsi que, dans l'affaire des *Pêcheries*, la Cour a dit de neuf des treize points que comportaient les conclusions du demandeur: « Ce sont là des éléments qui, le cas échéant, pourraient fournir les motifs de l'arrêt et non en constituer l'objet »

(*I.C.J. Reports 1951*, p. 126). Similarly in the *Minquiers and Ecrehos* case, the Court observed that:

“The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government.” (*I.C.J. Reports 1953*, p. 52; see also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

30. In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court “to adjudge and declare” (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court’s attention, and public statements made on behalf of the applicant Government. If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected. In the present case, it is evident that the *fons et origo* of the case was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment. While the judgment of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court on questions of law, such finding would be only a means to an end, and not an end in itself. The Court is of course aware of the role of declaratory judgments, but the present case is not one in which such a judgment is requested.

31. In view of the object of the Applicant’s claim, namely to prevent further tests, the Court has to take account of any developments, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court’s attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

32. At the hearing of 4 July 1974, in the course of a review of developments in relation to the proceedings since counsel for Australia had

(*C.I.J. Recueil 1951*, p. 126). De même, dans l'affaire des *Minquiers et Ecréhous*, la Cour a relevé que :

« Les conclusions du Gouvernement du Royaume-Uni, reproduites ci-dessus, consistent en trois paragraphes, les deux derniers étant les motifs à l'appui de la première proposition qui doit être considérée comme la conclusion finale de ce gouvernement. Les conclusions du Gouvernement français se composent de dix paragraphes, les premiers neuf étant les motifs qui conduisent à la dixième proposition, qui doit être considérée comme la conclusion finale de ce gouvernement. » (*C.I.J. Recueil 1953*, p. 52; voir aussi *Nottebohm, deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 16.)

30. Dans les circonstances de l'espèce, et bien que dans sa requête le demandeur ait employé la formule traditionnelle consistant à prier la Cour de « dire et juger » (et des termes analogues étaient employés dans les affaires citées au paragraphe précédent), c'est à la Cour qu'il appartient de s'assurer du but et de l'objet véritable de la demande et elle ne saurait, pour ce faire, s'en tenir au sens ordinaire des termes utilisés; elle doit considérer l'ensemble de la requête, les arguments développés devant la Cour par le demandeur, les échanges diplomatiques qui ont été portés à son attention et les déclarations publiques faites au nom du gouvernement demandeur. Si ces éléments délimitent nettement l'objet de la demande, ils ne peuvent manquer d'influer sur l'interprétation des conclusions. En l'espèce, il apparaît nettement que l'affaire trouve son origine dans les essais nucléaires atmosphériques effectués par la France dans la région du Pacifique Sud et que le demandeur a eu pour objectif initial et conserve pour objectif ultime la cessation de ces essais; dans ces conditions, on ne saurait considérer que sa demande tende à obtenir un jugement déclaratoire. Dès lors que l'arrêt dont l'Australie sollicite le prononcé devrait se fonder d'après elle sur une constatation de la Cour relative aux questions de droit, une telle constatation ne serait qu'un moyen utilisé en vue d'une fin et non une fin en soi. La Cour a bien entendu conscience du rôle joué par les jugements déclaratoires mais la présente affaire n'est pas de celles où un tel jugement est demandé.

31. Etant donné l'objet de la demande, à savoir empêcher de nouveaux essais, la Cour a l'obligation de tenir compte de tout fait intéressant le comportement du défendeur survenu depuis le dépôt de la requête. De plus, ainsi qu'il a été mentionné, le demandeur lui-même a implicitement admis que des événements postérieurs à la requête pouvaient être pertinents quand il a appelé l'attention de la Cour sur le communiqué du 8 juin 1974 et présenté des observations à son sujet. Dans ces conditions la Cour est tenue de prendre en considération des faits nouveaux survenus tant avant qu'après la clôture de la procédure orale. Etant donné la non-comparution du défendeur, il incombe tout particulièrement à la Cour de s'assurer qu'elle est bien en possession de tous les faits disponibles.

32. A l'audience du 4 juillet 1974, alors qu'il énumérait les faits nouveaux intéressant l'instance qui s'étaient produits depuis que les conseils

previously addressed the Court in May 1973, the Attorney-General of Australia made the following statement:

“You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given.

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans.”

He devoted considerable attention to a communiqué dated 8 June 1974 from the Office of the President of the French Republic, and submitted to the Court the Australian Government's interpretation of that document. Since that time, certain French authorities have made a number of consistent public statements concerning future tests, which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court's attention in July 1974 and those subsequently made.

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before

de l'Australie s'étaient adressés à la Cour en mai 1973, l'*Attorney-General* d'Australie a fait la déclaration suivante :

« Vous vous rappellerez que l'Australie a maintes fois répété qu'elle souhaite obtenir de la France l'assurance qu'il ne sera pas procédé à de nouvelles explosions nucléaires dans l'atmosphère. De fait, la Cour s'en souvient, cette assurance a été demandée au Gouvernement français par le Gouvernement australien dans une note du 3 janvier 1973, mais elle n'a pas été donnée.

Je rappelle à la Cour qu'au paragraphe 427 de son mémoire le Gouvernement australien a fait une déclaration, alors absolument exacte, selon laquelle le Gouvernement français n'avait pas manifesté la moindre intention d'interrompre le programme d'expériences prévu pour 1974 et 1975. Il faut désormais envisager cette déclaration dans la perspective des problèmes que je vais maintenant aborder et qui portent sur les communications officielles du Gouvernement français relatives à ses plans actuels. »

L'*Attorney-General* a évoqué longuement un communiqué de la présidence de la République française en date du 8 juin 1974 et il a exposé à la Cour l'interprétation que le Gouvernement australien en donnait. Depuis lors, des autorités françaises ont fait au sujet des expériences futures un certain nombre de déclarations publiques allant toutes dans le même sens, qui sont autant d'éléments propres à aider la Cour à évaluer l'interprétation des documents antérieurs présentée par le demandeur et qu'il importe d'examiner pour déterminer si elles consacrent un changement dans les intentions de la France relatives à son comportement futur. Il est vrai que ces déclarations n'ont pas été faites devant la Cour mais elles sont du domaine public, sont connues du Gouvernement australien et l'une d'elles a été commentée par l'*Attorney-General* le 26 septembre 1974 devant le Sénat australien. Il est bien entendu nécessaire d'examiner toutes ces déclarations, celle qui a été portée à l'attention de la Cour en juillet 1974 comme celles qui ont été faites ultérieurement.

33. Si la Cour avait estimé que l'intérêt de la justice l'exigeait, elle aurait certes pu donner aux Parties la possibilité de lui présenter leurs observations sur les déclarations postérieures à la clôture de la procédure orale, par exemple en rouvrant celle-ci. Cette façon de procéder n'aurait cependant été pleinement justifiée que si le sujet de ces déclarations avait été entièrement nouveau, n'avait pas été évoqué en cours d'instance, ou était inconnu des Parties. Manifestement, tel n'est pas le cas. Les éléments essentiels que la Cour doit examiner ont été introduits dans la procédure par le demandeur lui-même pendant les audiences, et d'une façon qui n'était pas seulement incidente, quand il a appelé l'attention de la Cour sur une déclaration antérieure des autorités françaises, produit les documents où elle figurait et présenté une interprétation de son caractère, en particulier sur le point de savoir si elle renfermait une assurance ferme. C'est donc à l'initiative du demandeur que la déclaration et l'interprétation qu'en donne l'Australie se trouvent soumises à la Cour. De plus, le

the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

“The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.

The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.”

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned, the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July 1974 in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June 1974, mentioned above, stated that on 10 June 1974 the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:

demandeur a publiquement formulé des observations par la suite (paragraphe 28 ci-dessus) sur des déclarations faites par les autorités françaises après la clôture de la procédure orale. La Cour est donc en possession non seulement des déclarations des autorités françaises concernant la cessation des essais nucléaires dans l'atmosphère, mais aussi des vues exprimées par le demandeur à leur sujet. Bien que la Cour, en tant qu'organe judiciaire, ait conscience de l'importance du principe que traduit la maxime *audi alteram partem*, elle ne pense pas que ce principe l'empêche de prendre en considération des déclarations postérieures à la procédure orale et qui se bornent à compléter et à renforcer des points déjà discutés pendant cette procédure — déclarations que le demandeur ne peut pas ignorer. C'est pourquoi le demandeur ayant présenté des observations sur les déclarations faites par les autorités françaises aussi bien avant qu'après la procédure orale, il pouvait raisonnablement escompter que la Cour traite de ce sujet et aboutisse à ses propres conclusions sur le sens et les effets de ces déclarations. La Cour, ayant pris note des observations du demandeur et ne s'estimant pas tenue de consulter les Parties sur la base de sa décision, considère qu'il ne servirait à rien de rouvrir la procédure orale.

34. Il convient d'examiner les déclarations mentionnées plus haut dans l'ordre chronologique. La première est celle que contient le communiqué publié par la présidence de la République française le 8 juin 1974, peu avant le début de la campagne d'essais nucléaires lancée par la France en 1974:

« Le *Journal Officiel* du 8 juin 1974 publie l'arrêté remettant en vigueur les mesures de sécurité de la zone d'expérimentation nucléaire du Pacifique Sud.

La présidence de la République précise, à cette occasion, qu'au point où en est parvenue l'exécution de son programme de défense en moyens nucléaires la France sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée. »

Copie du communiqué a été transmise au département des affaires étrangères d'Australie sous le couvert d'une note du 11 juin 1974 de l'ambassade de France à Canberra et, ainsi qu'on l'a vu, le texte du communiqué a été porté à l'attention de la Cour pendant la procédure orale.

35. La Cour ne peut manquer de relever en outre que mention d'un document a été faite en audience publique par un conseil dans l'instance parallèle introduite le 9 mai 1973 par la Nouvelle-Zélande contre la France. A l'audience du 10 juillet 1974, l'*Attorney-General* de Nouvelle-Zélande, après avoir évoqué le communiqué précité du 8 juin 1974, a indiqué que, le 10 juin 1974, l'ambassade de France à Wellington avait adressé au ministère des affaires étrangères de Nouvelle-Zélande une note dont il a lu le passage suivant:

“France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type.”

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

“... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government’s programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . .”

38. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

39. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

“We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year.”

40. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added “in the normal course of events”, he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric tests contemplated “will, in the normal course of events, be the last of this type”. The Minister also mentioned that, whether or not other governments had been officially advised of the

«la France, au point où en est parvenue l'exécution de son programme de défense en moyens nucléaires, sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée.

Ainsi, les essais atmosphériques qui seront prochainement effectués seront normalement les derniers de ce type.»

36. La Cour doit examiner aussi les déclarations faites en la matière par les autorités françaises après la procédure orale, à savoir le 25 juillet 1974 par le président de la République, le 16 août 1974 par le ministre de la défense, le 25 septembre 1974 par le ministre des affaires étrangères devant l'Assemblée générale des Nations Unies et le 11 octobre 1974 par le ministre de la défense.

37. La déclaration qu'il convient d'examiner d'abord est celle que le président de la République a faite le 25 juillet 1974 lors d'une réunion de presse dans les termes suivants :

«sur cette question des essais nucléaires, vous savez que le premier ministre s'était exprimé publiquement à l'Assemblée nationale, lors du discours de présentation du programme du Gouvernement. Il avait indiqué que les expériences nucléaires françaises seraient poursuivies. J'avais moi-même précisé que cette campagne d'expériences atmosphériques serait la dernière, et donc les membres du gouvernement étaient complètement informés de nos intentions à cet égard...»

38. Le 16 août 1974, au cours d'une interview donnée à la télévision française, le ministre de la défense a dit que le Gouvernement français avait tout mis en œuvre pour que les essais nucléaires de 1974 soient les derniers à se dérouler dans l'atmosphère.

39. Le 25 septembre 1974, le ministre des affaires étrangères a dit, s'adressant à l'Assemblée générale des Nations Unies :

« Parvenus désormais, dans la technologie nucléaire, à un degré où il devient possible de poursuivre nos programmes par des essais souterrains, nous avons pris nos dispositions pour nous engager dans cette voie dès l'année prochaine. »

40. Le 11 octobre 1974, le ministre de la défense a tenu une conférence de presse au cours de laquelle il a dit par deux fois en termes presque identiques qu'il n'y aurait pas d'essai aérien en 1975 et que la France était prête à procéder à des essais souterrains. La remarque ayant été faite qu'il n'avait pas ajouté « normalement », il en a convenu. Cette indication est intéressante eu égard au passage de la note de l'ambassade de France à Wellington au ministère des affaires étrangères de Nouvelle-Zélande en date du 10 juin 1974, cité au paragraphe 35 ci-dessus, où il est précisé que les essais atmosphériques envisagés « seront normalement les derniers de ce type ». Le ministre a mentionné aussi que d'autres gouvernements, qu'ils aient été officiellement avisés ou non de la décision,

decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court must in particular take into consideration the President's statement of 25 July 1974 (paragraph 37 above) followed by the Defence Minister's statement on 11 October 1974 (paragraph 40). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events [*normalement*]".

*
* *

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the ques-

ont pu la connaître à la lecture des journaux et des communiqués de la présidence de la République.

41. Vu ce qui précède, la Cour estime que la France a rendu publique son intention de cesser de procéder à des expériences nucléaires en atmosphère, une fois terminée la campagne d'essais de 1974. La Cour doit en particulier tenir compte de la déclaration du président de la République en date du 25 juillet 1974 (paragraphe 37 ci-dessus) suivie de la déclaration du ministre de la défense en date du 11 octobre 1974 (paragraphe 40 ci-dessus). L'une et l'autre révèlent que les déclarations officielles faites au nom de la France sur la question des futures expériences nucléaires ne sont pas subordonnées à ce que pouvait éventuellement impliquer l'indication contenue dans le terme « normalement ».

*

* * *

42. Avant d'examiner si les déclarations des autorités françaises répondent à l'objet de la demande australienne tendant à ce qu'il soit mis fin aux essais nucléaires en atmosphère dans le Pacifique Sud, il faut d'abord déterminer la nature de ces déclarations ainsi que leur portée sur le plan international.

43. Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques. Des déclarations de cette nature peuvent avoir et ont souvent un objet très précis. Quand l'Etat auteur de la déclaration entend être lié conformément à ses termes, cette intention confère à sa prise de position le caractère d'un engagement juridique, l'Etat intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration. Un engagement de cette nature, exprimé publiquement et dans l'intention de se lier, même hors du cadre de négociations internationales, a un effet obligatoire. Dans ces conditions, aucune contrepartie n'est nécessaire pour que la déclaration prenne effet, non plus qu'une acceptation ultérieure ni même une réplique ou une réaction d'autres Etats, car cela serait incompatible avec la nature strictement unilatérale de l'acte juridique par lequel l'Etat s'est prononcé.

44. Bien entendu, tout acte unilatéral n'entraîne pas des obligations mais un Etat peut choisir d'adopter une certaine position sur un sujet donné dans l'intention de se lier — ce qui devra être déterminé en interprétant l'acte. Lorsque des Etats font des déclarations qui limitent leur liberté d'action future, une interprétation restrictive s'impose.

45. Pour ce qui est de la forme, il convient de noter que ce n'est pas là un domaine dans lequel le droit international impose des règles strictes ou spéciales. Qu'une déclaration soit verbale ou écrite, cela n'entraîne aucune différence essentielle, car de tels énoncés faits dans des circonstances particulières peuvent constituer des engagements en droit international sans avoir nécessairement à être consignés par écrit. La forme n'est donc pas

tion of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

“Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.”
(*I.C.J. Reports 1961*, p. 31.)

The Court further stated in the same case: “. . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention . . .” (*ibid.*, p. 32).

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

*
* * *

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September 1974 (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric nuclear testing, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) “falls far short of an undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre” and that France was “still reserving to itself the right to carry out atmospheric nuclear tests” so that “In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests”.

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no “commitment” or “firm, explicit and binding undertaking” had been given is based on the view that the assurance is not absolute in its terms,

décisive. Comme la Cour l'a dit dans son arrêt sur les exceptions préliminaires en l'affaire du *Temple de Préah Vihéar*:

« [comme] c'est généralement le cas en droit international qui insiste particulièrement sur les intentions des parties, lorsque la loi ne prescrit pas de forme particulière, les parties sont libres de choisir celle qui leur plaît, pourvu que leur intention en ressorte clairement » (*C.I.J. Recueil 1961*, p. 31).

La Cour a ajouté dans la même affaire: « la seule question pertinente est de savoir si la rédaction employée dans une déclaration donnée révèle clairement l'intention... » (*ibid.*, p. 32).

46. L'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale, surtout à une époque où, dans bien des domaines, cette coopération est de plus en plus indispensable. Tout comme la règle du droit des traités *pacta sunt servanda* elle-même, le caractère obligatoire d'un engagement international assumé par déclaration unilatérale repose sur la bonne foi. Les Etats intéressés peuvent donc tenir compte des déclarations unilatérales et tabler sur elles; ils sont fondés à exiger que l'obligation ainsi créée soit respectée.

*
* *

47. Ayant examiné les principes juridiques en jeu, la Cour en vient plus précisément aux déclarations du Gouvernement français. Le Gouvernement australien a indiqué à la Cour pendant la procédure orale comment il interprétait la première de ces déclarations (paragraphe 27 ci-dessus). Au sujet de celles qui ont suivi, on peut se référer à ce qu'a dit l'*Attorney-General* devant le Sénat australien le 26 septembre 1974 (paragraphe 28 ci-dessus). En réponse à une question relative à des informations d'après lesquelles la France avait annoncé qu'elle avait terminé ses essais nucléaires en atmosphère, il a dit que la déclaration du ministre des affaires étrangères de France en date du 25 septembre 1974 (paragraphe 39 ci-dessus) « est fort loin de représenter un engagement suivant lequel le Gouvernement français n'effectuerait plus d'essais dans l'atmosphère à son centre d'expérimentations du Pacifique » et que la France « continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère » de sorte que « D'un point de vue juridique, l'Australie n'a rien obtenu du Gouvernement français qui la protège contre de nouveaux essais atmosphériques ».

48. On notera que l'Australie a admis que le différend pourrait être résolu par une déclaration unilatérale, de la nature précisée plus haut, qui serait donnée par la France et sa conclusion qu'en fait aucun « engagement ferme, explicite et de caractère obligatoire » n'a été pris procède de l'idée que l'assurance ne revêt pas une forme absolue, qu'il faut « dis-

that there is a “distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place”, that “the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded” and that thus “the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests”. The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers

tinguer l'affirmation selon laquelle les essais seront désormais souterrains de l'assurance qu'il n'y aura plus de nouveaux essais dans l'atmosphère », que « la possibilité d'une reprise des essais en atmosphère après le début des tirs souterrains ne saurait être exclue » et qu'ainsi « le Gouvernement français continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère ». Il appartient cependant à la Cour de se faire sa propre opinion sur le sens et la portée que l'auteur a entendu donner à une déclaration unilatérale d'où peut naître une obligation juridique, et à cet égard elle ne peut être liée par les thèses d'un autre Etat qui n'est en rien partie au texte.

49. Parmi les déclarations du Gouvernement français en possession desquelles la Cour se trouve, il est clair que les plus importantes sont celles du président de la République. Etant donné ses fonctions, il n'est pas douteux que les communications ou déclarations publiques, verbales ou écrites, qui émanent de lui en tant que chef de l'Etat, représentent dans le domaine des relations internationales des actes de l'Etat français. Ses déclarations et celles des membres du Gouvernement français agissant sous son autorité, jusques et y compris la dernière déclaration du ministre de la défense, en date du 11 octobre 1974, doivent être envisagées comme un tout. Ainsi, quelle qu'ait pu en être la forme, il convient de les considérer comme constituant un engagement de l'Etat, étant donné leur intention et les circonstances dans lesquelles elles sont intervenues.

50. Les déclarations unilatérales des autorités françaises ont été faites publiquement en dehors de la Cour et *erga omnes*, même si la première a été communiquée au Gouvernement australien. Ainsi qu'on l'a vu plus haut, pour que ces déclarations eussent un effet juridique, il n'était pas nécessaire qu'elles fussent adressées à un Etat particulier, ni qu'un Etat quelconque signifîât son acceptation. Les caractères généraux de ces déclarations et leur nature sont les éléments décisifs quand il s'agit d'en apprécier les effets juridiques; c'est à leur interprétation que la Cour doit procéder maintenant. La Cour est en droit de partir de la présomption que ces déclarations n'ont pas été faites *in vacuo* mais à propos des essais qui forment l'objet même de l'instance, bien que la France ne se soit pas présentée en l'espèce.

51. Quand il a annoncé que la série d'essais atmosphériques de 1974 serait la dernière, le Gouvernement français a signifié par là à tous les Etats du monde, y compris le demandeur, son intention de mettre effectivement fin à ces essais. Il ne pouvait manquer de supposer que d'autres Etats pourraient prendre acte de cette déclaration et compter sur son effectivité. La validité de telles déclarations et leurs conséquences juridiques doivent être envisagées dans le cadre général de la sécurité des relations internationales et de la confiance mutuelle si indispensable dans les rapports entre Etats. C'est du contenu réel de ces déclarations et des circonstances dans lesquelles elles ont été faites que la portée juridique de l'acte unilatéral doit être déduite. L'objet des déclarations étant clair et celles-ci étant adressées à la communauté internationale dans son ensemble, la Cour tient qu'elles constituent un engagement comportant des

that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule of international law", nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of Applicant has been to seek protection "against any further atmospheric test" (see paragraph 28 above).

54. It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (*Factory at Chorzów (Merits)*, P.C.I.J., Series A, No. 17, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary

effets juridiques. La Cour estime que le président de la République, en décidant la cessation effective des essais atmosphériques, a pris un engagement vis-à-vis de la communauté internationale à qui il s'adressait. Certes le Gouvernement français a constamment soutenu, en particulier dans la note que l'ambassadeur de France à Canberra a adressée le 7 février 1973 au premier ministre et ministre des affaires étrangères d'Australie, qu'« il est convaincu que ses expériences nucléaires n'ont violé aucune règle du droit international » et il n'a pas reconnu non plus qu'il était tenu de mettre fin à ses expériences par une règle de droit international mais cela ne change rien aux conséquences juridiques des déclarations étudiées plus haut. La Cour estime que l'engagement unilatéral résultant de ces déclarations ne saurait être interprété comme ayant comporté l'invocation d'un pouvoir arbitraire de revision. La Cour constate en outre que le Gouvernement français a assumé une obligation dont il convient de comprendre l'objet précis et les limites dans les termes mêmes où ils sont exprimés publiquement.

52. La Cour est donc en présence d'une situation où l'objectif du demandeur a été effectivement atteint, du fait que la Cour constate que la France a pris l'engagement de ne plus procéder à des essais nucléaires en atmosphère dans le Pacifique Sud.

53. La Cour constate qu'aucune question de dédommagement ne se pose en l'espèce, puisque le demandeur n'a présenté aucune demande à cet effet, ni avant ni pendant la procédure, et que son objectif initial et son but ultime étaient d'obtenir une protection « contre de nouveaux essais atmosphériques » (voir paragraphe 28 ci-dessus).

54. Bien entendu, il aurait été loisible à l'Australie, si elle avait considéré l'affaire comme effectivement close, de se désister conformément au Règlement. Si elle ne l'a pas fait, cela n'empêche pas la Cour d'arriver à sa propre conclusion sur la question. Il est vrai que « la Cour ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours de négociations directes qui ont eu lieu entre elles, lorsque ces négociations n'ont pas abouti à un accord complet » (*Usine de Chorzów (fond)*, C.P.J.I. série A n° 17, p. 51). Mais telle n'est pas en l'espèce la situation qui se présente à la Cour. Le demandeur a clairement indiqué ce qui lui donnerait satisfaction et le défendeur a agi indépendamment; la question qui se pose à la Cour est donc celle de l'interprétation du comportement des deux Parties. La conclusion à laquelle cette interprétation a amené la Cour ne signifie pas qu'elle opère elle-même un retrait de la demande; elle se borne à établir l'objet de cette demande et l'effet des actes du défendeur, comme elle est tenue de le faire. En prétendant que des déclarations faites au nom de la France ne sauraient mettre fin au différend, on irait à l'encontre des vues exprimées sans équivoque par le demandeur aussi bien devant la Cour qu'en dehors.

55. La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la

condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific Ocean, a judgment of the Court on this subject might still be of value because, if the judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être*.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

58. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment*, *I.C.J. Reports 1963*, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required

condition première de l'exercice de sa fonction judiciaire; on ne peut se contenter à cet égard des affirmations d'une partie car « l'existence d'un différend international demande à être établie objectivement » par la Cour (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950, p. 74*). Le différend dont la Cour a été saisie doit donc persister au moment où elle statue. Elle doit tenir compte de toute situation dans laquelle le différend a disparu parce que l'objet de la demande a été atteint d'une autre manière. Si les déclarations de la France concernant la cessation effective des expériences nucléaires ont la portée que la Cour a décrite, autrement dit si elles ont éliminé le différend, il faut en tirer les conséquences qui s'imposent.

56. On pourrait soutenir que, bien que la France se soit obligée, par déclaration unilatérale, à ne pas effectuer d'essais nucléaires en atmosphère dans l'océan Pacifique Sud, un arrêt de la Cour sur ce point pourrait encore présenter de l'intérêt car, s'il adoptait les thèses du demandeur il renforcerait la position de celui-ci en constatant l'obligation du défendeur. Cependant, la Cour ayant conclu que le défendeur a assumé une obligation de comportement sur la cessation effective des expériences nucléaires, aucune autre action judiciaire n'est nécessaire. Le demandeur a cherché à maintes reprises à obtenir du défendeur l'assurance que les essais prendraient fin et celui-ci a, de sa propre initiative, fait une série de déclarations d'où il résulte qu'ils prendront fin. C'est pourquoi la Cour conclut que, le différend ayant disparu, la demande présentée par l'Australie ne comporte plus d'objet. Il en résulte qu'aucune autre constatation n'aurait de raison d'être.

57. Cela n'est pas à dire que la Cour ait la faculté de choisir parmi les affaires qui lui sont soumises celles qui lui paraissent se prêter à une décision et de refuser de statuer sur les autres. L'article 38 du Statut dispose que la mission de la Cour est « de régler conformément au droit international les différends qui lui sont soumis »; en dehors de l'article 38 lui-même, d'autres dispositions du Statut et du Règlement indiquent aussi que la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties. En n'allant pas plus loin en l'espèce la Cour ne fait qu'agir conformément à une interprétation correcte de sa fonction judiciaire.

58. La Cour a indiqué dans le passé des considérations qui pouvaient l'amener à ne pas statuer. La présente affaire est l'une de celles dans lesquelles « les circonstances qui se sont produites ... rendent toute décision judiciaire sans objet » (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963, p. 38*). La Cour ne voit donc pas de raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile. Si le règlement judiciaire peut ouvrir la voie de l'harmonie internationale lorsqu'il existe un conflit, il n'est pas moins vrai que la vaine poursuite d'un procès compromet cette harmonie.

59. La Cour conclut donc qu'aucun autre prononcé n'est nécessaire

in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

*
* * *

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

*
* * *

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France". It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

*
* * *

62. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

en l'espèce. Il n'entre pas dans la fonction juridictionnelle de la Cour de traiter des questions dans l'abstrait, une fois qu'elle est parvenue à la conclusion qu'il n'y a plus lieu de statuer au fond. La demande ayant manifestement perdu son objet, il n'y a rien à juger.

*
* *

60. Dès lors que la Cour a constaté qu'un Etat a pris un engagement quant à son comportement futur, il n'entre pas dans sa fonction d'envisager que cet Etat ne le respecte pas. La Cour fait observer que, si le fondement du présent arrêt était remis en cause, le requérant pourrait demander un examen de la situation conformément aux dispositions du Statut; la dénonciation par la France, dans une lettre du 2 janvier 1974, de l'Acte général pour le règlement pacifique des différends internationaux, qui est invoqué comme l'un des fondements de la compétence de la Cour en l'espèce, ne saurait en soi faire obstacle à la présentation d'une telle demande.

*
* *

61. Dans l'ordonnance déjà mentionnée du 22 juin 1973, la Cour a précisé que les mesures conservatoires indiquées l'étaient «en attendant son arrêt définitif dans l'instance introduite le 9 mai 1973 par l'Australie contre la France». L'ordonnance cesse donc de produire ses effets dès le prononcé du présent arrêt et les mesures conservatoires prennent fin en même temps.

*
* *

62. Par ces motifs,

LA COUR,

par neuf voix contre six,
dit que la demande de l'Australie est désormais sans objet et qu'il n'y a dès lors pas lieu à statuer.

Fait en anglais et en français, le texte anglais faisant foi, au palais de la Paix, à La Haye, le vingt décembre mil neuf cent soixante-quatorze, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis respectivement au Gouvernement australien et au Gouvernement de la République française.

Le Président,
(Signé) Manfred LACHS.

Le Greffier,
(Signé) S. AQUARONE.

President LACHS makes the following declaration:

Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court's Order of 22 June 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case *sub judice*.

The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.

The Court concluded, by a resolution of 21 March 1974, that its investigations had not enabled it to identify any specific source of the statements and reports published.

I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all the seriousness for which it called.

Judges BENGZON, ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK make the following joint declaration:

Certain criticisms have been made of the Court's handling of the matter to which the President alludes in the preceding declaration. We wish by our declaration to make it clear that we do not consider those criticisms to be in any way justified.

The Court undertook a lengthy examination of the matter by the several means at its disposal: through its services, by convoking the Agent for Australia and having him questioned, and by its own investigations and enquiries. Any suggestion that the Court failed to treat the matter with all the seriousness and care which it required is, in our opinion, without foundation. The seriousness with which the Court regarded the matter is indeed reflected and emphasized in the communiqués which it issued, first on 8 August 1973 and subsequently on 26 March 1974.

The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.

M. LACHS, Président, fait la déclaration suivante:

[Traduction]

La bonne administration de la justice et le respect dû à la Cour exigent que l'issue de ses délibérations reste strictement secrète et que ses décisions ne soient diffusées en aucun de leurs éléments avant d'être officiellement rendues. Il est donc regrettable qu'en l'espèce, avant la lecture publique de l'ordonnance de la Cour en date du 22 juin 1973, une déclaration ait été faite et des nouvelles de presse aient paru, qui dépassaient ce qui est juridiquement admissible s'agissant d'une affaire *sub judice*.

La Cour a été très sérieusement préoccupée par cette question et une enquête a été ordonnée pendant laquelle toutes les voies qui pouvaient lui être ouvertes ont été explorées.

La Cour a conclu, dans sa résolution du 21 mars 1974, que ses recherches ne lui avaient pas permis d'identifier une source exacte pour les déclarations et les informations publiées.

J'ai la certitude que la Cour a fait tout ce qui était en son pouvoir à cet égard et qu'elle a traité de la question avec tout le sérieux que celle-ci méritait.

MM. BENGZON, ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA et sir Humphrey WALDOCK, juges, font la déclaration commune suivante:

[Traduction]

Certaines critiques ont été émises sur la manière dont la Cour a traité de la question visée par le Président dans la déclaration qui précède. Nous tenons à préciser par la présente déclaration que nous ne considérons pas ces critiques comme justifiées en quoi que ce soit.

La Cour a procédé à un examen détaillé de la question grâce aux divers moyens dont elle dispose: elle a eu recours à ses services, convoqué l'agent de l'Australie pour qu'il soit interrogé, effectué ses recherches et ses enquêtes propres. Suggérer que la Cour n'aurait pas traité de la question avec tout le sérieux et le soin nécessaires serait selon nous sans fondement. Les communiqués qu'elle a publiés le 8 août 1973 d'abord, le 26 mars 1974 ensuite, traduisent et soulignent d'ailleurs le sérieux avec lequel la Cour a envisagé cette question.

L'examen que la Cour a fait de la question ne lui a pas permis d'identifier une source d'information exacte sur laquelle se fondaient les déclarations et les nouvelles de presse mentionnées par le Président. Quand la Cour a décidé, par onze voix contre trois, de clore son examen, elle l'a fait pour la raison sérieuse que la poursuite des recherches et des enquêtes avait très peu de chance, d'après elle, de fournir davantage d'informations utiles.

Judges FORSTER, GROS, PETRÉN and IGNACIO-PINTO append separate opinions to the Judgment of the Court.

Judges ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK append a joint dissenting opinion, and Judge DE CASTRO and Judge *ad hoc* Sir Garfield BARWICK append dissenting opinions to the Judgment of the Court.

(Initialed) M.L.

(Initialed) S.A.

MM. FORSTER, GROS, PETRÉN et IGNACIO-PINTO, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA et sir Humphrey WALDOCK, juges, joignent à l'arrêt une opinion dissidente commune. M. DE CASTRO, juge, et sir Garfield BARWICK, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) M.L.

(Paraphé) S.A.

Reference Material 29.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA FRONTIÈRE TERRESTRE
ET MARITIME ENTRE LE CAMEROUN
ET LE NIGÉRIA

(CAMEROUN *c.* NIGÉRIA)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 11 JUIN 1998

1998

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE LAND AND MARITIME BOUNDARY
BETWEEN CAMEROON AND NIGERIA

(CAMEROON *v.* NIGERIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 11 JUNE 1998

Mode officiel de citation :

*Frontière terrestre et maritime entre le Cameroun et le Nigéria,
exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 275*

Official citation :

*Land and Maritime Boundary between Cameroon and Nigeria,
Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275*

ISSN 0074-4441

ISBN 92-1-070772-9

N° de vente :
Sales number

708

COUR INTERNATIONALE DE JUSTICE

ANNÉE 1998

1998
11 juin
Rôle général
n° 94

11 juin 1998

AFFAIRE DE LA FRONTIÈRE TERRESTRE ET MARITIME ENTRE LE CAMEROUN ET LE NIGÉRIA

(CAMEROUN c. NIGÉRIA)

EXCEPTIONS PRÉLIMINAIRES

1) *Clause facultative (paragraphe 2 de l'article 36 du Statut) — Remise de la déclaration au Secrétaire général des Nations Unies (paragraphe 4 de l'article 36 du Statut) — Transmission par le Secrétaire général d'une copie aux Etats parties au Statut — Intervalle entre la remise de la déclaration et le dépôt de la requête — Abus allégué du système de la clause facultative — Date à laquelle est établi le lien consensuel en vertu du paragraphe 2 de l'article 36 du Statut — Autorité de la chose jugée — Article 59 du Statut.*

Articles 16, 24 et 78 de la convention de Vienne sur le droit des traités.

Retrait des déclarations d'acceptation de la juridiction obligatoire — Délai raisonnable — Question de savoir si un tel délai est requis dans le cas de remise des déclarations.

Question de savoir si un Etat ayant souscrit à la clause facultative et déposé peu de temps après une requête a l'obligation d'informer l'Etat défendeur potentiel — Principe de la bonne foi.

Condition de réciprocité — Réserve ratione temporis.

2) *Obligation alléguée de recourir exclusivement à des mécanismes bilatéraux — Estoppel — Principe de la bonne foi — Règle pacta sunt servanda — Question de savoir si l'épuisement des négociations diplomatiques est un préalable à la saisine de la Cour.*

3) *Question de savoir si la commission du bassin du lac Tchad possède une compétence exclusive en matière de règlement de différends de frontières — Accords ou organismes au sens de l'article 52 de la Charte des Nations Unies — Estoppel — Allégation selon laquelle la Cour devrait refuser de statuer au fond sur des conclusions pour des raisons d'opportunité judiciaire.*

4) *Frontière se terminant sur un tripoint dans le lac Tchad — Incidence possible sur les intérêts juridiques d'Etats tiers.*

INTERNATIONAL COURT OF JUSTICE

YEAR 1998

11 June 1998

1998
11 June
General List
No. 94CASE CONCERNING
THE LAND AND MARITIME BOUNDARY
BETWEEN CAMEROON AND NIGERIA

(CAMEROON v. NIGERIA)

PRELIMINARY OBJECTIONS

(1) Optional Clause (Article 36, paragraph 2, of Statute) — Deposit of Declaration with United Nations Secretary-General (Article 36, paragraph 4, of Statute) — Transmission of copy by Secretary-General to States parties to Statute — Interval between deposit of Declaration and filing of Application — Alleged abuse of Optional Clause system — Date of establishment of consensual bond under Article 36, paragraph 2, of Statute — Res judicata — Article 59 of Statute.

Articles 16, 24 and 78 of Vienna Convention on the Law of Treaties.

Withdrawal of declarations of acceptance of compulsory jurisdiction — Reasonable period of notice — Question whether such period should be required for deposit of declarations.

Whether a State subscribing to Optional Clause and filing an application shortly thereafter has obligation to inform prospective respondent State — Principle of good faith.

Condition of reciprocity — Reservation ratiōne temporis.

(2) Asserted duty to resort exclusively to bilateral machinery — Estoppel — Principle of good faith — Rule pacta sunt servanda — Whether exhaustion of diplomatic negotiations is precondition for referral to the Court.

(3) Whether Lake Chad Basin Commission has exclusive jurisdiction for settlement of boundary disputes — Arrangements or agencies within meaning of Article 52 of United Nations Charter — Estoppel — Claim that the Court should decline to decide merits of submissions for reasons of judicial propriety.

(4) Boundary terminating in a tripoint in Lake Chad — Possible effect on legal interests of third States.

5) *Question relative à l'existence d'un différend de frontière — Détermination de l'existence d'un différend.*

6) *Exposé des faits dans une requête — Exigences du paragraphe 2 de l'article 38 du Règlement — Sens du mot « succinct ».*

7) *Détermination du titre sur une presqu'île préalablement à une délimitation maritime — Pouvoir discrétionnaire de la Cour relativement à l'ordre dans lequel elle entend régler les questions portées devant elle — Absence alléguée d'efforts suffisants des Parties pour effectuer une délimitation par voie d'accord conformément au droit international — Saisine sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut — Caractère suffisamment précisé d'un différend.*

8) *Délimitation maritime mettant éventuellement en cause les droits et intérêts d'Etats tiers — Question de savoir si l'exception soulevée présente un caractère exclusivement préliminaire (paragraphe 7 de l'article 79 du Règlement).*

ARRÊT

Présents: M. SCHWABEL, président; M. WEERAMANTRY, vice-président; MM. ODA, BEDJAOU, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, M^{me} HIGGINS, MM. PARRA-ARANGUREN, KOOIJMANS, REZEK, juges; MM. MBAYE, AJIBOLA, juges ad hoc; M. VALENCIA-OSPINA, greffier.

En l'affaire de la frontière terrestre et maritime entre le Cameroun et le Nigéria,

entre

la République du Cameroun,
représentée par

S. Exc. M. Laurent Ezzo, ministre de la justice, garde des sceaux,
comme agent;

M. Douala Moutomé, avocat au barreau du Cameroun, ancien ministre,

M. Maurice Kamto, professeur à l'Université de Yaoundé II, avocat au barreau de Paris,

M. Peter Ntamark, doyen, professeur de droit à la faculté de droit et de science politique de l'Université de Yaoundé II, *Barrister-at-Law*, membre de l'*Inner Temple*,

comme coagents;

S. Exc. M. Joseph Owona, ministre de la jeunesse et des sports,

M. Joseph-Marie Bipoun Woum, professeur à l'Université de Yaoundé II, ancien ministre,

comme conseillers spéciaux;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

comme agent adjoint, conseil et avocat;

M. Michel Aurillac, avocat à la cour, conseiller d'Etat honoraire, ancien ministre,

(5) *Question relating to the existence of a boundary dispute — Determination of the existence of a dispute.*

(6) *Presentation of facts in an application — Requirements of Article 38, paragraph 2, of Rules of Court — Meaning of “succinct”.*

(7) *Determination of title to a peninsula prior to maritime delimitation — Discretionary power of the Court concerning sequence in which it settles issues before it — Alleged absence of sufficient action by Parties to effect delimitation by agreement on basis of international law — Seisin based on declarations made under Article 36, paragraph 2, of Statute — Sufficiently precise character of a dispute.*

(8) *Maritime delimitation which may involve rights and interests of third States — Whether objection raised has exclusively preliminary character (Article 79, paragraph 7, of Rules of Court).*

JUDGMENT

Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLMANS, REZEK; Judges ad hoc MBAYE, AJIBOLA; Registrar VALENCIA-OSPINA.

In the case concerning the land and maritime boundary between Cameroon and Nigeria,

between

the Republic of Cameroon,

represented by

H.E. Mr. Laurent Eso, Minister of Justice, Keeper of the Seals,
as Agent;

Mr. Douala Moutomé, Member of the Cameroon Bar, former Minister,
Mr. Maurice Kamto, Professor, University of Yaoundé II, Member of the
Paris Bar,

Mr. Peter Ntamark, Dean, Professor of Law, Faculty of Law and Political
Science, University of Yaoundé II, Barrister-at-Law, member of the Inner
Temple,

as Co-Agents;

H.E. Mr. Joseph Owona, Minister of Youth and Sport,

Mr. Joseph-Marie Bipoun Woum, Professor, University of Yaoundé II,
former Minister,

as Special Advisers;

Mr. Alain Pellet, Professor, University of Paris X-Nanterre and Institute of
Political Studies, Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Michel Aurillac, avocat à la cour, Honorary Member of the Council of
State, former Minister,

- M. Jean-Pierre Cot, professeur à l'Université de Paris I (Panthéon-Sorbonne), vice-président du Parlement européen, avocat aux barreaux de Paris et de Bruxelles, ancien ministre,
- M. Keith Highet, conseil en droit international, vice-président du comité juridique interaméricain de l'Organisation des États américains,
- M. Malcolm N. Shaw, *Barrister-at-Law*, professeur de droit international à la faculté de droit de l'Université de Leicester, titulaire de la chaire sir Robert Jennings,
- M. Bruno Simma, professeur à l'Université de Munich,
- sir Ian Sinclair, K.C.M.G., Q.C., *Barrister-at-Law*,
- M. Christian Tomuschat, professeur à l'Université de Berlin,
- comme conseils et avocats;
- S. Exc. M. Pascal Biloa Tang, ambassadeur du Cameroun en France,
- S. Exc. M^{me} Isabelle Bassong, ambassadeur du Cameroun auprès des États membres du Benelux,
- S. Exc. M. Martin Belinga Eboutou, ambassadeur, représentant permanent du Cameroun auprès de l'Organisation des Nations Unies,
- M. Pierre Semengue, général de corps d'armée, chef d'état-major général des armées,
- M. Robert Akamba, administrateur civil principal, chargé de mission au secrétariat général de la présidence de la République,
- M. Etienne Ateba, ministre-conseiller, chargé d'affaires par intérim à l'ambassade du Cameroun, La Haye,
- M. Ernest Bodo Abanda, directeur du cadastre, membre de la commission nationale des frontières du Cameroun,
- M. Ngolle Philip Ngwesse, directeur au ministère de l'administration territoriale,
- M. Thomas Fozein Kwanke, conseiller des affaires étrangères, sous-directeur au ministère des relations extérieures,
- M. Jean Gateaud, ingénieur général géographe,
- M. Bienvenu Obelabout, directeur d'administration centrale au secrétariat général de la présidence de la République,
- M. Marc Sassen, avocat et conseil juridique, La Haye,
- M. Joseph Tjop, consultant à la société d'avocats Mignard, Teitgen, Grisoni et associés, chargé d'enseignement et de recherche à l'Université de Paris X-Nanterre,
- M. Songola Oudini, directeur d'administration centrale au secrétariat général de la présidence de la République,
- comme conseillers;
- M^{me} Florence Kollo, traducteur-interprète principal,
- comme traducteur-interprète;
- M. Pierre Bodeau, attaché temporaire d'enseignement et de recherche à l'Université de Paris X-Nanterre,
- M. Olivier Corten, maître de conférences à la faculté de droit de l'Université libre de Bruxelles,
- M. Daniel Khan, assistant à l'Université de Munich,
- M. Jean-Marc Thouvenin, maître de conférences à l'Université du Maine et à l'Institut d'études politiques de Paris,
- comme assistants de recherche;

Mr. Jean-Pierre Cot, Professor, University of Paris I (Panthéon-Sorbonne),
Vice-President of the European Parliament, Member of the Paris and
Brussels Bars, former Minister,

Mr. Keith Highet, Counsellor in International Law, Vice-Chairman, Inter-
American Juridical Committee, Organization of American States,

Mr. Malcolm N. Shaw, Barrister-at-Law, Sir Robert Jennings Professor of
International Law, Faculty of Law, University of Leicester,

Mr. Bruno Simma, Professor, University of Munich,

Sir Ian Sinclair, K.C.M.G., Q.C., Barrister-at-Law,

Mr. Christian Tomuschat, Professor, University of Berlin,

as Counsel and Advocates;

H.E. Mr. Pascal Biloa Tang, Ambassador of Cameroon to France,

H.E. Mrs. Isabelle Bassong, Ambassador of Cameroon to the Benelux Coun-
tries,

H.E. Mr. Martin Belinga Eboutou, Ambassador, Permanent Representative
of Cameroon to the United Nations,

Lieutenant General Pierre Semengue, Chief of Staff of the Armed Forces,

Mr. Robert Akamba, Principal Civil Administrator, chargé de mission, Sec-
retariat of the Presidency of the Republic,

Mr. Etienne Ateba, Minister-Counsellor, Chargé d'affaires a.i. at the
Embassy of Cameroon, The Hague,

Mr. Ernest Bodo Abanda, Director of the Cadastral Survey, Member of the
National Boundary Commission of Cameroon,

Mr. Ngolle Philip Ngwesse, Director at the Ministry of Territorial Adminis-
tration,

Mr. Thomas Fozein Kwanke, Counsellor in Foreign Affairs, Deputy Direc-
tor at the Ministry of Foreign Relations,

Mr. Jean Gateaud, ingénieur général géographe,

Mr. Bienvenu Obelabout, Director, Central Administration, General Secre-
tariat of the Presidency of the Republic,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

Mr. Joseph Tjop, Consultant at Mignard, Teitgen, Grisoni and Associates,
Senior Teaching and Research Assistant, University of Paris X-Nanterre,

Mr. Songola Oudini, Director, Central Administration, General Secretariat
of the Presidency of the Republic,

as Advisers;

Mrs. Florence Kollo, Principal Translator-Interpreter,

as Translator-Interpreter;

Mr. Pierre Bodeau, Teaching and Research Assistant, University of Paris
X-Nanterre,

Mr. Olivier Corten, Senior Lecturer, Faculty of Law, Université libre de
Bruxelles,

Mr. Daniel Khan, Assistant, University of Munich,

Mr. Jean-Marc Thouvenin, Senior Lecturer, University of Maine, and Insti-
tute of Political Studies, Paris,

as Research Assistants;

M. Guy Roger Eba'a,
 M. Daniel Nfan Bile,
 comme responsables de la communication ;
 M^{me} René Bakker,
 M^{me} Florence Jovis,
 M^{me} Mireille Jung,
 comme secrétaires,

et

la République fédérale du Nigéria,

représentée par

S. Exc. l'honorable Alhaji Abdullahi Ibrahim, OFR, SAN, *Attorney-General* de la Fédération et ministre de la justice,

comme agent ;

Le chef Richard Akinjide, SAN, FCI Arb, ancien ministre, membre des barreaux d'Angleterre et de Gambie,

comme coagent ;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, membre de la Commission du droit international, membre du barreau d'Angleterre, sir Arthur Watts, K.C.M.G., Q.C., membre du barreau d'Angleterre,

M. James Crawford, S.C., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de la Commission du droit international, membre du barreau d'Australie,

comme conseils et avocats ;

M. Timothy H. Daniel, associé, cabinet D. J. Freeman de la City de Londres,

M. Alan Perry, associé, cabinet D. J. Freeman de la City de Londres,

M. David Lerer, *Solicitor*, cabinet D. J. Freeman de la City de Londres,

M. Christopher Hackford, *Solicitor*, cabinet D. J. Freeman de la City de Londres,

M^{me} Louise Cox, *Solicitor* stagiaire, cabinet D. J. Freeman de la City de Londres,

comme *Solicitors* ;

M. A. H. Yadudu, professeur, conseiller spécial du chef de l'Etat pour les questions juridiques,

M. A. Oye Cukwurah, professeur, membre de la commission nationale des frontières, Abuja,

M. I. A. Ayua, professeur, directeur général, NIALS,

M. L. S. Ajiborisha, général de brigade, directeur des opérations, DHQ,

M^{me} Stella Omiyi, directeur, direction du droit international et comparé, ministère fédéral de la justice,

M. K. Mohammed, directeur de la recherche et de l'analyse, Présidence,

M. Jalal A. Arabi, conseiller juridique du secrétaire du gouvernement de la Fédération,

M. M. M. Kida, sous-directeur, ministère des affaires étrangères,

M. Alhaji A. A. Adisa, adjoint du directeur général du service cartographique de la Fédération, Abuja,

M. P. M. Mann, chargé d'affaires à l'ambassade du Nigéria, La Haye,

Mr. Guy Roger Eba'a,
 Mr. Daniel Nfan Bile,
 as Communications Specialists;
 Mrs. René Bakker,
 Mrs. Florence Jovis,
 Mrs. Mireille Jung,
 as Secretaries,

and

the Federal Republic of Nigeria,
 represented by

H.E. the Honourable Alhaji Abdullahi Ibrahim, OFR, SAN, Attorney-General of the Federation and Minister of Justice,

as Agent;

Chief Richard Akinjide, SAN, FCIArb, former Minister, Member of the English and Gambian Bars,

as Co-Agent;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford, Member of the International Law Commission, Member of the English Bar,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the International Law Commission, Member of the Australian Bar,

as Counsel and Advocates;

Mr. Timothy H. Daniel, Partner, D. J. Freeman of the City of London,

Mr. Alan Perry, Partner, D. J. Freeman of the City of London,

Mr. David Lerer, Solicitor, D. J. Freeman of the City of London,

Mr. Christopher Hackford, Solicitor, D. J. Freeman of the City of London,

Ms Louise Cox, trainee Solicitor, D. J. Freeman of the City of London,

as Solicitors;

Mr. A. H. Yadudu, Professor, Special Adviser to the Head of State on Legal Matters,

Mr. A. Oye Cukwurah, Professor, National Boundary Commission, Abuja,

Mr. I. A. Ayua, Professor, Director-General, NIALS,

Brigadier General L. S. Ajiborisha, Director of Operations, DHQ,

Mrs. Stella Omiyi, Director, International and Comparative Law Department, Federal Ministry of Justice,

Mr. K. Mohammed, Director of Research and Analysis, the Presidency,

Mr. Jalal A. Arabi, Legal Adviser to the Secretary to the Government of the Federation,

Mr. M. M. Kida, Assistant Director, Ministry of Foreign Affairs,

Mr. Alhaji A. A. Adisa, Deputy Surveyor-General of the Federation, Abuja,

Mr. P. M. Mann, Chargé d'affaires, Embassy of Nigeria, The Hague,

M^{me} V. Okwecheme, conseiller à l'ambassade du Nigéria, La Haye,
 M. Amuzuei, conseiller à l'ambassade du Nigéria, La Haye,
 M. Clive Schofield, cartographe, unité de recherche sur les frontières inter-
 nationales, Université de Durham,
 M. Arthur Corner, cartographe, Université de Durham,
 M^{me} Michelle Burgoine, assistant pour les techniques de l'information,
 comme conseillers;
 M^{me} Coralie Ayad, cabinet D. J. Freeman de la City de Londres,
 comme secrétaire,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant :

1. Le 29 mars 1994, le Gouvernement de la République du Cameroun (dénommée ci-après le «Cameroun») a déposé au Greffe de la Cour une requête introductive d'instance contre le Gouvernement de la République fédérale du Nigéria (dénommée ci-après le «Nigéria») au sujet d'un différend présenté comme «port[ant] essentiellement sur la question de la souveraineté sur la presqu'île de Bakassi». Le Cameroun exposait en outre dans sa requête que la «délimitation [de la frontière maritime entre les deux Etats] est demeurée partielle et [que] les deux parties n'ont pas pu, malgré de nombreuses tentatives, se mettre d'accord pour la compléter». Il priait en conséquence la Cour, «[a]fin d'éviter de nouveaux incidents entre les deux pays, ... de bien vouloir déterminer le tracé de la frontière maritime entre les deux Etats au-delà de celui qui avait été fixé en 1975». La requête invoquait, pour fonder la compétence de la Cour, les déclarations par lesquelles les deux Parties ont accepté la juridiction de la Cour au titre du paragraphe 2 de l'article 36 du Statut de la Cour.

2. Conformément au paragraphe 2 de l'article 40 du Statut, la requête a été immédiatement communiquée au Gouvernement du Nigéria par le greffier.

3. Le 6 juin 1994, le Cameroun a déposé au Greffe une requête additionnelle «aux fins d'élargissement de l'objet du différend» à un autre différend décrit dans cette requête additionnelle comme «port[ant] essentiellement sur la question de la souveraineté sur une partie du territoire camerounais dans la zone du lac Tchad». Le Cameroun demandait également à la Cour, dans sa requête additionnelle, de «préciser définitivement» la frontière entre les deux Etats du lac Tchad à la mer, et la priait de joindre les deux requêtes et «d'examiner l'ensemble en une seule et même instance». La requête additionnelle se référait, pour fonder la compétence de la Cour, à la «base de ... compétence ... déjà ... indiquée» dans la requête introductive d'instance du 29 mars 1994.

4. Le 7 juin 1994, le greffier a communiqué la requête additionnelle au Gouvernement du Nigéria.

5. Lors d'une réunion que le président de la Cour a tenue avec les représentants des Parties le 14 juin 1994, l'agent du Nigéria a déclaré ne pas voir d'objection à ce que la requête additionnelle soit traitée, ainsi que le Cameroun en avait exprimé le souhait, comme un amendement à la requête initiale, de sorte que la Cour puisse examiner l'ensemble en une seule et même instance. Par une ordonnance en date du 16 juin 1994, la Cour a indiqué qu'elle ne voyait pas elle-même d'objection à ce qu'il soit ainsi procédé, et a fixé respectivement

Mrs. V. Okwecheme, Counsellor, Embassy of Nigeria, The Hague,
Mr. Amuzuei, Counsellor, Embassy of Nigeria, The Hague,
Mr. Clive Schofield, Cartographer, International Boundaries Research Unit,
Durham University,
Mr. Arthur Corner, Cartographer, Durham University,
Ms Michelle Burgoine, Information Technology Assistant,
as Advisers;
Mrs. Coralie Ayad, D. J. Freeman of the City of London
as Secretary.

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 29 March 1994, the Government of the Republic of Cameroon (hereinafter called "Cameroon") filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Nigeria (hereinafter called "Nigeria") in respect of a dispute described as "relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula". Cameroon further stated in its Application that the "delimitation [of the maritime boundary between the two States] has remained a partial one and [that], despite many attempts to complete it, the two parties have been unable to do so". It accordingly requested the Court, "in order to avoid further incidents between the two countries, . . . to determine the course of the maritime boundary between the two States beyond the line fixed in 1975". In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of Nigeria by the Registrar.

3. On 6 June 1994, Cameroon filed in the Registry an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute described in that Additional Application as "relat[ing] essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad". Cameroon also requested the Court, in its Additional Application, "to specify definitively" the frontier between the two States from Lake Chad to the sea, and asked it to join the two Applications and "to examine the whole in a single case". In order to found the jurisdiction of the Court, the Additional Application referred to the "basis of . . . jurisdiction . . . already . . . indicated" in the Application instituting proceedings of 29 March 1994.

4. On 7 June 1994, the Registrar communicated the Additional Application to the Government of Nigeria.

5. At a meeting which the President of the Court held with the representatives of the Parties on 14 June 1994, the Agent of Nigeria stated that he had no objection to the Additional Application being treated, in accordance with the wish expressed by Cameroon, as an amendment to the initial Application, so that the Court could deal with the whole in a single case. By an Order dated 16 June 1994, the Court indicated that it had no objection itself to such a procedure, and fixed 16 March 1995 and 18 December 1995, respectively, as the

au 16 mars 1995 et au 18 décembre 1995 les dates d'expiration des délais pour le dépôt du mémoire du Cameroun et du contre-mémoire du Nigéria.

6. Conformément au paragraphe 3 de l'article 40 du Statut, tous les Etats admis à ester devant la Cour ont été informés de la requête.

7. Le Cameroun a dûment déposé son mémoire dans le délai prescrit dans l'ordonnance de la Cour en date du 16 juin 1994.

8. Dans le délai fixé pour le dépôt de son contre-mémoire, le Nigéria a déposé des exceptions préliminaires à la compétence de la Cour et à la recevabilité de la requête. En conséquence, par une ordonnance en date du 10 janvier 1996, le président de la Cour, constatant qu'en vertu des dispositions du paragraphe 3 de l'article 79 du Règlement la procédure sur le fond était suspendue, a fixé au 15 mai 1996 la date d'expiration du délai dans lequel le Cameroun pourrait présenter un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires.

Le Cameroun a déposé un tel exposé dans le délai ainsi prescrit, et l'affaire s'est trouvée en état pour ce qui est des exceptions préliminaires.

9. La Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalu du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire: le Cameroun a désigné M. Kéba Mbaye, et le Nigéria M. Bola Ajibola.

10. Par une lettre datée du 10 février 1996 et reçue au Greffe le 12 février 1996, le Cameroun a présenté une demande en indication de mesures conservatoires en vertu de l'article 41 du Statut. Par une ordonnance en date du 15 mars 1996, la Cour, après avoir entendu les Parties, a indiqué certaines mesures conservatoires.

11. Par diverses communications, le Cameroun a souligné auprès de la Cour toute l'importance qu'il attachait à un règlement rapide de l'affaire; il a en outre déposé, sous le couvert d'une lettre datée du 9 avril 1997, un document avec annexes intitulé «Mémorandum de la République du Cameroun sur la procédure». Le Nigéria a fait connaître ses vues sur cette dernière communication dans une lettre datée du 13 mai 1997.

12. Par une lettre datée du 2 février 1998, le Nigéria a demandé à produire un volume de documents intitulé «Documents supplémentaires (Procès-verbaux de la commission du bassin du lac Tchad)». Par une lettre datée du 16 février 1998, l'agent du Cameroun a indiqué que le Cameroun ne s'opposait pas à la production de ces documents. La Cour en a accepté la présentation conformément au paragraphe 1 de l'article 56 de son Règlement.

13. Par une lettre datée du 11 février 1998, l'agent du Cameroun a demandé à produire certains «documents nouveaux relatifs aux événements qui se sont produits depuis le dépôt du mémoire» du Cameroun et a prié «en outre la Cour de bien vouloir considérer les annexes au [mémorandum d'avril 1997] comme parties intégrantes de la présente procédure». Après examen des vues exprimées par le Nigéria dans sa lettre susmentionnée du 13 mai 1997 (voir paragraphe 11 ci-dessus) et dans sa lettre du 24 février 1998, la Cour a accepté la production de ces documents conformément aux dispositions de l'article 56 de son Règlement.

14. Conformément au paragraphe 2 de l'article 53 du Règlement, la Cour a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, les exceptions préliminaires du Nigéria et l'exposé écrit contenant les observations et conclusions du Cameroun sur ces exceptions, ainsi que les documents qui étaient joints à ces pièces.

time-limits for the filing of the Memorial of Cameroon and the Counter-Memorial of Nigeria.

6. Pursuant to Article 40, paragraph 3, of the Statute, all States entitled to appear before the Court were notified of the Application.

7. Cameroon duly filed its Memorial within the time-limit prescribed in the Court's Order dated 16 June 1994.

8. Within the time-limit fixed for the filing of its Counter-Memorial, Nigeria filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Accordingly, by an Order dated 10 January 1996, the President of the Court, noting that, under Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed 15 May 1996 as the time-limit within which Cameroon might present a written statement of its observations and submissions on the preliminary objections.

Cameroon filed such a statement within the time-limit so prescribed, and the case became ready for hearing in respect of the preliminary objections.

9. Since the Court included upon the Bench no judge of the nationality of the Parties, each Party exercised its right under Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case: Cameroon chose Mr. Kéba Mbaye and Nigeria chose Mr. Bola Ajibola.

10. By a letter dated 10 February 1996 and received in the Registry on 12 February 1996, Cameroon submitted a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 15 March 1996, the Court, after hearing the Parties, indicated certain provisional measures.

11. By various communications, Cameroon stressed the importance of a speedy disposal of the case; it also filed, under cover of a letter dated 9 April 1997, a document with annexes entitled "Memorandum of the Republic of Cameroon on Procedure". Nigeria made known its views on the latter communication in a letter dated 13 May 1997.

12. By a letter dated 2 February 1998, Nigeria sought to introduce a volume of documents entitled "Supplemental Documents (Lake Chad Basin Commission Proceedings)". By a letter dated 16 February 1998, the Agent of Cameroon indicated that Cameroon did not oppose their introduction. The Court admitted the said documents pursuant to Article 56, paragraph 1, of the Rules of Court.

13. By a letter dated 11 February 1998, the Agent of Cameroon sought to introduce certain "new documents relating to events occurring since the filing of the Memorial" of Cameroon, and "moreover requested the Court to consider the annexes to the [Memorandum of April 1997] as an integral part of the proceedings". Having considered the views expressed by Nigeria in its above-mentioned letter of 13 May 1997 (see paragraph 11 above) and in its letter of 24 February 1998, the Court admitted the documents pursuant to the provisions of Article 56 of its Rules.

14. In accordance with Article 53, paragraph 2, of its Rules, the Court decided to make accessible to the public, on the opening of the oral proceedings, the preliminary objections of Nigeria and the written statement containing the observations and submissions of Cameroon on the objections, as well as the documents annexed to those pleadings.

15. Des audiences publiques ont été tenues entre le 2 et le 11 mars 1998, au cours desquelles ont été entendus en leurs plaidoiries et réponses :

Pour le Nigéria : S. Exc. l'honorable Alhaji Abdullahi Ibrahim,
M. Richard Akinjide,
M. Ian Brownlie,
sir Arthur Watts,
M. James Crawford.

Pour le Cameroun : S. Exc. M. Laurent Esso,
M. Douala Moutomé,
M. Maurice Kamto,
M. Peter Ntamark,
M. Joseph-Marie Bipoun Woum,
M. Alain Pellet,
M. Michel Aurillac,
M. Jean-Pierre Cot,
M. Keith Highet,
M. Malcolm N. Shaw,
M. Bruno Simma,
sir Ian Sinclair,
M. Christian Tomuschat.

A l'audience, un membre de la Cour a posé aux Parties une question à laquelle il a été répondu par écrit, après la clôture de la procédure orale.

*

16. Dans la requête, les demandes ci-après ont été formulées par le Cameroun :

« Sur la base de l'exposé des faits et des moyens juridiques qui précèdent, la République du Cameroun, tout en se réservant le droit de compléter, d'amender ou de modifier la présente requête pendant la suite de la procédure et de présenter à la Cour une demande en indication de mesures conservatoires si celles-ci se révélaient nécessaires, prie la Cour de dire et juger :

- a) que la souveraineté sur la presqu'île de Bakassi est camerounaise, en vertu du droit international, et que cette presqu'île fait partie intégrante du territoire de la République du Cameroun ;
- b) que la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation (*uti possidetis juris*) ;
- c) que, en utilisant la force contre la République du Cameroun, la République fédérale du Nigéria a violé et viole ses obligations en vertu du droit international conventionnel et coutumier ;
- d) que la République fédérale du Nigéria, en occupant militairement la presqu'île camerounaise de Bakassi, a violé et viole les obligations qui lui incombent en vertu du droit conventionnel et coutumier ;
- e) que, vu ces violations des obligations juridiques susvisées, la République fédérale du Nigéria a le devoir exprès de mettre fin à sa présence militaire sur le territoire camerounais, et d'évacuer sans délai et sans condition ses troupes de la presqu'île camerounaise de Bakassi ;

15. Public sittings were held between 2 March and 11 March 1998, at which the Court heard the oral arguments and replies of:

For Nigeria: H.E. the Honourable Alhaji Abdullahi Ibrahim,
Mr. Richard Akinjide,
Mr. Ian Brownlie,
Sir Arthur Watts,
Mr. James Crawford.

For Cameroon: H.E. Mr. Laurent Easo,
Mr. Douala Moutomé,
Mr. Maurice Kamto,
Mr. Peter Ntamark,
Mr. Joseph-Marie Bipoun Woum,
Mr. Alain Pellet,
Mr. Michel Aurillac,
Mr. Jean-Pierre Cot,
Mr. Keith Highet,
Mr. Malcolm N. Shaw,
Mr. Bruno Simma,
Sir Ian Sinclair,
Mr. Christian Tomuschat.

At the hearings, a Member of the Court put a question to the Parties, who answered in writing after the close of the oral proceedings.

*

16. In its Application, Cameroon made the following requests:

“On the basis of the foregoing statement of facts and legal grounds, the Republic of Cameroon, while reserving for itself the right to complement, amend or modify the present Application in the course of the proceedings and to submit to the Court a request for the indication of provisional measures should they prove to be necessary, asks the Court to adjudge and declare:

- (a) that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon;
- (b) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*);
- (c) that by using force against the Republic of Cameroon, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law;
- (d) that the Federal Republic of Nigeria, by militarily occupying the Cameroonian Peninsula of Bakassi, has violated and is violating the obligations incumbent upon it by virtue of treaty law and customary law;
- (e) that in view of these breaches of legal obligation, mentioned above, the Federal Republic of Nigeria has the express duty of putting an end to its military presence in Cameroonian territory, and effecting an immediate and unconditional withdrawal of its troops from the Cameroonian Peninsula of Bakassi;

- e') que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés *sub litterae a), b), c), d) et e)* ci-dessus;
- e'') qu'en conséquence une réparation d'un montant à déterminer par la Cour est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci, la République du Cameroun se réservant d'introduire devant la Cour une évaluation précise des dommages provoqués par la République fédérale du Nigéria.
- f) Afin d'éviter la survenance de tout différend entre les deux Etats relativement à leur frontière maritime, la République du Cameroun prie la Cour de procéder au prolongement du tracé de sa frontière maritime avec la République fédérale du Nigéria jusqu'à la limite des zones maritimes que le droit international place sous leur juridiction respective.»

17. Dans la requête additionnelle, les demandes ci-après ont été formulées par le Cameroun :

«Sur la base de l'exposé des faits et des moyens juridiques qui précèdent et sous toutes les réserves formulées au paragraphe 20 de sa requête du 29 mars 1994, la République du Cameroun prie la Cour de dire et juger :

- a) que la souveraineté sur la parcelle litigieuse dans la zone du lac Tchad est camerounaise en vertu du droit international, et que cette parcelle fait partie intégrante du territoire de la République du Cameroun;
- b) que la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation (*uti possidetis juris*) ainsi que ses engagements juridiques récents relativement à la démarcation des frontières dans le lac Tchad;
- c) que la République fédérale du Nigéria, en occupant avec l'appui de ses forces de sécurité des parcelles du territoire camerounais dans la zone du lac Tchad, a violé et viole ses obligations en vertu du droit conventionnel et coutumier;
- d) que, vu les obligations juridiques susvisées, la République fédérale du Nigéria a le devoir exprès d'évacuer sans délai et sans conditions ses troupes du territoire camerounais dans la zone du lac Tchad;
- e) que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés aux sous-paragraphes a), b), c) et d) ci-dessus;
- e') qu'en conséquence une réparation d'un montant à déterminer par la Cour est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci, la République du Cameroun se réservant d'introduire devant la Cour une évaluation précise des dommages provoqués par la République fédérale du Nigéria.
- f) Que vu les incursions répétées des populations et des forces armées nigérianes en territoire camerounais tout le long de la frontière entre les deux pays, les incidents graves et répétés qui s'ensuivent, et l'attitude instable et réversible de la République fédérale du Nigéria relativement aux instruments juridiques définissant la frontière entre les

- (e') that the internationally unlawful acts referred to under (a), (b), (c), (d) and (e) above involve the responsibility of the Federal Republic of Nigeria;
- (e'') that, consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.
- (f) In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions."

17. In its Additional Application, Cameroon made the following requests:

"On the basis of the foregoing statement of facts and legal grounds, and subject to the reservations expressed in paragraph 20 of its Application of 29 March 1994, the Republic of Cameroon asks the Court to adjudge and declare:

- (a) that sovereignty over the disputed parcel in the area of Lake Chad is Cameroonian, by virtue of international law, and that that parcel is an integral part of the territory of Cameroon;
- (b) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*), and its recent legal commitments concerning the demarcation of frontiers in Lake Chad;
- (c) that the Federal Republic of Nigeria, by occupying, with the support of its security forces, parcels of Cameroonian territory in the area of Lake Chad, has violated and is violating its obligations under treaty law and customary law;
- (d) that in view of these legal obligations, mentioned above, the Federal Republic of Nigeria has the express duty of effecting an immediate and unconditional withdrawal of its troops from Cameroonian territory in the area of Lake Chad;
- (e) that the internationally unlawful acts referred to under (a), (b), (c) and (d) above involve the responsibility of the Federal Republic of Nigeria;
- (e') that consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.
- (f) That in view of the repeated incursions of Nigerian groups and armed forces into Cameroonian territory, all along the frontier between the two countries, the consequent grave and repeated incidents, and the vacillating and contradictory attitude of the Federal Republic of Nigeria in regard to the legal instruments defining the

deux pays et au tracé exact de cette frontière, la République du Cameroun prie respectueusement la Cour de bien vouloir préciser définitivement la frontière entre elle et la République fédérale du Nigéria du lac Tchad à la mer.»

18. Dans la procédure écrite, les conclusions ci-après ont été présentées par les Parties :

Au nom du Gouvernement du Cameroun,

dans le mémoire :

«La République du Cameroun a l'honneur de conclure à ce qu'il plaise à la Cour internationale de Justice de dire et juger :

a) Que la frontière lacustre et terrestre entre le Cameroun et le Nigéria suit le tracé suivant :

- du point de longitude 14° 04' 59" 9999 à l'est de Greenwich et de latitude de 13° 050' 00" 0001, nord, elle passe ensuite par le point situé à 14° 12' 11" 7 de longitude est et 12° 32' 17" 4 de latitude nord ;
- de ce point, elle suit le tracé fixé par la déclaration franco-britannique du 10 juillet 1919, tel que précisé par les alinéas 3 à 60 de la déclaration Thomson-Marchand confirmée par l'échange de lettres du 9 janvier 1931, jusqu'au «pic assez proéminent» décrit par cette dernière disposition et connu sous le nom usuel de «mont Kombon» ;
- du mont Kombon, la frontière se dirige ensuite vers la «borne 64» visée au paragraphe 12 de l'accord germano-britannique d'Obokum du 12 avril 1913 et suit, dans ce secteur, le tracé décrit à la section 6 (1) du *Nigeria (Protectorate and Cameroons) Order in Council* britannique du 2 août 1946 ;
- de la «borne 64» elle suit le tracé décrit par les paragraphes 13 à 21 de l'accord d'Obokum du 12 avril 1913 jusqu'à la borne 114 sur la Cross River ;
- de ce point, jusqu'à l'intersection de la ligne droite joignant Bakassi Point à King Point et du centre du chenal navigable de l'Akwayafé, la frontière est déterminée par les paragraphes 16 à 21 de l'accord germano-britannique du 11 mars 1913.

b) Que, dès lors, notamment, la souveraineté sur la presqu'île de Bakassi d'une part et sur la parcelle litigieuse occupée par le Nigéria dans la zone du lac Tchad d'autre part, en particulier sur Darak et sa région, est camerounaise.

c) Que la limite des zones maritimes relevant respectivement de la République du Cameroun et de la République fédérale du Nigéria suit le tracé suivant :

- de l'intersection de la ligne droite joignant Bakassi Point à King Point et du centre du chenal navigable de l'Akwayafé jusqu'au «point 12», cette limite est déterminée par la «ligne de compromis» reportée sur la carte de l'amirauté britannique n° 3343 par les chefs d'Etat des deux pays le 4 avril 1971 (déclaration de Yaoundé) et, de ce «point 12» jusqu'au «point G» par la déclaration signée à Maroua le 1^{er} juin 1975 ;

frontier between the two countries and the exact course of that frontier, the Republic of Cameroon respectfully asks the Court to specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea.”

18. In the written proceedings, the Parties presented the following submissions:

On behalf of the Government of Cameroon,

in the Memorial:

“The Republic of Cameroon has the honour to request that the Court be pleased to adjudge and declare:

(a) That the lake and land boundary between Cameroon and Nigeria takes the following course:

— from the point at longitude 14° 04' 59" 9999 E of Greenwich and latitude 13° 05' 00" 0001 N, it then runs through the point located at longitude 14° 12' 11" 7 E and latitude 12° 32' 17" 4 N;

— thence it follows the course fixed by the Franco-British Declaration of 10 July 1919, as specified in paragraphs 3 to 60 of the Thomson-Marchand Declaration, confirmed by the Exchange of Letters of 9 January 1931, as far as the ‘very prominent peak’ described in the latter provision and called by the usual name of ‘Mount Kombon’;

— from Mount Kombon the boundary then runs to ‘Pillar 64’ mentioned in paragraph 12 of the Anglo-German Agreement of Obokum of 12 April 1913 and follows, in that sector, the course described in Section 6 (1) of the British Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946;

— from Pillar 64 it follows the course described in paragraphs 13 to 21 of the Obokum Agreement of 12 April 1913 as far as Pillar 114 on the Cross River;

— thence, as far as the intersection of the straight line joining Bakassi Point to King Point and the centre of the navigable channel of the Akwayafe, the boundary is determined by paragraphs 16 to 21 of the Anglo-German Agreement of 11 March 1913.

(b) That notably, therefore, sovereignty over the Peninsula of Bakassi and over the disputed parcel occupied by Nigeria in the area of Lake Chad, in particular over Darak and its region, is Cameroonian.

(c) That the boundary of the maritime zones appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows the following course:

— from the intersection of the straight line joining Bakassi Point to King Point and the centre of the navigable channel of the Akwayafe to ‘point 12’, that boundary is determined by the ‘compromise line’ entered on British Admiralty Chart No. 3343 by the Heads of State of the two countries on 4 April 1971 (Yaoundé Declaration) and, from that ‘point 12’ to ‘point G’, by the Declaration signed at Maroua on 1 June 1975;

- du point G, cette limite s'infléchit ensuite vers le sud-ouest dans la direction indiquée par les points G, H, I, J, K représentés sur le croquis figurant à la page 556 du présent mémoire et qui répond à l'exigence d'une solution équitable, jusqu'à la limite extérieure des zones maritimes que le droit international place sous la juridiction respective des deux Parties.
- d) Qu'en contestant les tracés de la frontière définie ci-dessus *sub litterae a) et c)* la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation (*uti possidetis juris*) ainsi que ses engagements juridiques relativement à la démarcation des frontières dans le lac Tchad et à la délimitation terrestre et maritime.
- e) Qu'en utilisant la force contre la République du Cameroun, et, en particulier, en occupant militairement des parcelles du territoire camerounais dans la zone du lac Tchad et la péninsule camerounaise de Bakassi, en procédant à des incursions répétées, tant civiles que militaires, tout le long de la frontière entre les deux pays, la République fédérale du Nigéria a violé et viole ses obligations en vertu du droit international conventionnel et coutumier.
- f) Que la République fédérale du Nigéria a le devoir exprès de mettre fin à sa présence tant civile que militaire sur le territoire camerounais et, en particulier, d'évacuer sans délai et sans conditions ses troupes de la zone occupée du lac Tchad et de la péninsule camerounaise de Bakassi et de s'abstenir de tels faits à l'avenir.
- g) Que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés ci-dessus et précisés dans le corps du présent mémoire.
- h) Qu'en conséquence une réparation est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci selon des modalités à fixer par la Cour.

La République du Cameroun a en outre l'honneur de prier la Cour de bien vouloir l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due en réparation des préjudices qu'elle a subis en conséquence des faits internationalement illicites attribuables à la République fédérale du Nigéria, dans une phase ultérieure de la procédure.

Les présentes conclusions sont soumises sous réserve de tous éléments de fait et de droit et de toutes preuves qui viendraient à être soumis ultérieurement; la République du Cameroun se réserve le droit de les compléter ou de les amender le cas échéant, conformément aux dispositions du Statut et du Règlement de la Cour.»

Au nom du Gouvernement du Nigéria,
dans les exceptions préliminaires:

Première exception préliminaire:

- «1) que le Cameroun, en déposant sa requête du 29 mars 1994, a violé son obligation d'agir de bonne foi, a abusé du système institué par le paragraphe 2 de l'article 36 du Statut, et n'a pas tenu compte de la condition de réciprocité prévue par le paragraphe 2 de l'article 36 du Statut,

- from point G that boundary then swings south-westward in the direction which is indicated by points G, H, I, J and K represented on the sketch-map on page 556 of this Memorial and meets the requirement for an equitable solution, up to the outer limit of the maritime zones which international law places under the respective jurisdictions of the two Parties.
- (d) That by contesting the courses of the boundary defined above under (a) and (c), the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*) and its legal commitments concerning the demarcation of frontiers in Lake Chad and land and maritime delimitation.
 - (e) That by using force against the Republic of Cameroon and, in particular, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Cameroonian Peninsula of Bakassi, and by making repeated incursions, both civilian and military, all along the boundary between the two countries, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law.
 - (f) That the Federal Republic of Nigeria has the express duty of putting an end to its civilian and military presence in Cameroonian territory and, in particular, of effecting an immediate and unconditional withdrawal of its troops from the occupied area of Lake Chad and from the Cameroonian Peninsula of Bakassi and of refraining from such acts in the future.
 - (g) That the internationally wrongful acts referred to above and described in detail in the body of this Memorial involve the responsibility of the Federal Republic of Nigeria.
 - (h) That, consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in a form to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon.

The Republic of Cameroon further has the honour to request the Court to permit it to present an assessment of the amount of compensation due to it as reparation for the damage it has suffered as a result of the internationally wrongful acts attributable to the Federal Republic of Nigeria, at a subsequent stage of the proceedings.

These submissions are lodged subject to any points of fact and law and any evidence that may subsequently be lodged; the Republic of Cameroon reserves the right to complete or amend them, as necessary, in accordance with the Statute and the Rules of Court.”

On behalf of the Government of Nigeria,

in the preliminary objections:

First preliminary objection:

- “(1) that Cameroon, by lodging the Application on 29 March 1994, violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36,

ainsi que des termes de la déclaration du Nigéria du 3 septembre 1965;

- 2) qu'en conséquence les conditions nécessaires pour autoriser le Cameroun à invoquer sa déclaration en vertu du paragraphe 2 de l'article 36 comme fondement de la compétence de la Cour n'étaient pas remplies lorsque la requête a été soumise;
- 3) que, partant, la Cour n'est pas compétente pour connaître de la requête.»

Deuxième exception préliminaire:

«Pendant une période d'au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants:

- 1) Cet ensemble de comportements communs constitue un accord implicite de recourir exclusivement aux mécanismes bilatéraux existants et de ne pas invoquer la compétence de la Cour.
- 2) *A titre subsidiaire*, dans ces circonstances, la République du Cameroun est privée de son droit à invoquer la compétence de la Cour.»

Troisième exception préliminaire:

«Sans préjuger de ce qui sera décidé au sujet de la deuxième exception préliminaire, le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad et que, dans ce contexte, les procédures de règlement prévues dans le cadre de la commission sont obligatoires pour les Parties.

Le recours aux procédures de règlement des différends de la commission du bassin du lac Tchad impliquait nécessairement, pour ce qui a trait aux relations mutuelles entre le Nigéria et le Cameroun, que ne soit pas invoquée la compétence de la Cour en vertu du paragraphe 2 de l'article 36 en ce qui concerne les questions relevant de la compétence exclusive de la commission.»

Quatrième exception préliminaire:

«La Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.»

Cinquième exception préliminaire:

«1) Le Nigéria considère qu'il n'existe pas de différend concernant la délimitation de la frontière en tant que telle sur toute sa longueur entre le tripoint du lac Tchad et la mer, et notamment:

- a) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle dans le lac Tchad, sans préjuger de la question du titre sur Darak et les îles avoisinantes habitées par des Nigériens;
- b) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre le tripoint du lac Tchad et le mont Kombon;
- c) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et le mont Kombon;
- d) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et la mer.

- paragraph 2, of the Statute and the terms of Nigeria's Declaration of 3 September 1965;
- (2) that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court's jurisdiction did not exist when the Application was lodged; and
 - (3) that accordingly, the Court is without jurisdiction to entertain the Application."

Second preliminary objection:

"For a period of at least 24 years prior to the filing of the Application the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery.

- (1) This course of joint conduct constitutes an implied agreement to resort exclusively to the existing bilateral machinery and not to invoke the jurisdiction of the Court.
- (2) *In the alternative*, in the circumstances the Republic of Cameroon is estopped from invoking the jurisdiction of the Court."

Third preliminary objection:

"Without prejudice to the second preliminary objection, the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission, and in this context the procedures of settlement within the Lake Chad Basin Commission are obligatory for the Parties.

The operation of the dispute settlement procedures of the Lake Chad Basin Commission involved the necessary implication, for the relations of Nigeria and Cameroon *inter se*, that the jurisdiction of the Court by virtue of Article 36, paragraph 2, would not be invoked in relation to matters within the exclusive competence of the Commission."

Fourth preliminary objection:

"The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake."

Fifth preliminary objection:

"(1) In the submission of Nigeria there is no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and in particular:

- (a) there is no dispute in respect of the boundary delimitation as such within Lake Chad, subject to the question of title to Darak and adjacent islands inhabited by Nigerians;
- (b) there is no dispute relating to the boundary delimitation as such from the tripoint in Lake Chad to Mount Kombon;
- (c) there is no dispute relating to the boundary delimitation as such between Boundary Pillar 64 on the Gamana River and Mount Kombon; and
- (d) there is no dispute relating to the boundary delimitation as such between Pillar 64 on the Gamana River and the sea.

2) La présente exception préliminaire est présentée sans préjuger de la question du titre du Nigéria sur la presqu'île de Bakassi.»

Sixième exception préliminaire :

- «1) que la requête (et pour autant qu'ils sont pertinents l'amendement et le mémoire) déposée par le Cameroun ne satisfait pas aux critères exigés quant à l'exposé des faits sur lesquels elle se fonde, notamment en ce qui concerne les dates, les circonstances et les lieux précis des prétendus incursions et incidents imputés à des organes de l'Etat nigérian;
- 2) que ces carences font qu'il est impossible
 - a) au Nigéria de connaître, ainsi qu'il en a le droit, les circonstances qui, selon le Cameroun, sont à l'origine de l'engagement de la responsabilité internationale du Nigéria et de l'obligation de réparation qui en découle pour lui;
 - b) à la Cour de procéder à un examen judiciaire équitable et effectif des questions de responsabilité étatique et de réparation soulevées par le Cameroun et de se prononcer sur celles-ci;
- 3) et que, par conséquent, toutes les demandes concernant les questions de responsabilité étatique et de réparation présentées par le Cameroun dans ce contexte doivent être déclarées irrecevables.»

Septième exception préliminaire :

«Il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour, pour les motifs suivants :

- 1) il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi;
- 2) dans l'éventualité où la question du titre concernant la presqu'île de Bakassi serait réglée, les demandes concernant les questions de délimitation maritime ne seront pas recevables faute d'action suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international.»

Huitième exception préliminaire :

«La question de la délimitation maritime met nécessairement en cause les droits et les intérêts d'Etats tiers et la demande à ce sujet est irrecevable.»

Conclusions finales :

«Pour les motifs qu'elle a exposés, la République fédérale du Nigéria prie la Cour de dire et juger :

qu'elle n'a pas compétence pour connaître des demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun;

et/ou

que les demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun sont irrecevables dans la mesure précisée dans les présentes exceptions préliminaires.»

Au nom du Gouvernement du Cameroun,

dans l'exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires :

(2) This preliminary objection is without prejudice to the title of Nigeria over the Bakassi Peninsula.”

Sixth preliminary objection:

- “(1) that the Application (and so far as relevant, Amendment and Memorial) filed by Cameroon does not meet the required standard of adequacy as to the facts on which it is based, including the dates, circumstances and precise locations of the alleged incursions and incidents by Nigerian State organs;
- (2) that those deficiencies make it impossible
- (a) for Nigeria to have the knowledge to which it is entitled of the circumstances which are said by Cameroon to result in Nigeria’s international responsibility and consequential obligation to make reparation; and
- (b) for the Court to carry out a fair and effective judicial examination of, or make a judicial determination on, the issues of State responsibility and reparation raised by Cameroon; and
- (3) that accordingly all the issues of State responsibility and reparation raised by Cameroon in this context should be declared inadmissible.”

Seventh preliminary objection:

“There is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court, for the following reasons:

- (1) no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula;
- (2) at the juncture where there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation ‘by agreement on the basis of international law’.”

Eighth preliminary objection:

“The question of maritime delimitation necessarily involves the rights and interests of third States and is inadmissible.”

Concluding submissions:

“For the reasons advanced, the Federal Republic of Nigeria requests the Court to adjudge and declare that:

it lacks jurisdiction over the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon;

and/or

the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon are inadmissible to the extent specified in these preliminary objections.”

On behalf of the Government of Cameroon,

in the written statement containing its observations on the preliminary objections:

«Pour les motifs exposés ..., la République du Cameroun prie la Cour internationale de Justice de bien vouloir :

- 1) rejeter les exceptions préliminaires soulevées par la République fédérale du Nigéria ;
- 2) constater que, par ses déclarations formelles, celle-ci a accepté la compétence de la Cour ;
- 3) dire et juger :
 - qu'elle a compétence pour se prononcer sur la requête formée par le Cameroun le 29 mars 1994 et complétée par la requête additionnelle en date du 6 juin 1994 et
 - que la requête ainsi consolidée est recevable ;
- 4) compte dûment tenu de la nature particulière de cette affaire, qui porte sur un différend afférent à la souveraineté territoriale du Cameroun et crée des tensions graves entre les deux pays, fixer des délais pour la suite de la procédure qui permettent l'examen au fond du litige à une date aussi rapprochée que possible.»

19. Dans la procédure orale, les conclusions ci-après ont été présentées par les Parties :

Au nom du Gouvernement du Nigéria,
à l'audience du 9 mars 1998 :

«[P]our les motifs qui ont été exposés par écrit ou oralement, le Nigéria conclut :

Première exception préliminaire

1.1. Que le Cameroun, en déposant sa requête du 29 mars 1994, a violé son obligation d'agir de bonne foi, a abusé du système institué par le paragraphe 2 de l'article 36 du Statut et n'a pas tenu compte de la condition de réciprocité prévue par le paragraphe 2 de l'article 36 du Statut, ainsi que des termes de la déclaration du Nigéria du 3 septembre 1965 ;

1.2. Qu'en conséquence, les conditions nécessaires pour autoriser le Cameroun à invoquer sa déclaration en vertu du paragraphe 2 de l'article 36 comme fondement de la compétence de la Cour n'étaient pas remplies lorsque la requête a été soumise ;

1.3. Que, partant, la Cour n'est pas compétente pour connaître de la requête.

Deuxième exception préliminaire

2.1. Que, pendant une période d'au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants ;

2.1.1. Que cet ensemble de comportements communs constitue un accord implicite de recourir exclusivement aux mécanismes bilatéraux existants et de ne pas invoquer la compétence de la Cour ;

2.1.2. Qu'à titre subsidiaire, dans ces circonstances, la République du Cameroun est privée de son droit à invoquer la compétence de la Cour.

Troisième exception préliminaire

3.1. Que, sans préjuger de ce qui sera décidé au sujet de la deuxième

“For the reasons given . . . , the Republic of Cameroon requests the International Court of Justice:

- (1) to dismiss the preliminary objections raised by the Federal Republic of Nigeria;
- (2) to find that, by its formal declarations, Nigeria has accepted the jurisdiction of the Court;
- (3) to adjudge and declare:
 - that it has jurisdiction to decide on the Application filed by Cameroon on 29 March 1994 as supplemented by the additional Application of 6 June 1994; and
 - that the Application, thus consolidated, is admissible;
- (4) having due regard to the particular nature of the case, which relates to a dispute concerning the territorial sovereignty of Cameroon and is creating serious tensions between the two countries, to fix time-limits for the further proceedings which will enable the Court to proceed to the merits at the earliest possible time.”

19. In the oral proceedings, the Parties presented the following submissions:

On behalf of the Government of Nigeria,

at the hearing on 9 March 1998:

“[F]or the reasons that have been stated either in writing or orally, Nigeria submits:

First preliminary objection

1.1. That Cameroon, by lodging the Application on 29 March 1994, violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36, paragraph 2, of the Statute and the terms of Nigeria’s Declaration of 3 September 1965;

1.2. that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court’s jurisdiction did not exist when the Application was lodged;

1.3. that accordingly, the Court is without jurisdiction to entertain the Application.

Second preliminary objection

2.1. That for a period of at least 24 years prior to the filing of the Application, the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery;

2.1.1. that this course of joint conduct constitutes an implied agreement to resort exclusively to the existing bilateral machinery and not to invoke the jurisdiction of the Court;

2.1.2. that *in the alternative*, in the circumstances the Republic of Cameroon is estopped from invoking the jurisdiction of the Court.

Third preliminary objection

3.1. That without prejudice to the second preliminary objection, the

exception préliminaire, le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad et que, dans ce contexte, les procédures de règlement prévues dans le cadre de la commission sont obligatoires pour les Parties;

3.2. Que le recours aux procédures de règlement des différends de la commission du bassin du lac Tchad impliquait nécessairement, pour ce qui a trait aux relations mutuelles entre le Nigéria et le Cameroun, que ne soit pas invoquée la compétence de la Cour en vertu du paragraphe 2 de l'article 36 en ce qui concerne les questions relevant de la compétence exclusive de la commission.

Quatrième exception préliminaire

4.1. Que la Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.

Cinquième exception préliminaire

5.1. Que, sans préjuger de la question du titre du Nigéria sur la presqu'île de Bakassi, il n'existe pas de différend concernant la délimitation de la frontière en tant que telle sur toute sa longueur entre le tripoint du lac Tchad et la mer, et notamment:

- a) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle dans le lac Tchad, sans préjuger de la question du titre sur Darak et les îles avoisinantes habitées par des Nigériens;
- b) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre le tripoint du lac Tchad et le mont Kombon;
- c) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et le mont Kombon;
- d) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et la mer.

Sixième exception préliminaire

6.1. Que la requête (et les pièces ultérieures dans la mesure où elles pouvaient être déposées) introduite par le Cameroun ne satisfait pas aux critères exigés quant à l'exposé des faits sur lesquels elle se fonde, notamment en ce qui concerne les dates, les circonstances et les lieux précis des prétendus incursions et incidents imputés à des organes de l'Etat nigérian;

6.2. Que ces carences font qu'il est impossible

- a) au Nigéria de connaître, ainsi qu'il en a le droit, les circonstances qui, selon le Cameroun, sont à l'origine de l'engagement de la responsabilité internationale du Nigéria et de l'obligation de réparation qui en découle pour lui;
- b) à la Cour de procéder à un examen judiciaire équitable et effectif des questions de responsabilité étatique et de réparation soulevées par le Cameroun et de se prononcer sur celles-ci;

6.3. Que, par conséquent, toutes les demandes concernant les questions de responsabilité étatique et de réparation présentées par le Cameroun dans ce contexte doivent être déclarées irrecevables;

6.4. Que, sans préjudice de ce qui précède, les allégations formulées par le Cameroun quant à la responsabilité étatique du Nigéria ou à la répara-

settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission, and in this context the procedures of settlement within the Lake Chad Basin Commission are obligatory for the Parties;

3.2. that the operation of the dispute settlement procedures of the Lake Chad Basin Commission involved the necessary implication, for the relations of Nigeria and Cameroon *inter se*, that the jurisdiction of the Court by virtue of Article 36, paragraph 2, would not be invoked in relation to matters within the exclusive competence of the Commission.

Fourth preliminary objection

4.1. That the Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake.

Fifth preliminary objection

5.1. That, without prejudice to the title of Nigeria over the Bakassi Peninsula, there is no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and in particular:

- (a) there is no dispute in respect of the boundary delimitation as such within Lake Chad, subject to the question of title to Darak and adjacent islands inhabited by Nigerians;
- (b) there is no dispute relating to the boundary delimitation as such from the tripoint in Lake Chad to Mount Kombon;
- (c) there is no dispute relating to the boundary delimitation as such between boundary pillar 64 on the Gamana River and Mount Kombon; and
- (d) there is no dispute relating to the boundary delimitation as such between pillar 64 on the Gamana River and the sea.

Sixth preliminary objection

6.1. That the Application (and so far as permissible, subsequent pleadings) filed by Cameroon does not meet the required standard of adequacy as to the facts on which it is based, including the dates, circumstances and precise locations of the alleged incursions and incidents by Nigerian State organs;

6.2. that those deficiencies make it impossible

- (a) for Nigeria to have the knowledge to which it is entitled of the circumstances which are said by Cameroon to result in Nigeria's international responsibility and consequential obligation to make reparation; and
- (b) for the Court to carry out a fair and effective judicial examination of, or make a judicial determination on, the issues of State responsibility and reparation raised by Cameroon;

6.3. that accordingly all the issues of State responsibility and reparation raised by Cameroon in this context should be declared inadmissible;

6.4. that, without prejudice to the foregoing, any allegations by Cameroon as to State responsibility or reparation on the part of Nigeria in

tion due par celui-ci à l'égard des questions visées à l'alinéa *f*) du paragraphe 17 de la requête additionnelle du 6 juin 1994 du Cameroun sont irrecevables.

Septième exception préliminaire

7.1. Qu'il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour, pour les motifs suivants :

- 1) il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi ;
- 2) en tout état de cause, les demandes concernant les questions de délimitation maritime sont irrecevables faute d'action suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation « par voie d'accord conformément au droit international ».

Huitième exception préliminaire

8.1. Que la question de la délimitation maritime met nécessairement en cause les droits et les intérêts d'Etats tiers et que la demande à ce sujet est irrecevable au-delà du point G.

Partant, le Nigéria prie officiellement la Cour de dire et juger :

- 1) qu'elle n'a pas compétence pour connaître des demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun ; et/ou
- 2) que les demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun sont irrecevables dans la mesure précisée dans les présentes exceptions préliminaires. »

Au nom du Gouvernement du Cameroun,

à l'audience du 11 mars 1998 :

« Pour les motifs qui ont été développés dans les pièces de procédure écrite et lors de la procédure orale, la République du Cameroun prie la Cour internationale de Justice de bien vouloir :

- a*) rejeter les exceptions préliminaires soulevées par la République fédérale du Nigéria ;
- b*) à titre tout à fait subsidiaire, joindre au fond, le cas échéant, celles de ces exceptions qui ne lui paraîtraient pas présenter un caractère exclusivement préliminaire ;
- c*) dire et juger : qu'elle a compétence pour se prononcer sur la requête formée par le Cameroun le 29 mars 1994 et complétée par la requête additionnelle du 6 juin 1994, et que cette requête ainsi consolidée est recevable ;
- d*) compte dûment tenu de la nature particulière de cette affaire, fixer des délais pour la suite de la procédure qui permettent l'examen au fond du litige à une date aussi rapprochée que possible. »

* * *

20. La Cour examinera successivement les huit exceptions préliminaires soulevées par le Nigéria.

respect of matters referred to in paragraph 17 (f) of Cameroon's amending Application of 6 June 1994 are inadmissible.

Seventh preliminary objection

7.1. That there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court, for the following reasons:

- (1) no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula;
- (2) in any event, the issues of maritime delimitation are inadmissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'.

Eighth preliminary objection

8.1. That the question of maritime delimitation necessarily involves the rights and interests of third States and is inadmissible beyond point G.

Accordingly, Nigeria formally requests the Court to adjudge and declare that:

- (1) it lacks jurisdiction over the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon; and/or
- (2) the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon are inadmissible to the extent specified in the preliminary objections."

On behalf of the Government of Cameroon,

at the hearing on 11 March 1998:

"For the reasons developed in the written pleadings and in the oral proceedings, the Republic of Cameroon requests the International Court of Justice:

- (a) to dismiss the preliminary objections raised by the Federal Republic of Nigeria;
- (b) completely in the alternative, to join to the merits, as appropriate, such of those objections as it may deem not to be of an exclusively preliminary character;
- (c) to adjudge and declare: that it has jurisdiction to decide on the Application filed by Cameroon on 29 March 1994 as supplemented by the Additional Application of 6 June 1994; and that the Application, thus consolidated, is admissible;
- (d) having due regard to the particular nature of the case, to fix time-limits for the further proceedings which will permit examination of the merits of the dispute at the earliest possible time."

* * *

20. The Court will successively examine the eight preliminary objections raised by Nigeria.

PREMIÈRE EXCEPTION PRÉLIMINAIRE

21. Selon la première exception, la Cour n'a pas compétence pour connaître de la requête du Cameroun.

22. Dans cette perspective, le Nigéria expose qu'il avait accepté la juridiction obligatoire de la Cour par déclaration datée du 14 août 1965 remise au Secrétaire général des Nations Unies le 3 septembre 1965. Le Cameroun, quant à lui, a accepté cette juridiction par déclaration remise au Secrétaire général le 3 mars 1994. Ce dernier a transmis copie de la déclaration camerounaise aux parties au Statut onze mois et demi plus tard. Le Nigéria indique qu'il n'avait donc aucun moyen de savoir et ne savait pas, à la date d'introduction de la requête, soit le 29 mars 1994, que le Cameroun avait remis une déclaration. Le Cameroun aurait par suite «agi prématurément». En procédant de la sorte, le demandeur «aurait violé son obligation d'agir de bonne foi», «abusé du système institué par l'article 36, paragraphe 2, du Statut» et méconnu «la condition de réciprocité» prévue par cet article ainsi que par la déclaration du Nigéria. La Cour ne serait par suite pas compétente pour connaître de la requête.

23. Le Cameroun considère au contraire que sa requête remplit toutes les conditions requises par le Statut. Il rappelle que, dans l'affaire du *Droit de passage sur territoire indien*, la Cour a jugé que

«le Statut ne prescrit aucun délai entre le dépôt par un Etat d'une déclaration d'acceptation et d'une requête, et que le principe de réciprocité n'est pas affecté par un délai dans la réception par les Parties au Statut des copies de la déclaration» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957, p. 147*).

Le Cameroun souligne qu'il n'existe aucune raison de revenir sur ce précédent, au risque d'ébranler le système de la juridiction obligatoire reposant sur la clause facultative. Il ajoute que la déclaration camerounaise était en vigueur dès le 3 mars 1994, du fait qu'à cette date elle avait été enregistrée conformément à l'article 102 de la Charte des Nations Unies. Le Cameroun expose qu'en tout état de cause le Nigéria s'est comporté depuis l'ouverture de l'instance de manière telle qu'il doit être regardé comme ayant accepté la compétence de la Cour.

24. Le Nigéria fait valoir en réponse que «l'affaire du *Droit de passage sur territoire indien* correspondait à une première impression»; que l'arrêt rendu alors est dépassé; qu'il est resté isolé; que le droit international, spécialement en ce qui concerne la bonne foi, a évolué depuis lors et que, conformément à l'article 59 du Statut, ledit arrêt ne jouit de l'autorité de la chose jugée que pour les parties en litige et dans le cas qui a été décidé. Pour ces motifs, la solution retenue en 1957 ne devrait pas l'être en l'espèce. Le Nigéria s'oppose à l'argumentation tirée par le Cameroun de l'article 102 de la Charte. Il prétend aussi qu'en l'espèce il n'a jamais

FIRST PRELIMINARY OBJECTION

21. The first objection contends that the Court has no jurisdiction to entertain Cameroon's Application.

22. In this regard, Nigeria notes that it had accepted the Court's compulsory jurisdiction by a declaration dated 14 August 1965, deposited with the Secretary-General of the United Nations on 3 September 1965. Cameroon had also accepted the Court's compulsory jurisdiction by a declaration deposited with the Secretary-General on 3 March 1994. The Secretary-General transmitted copies of the Cameroon Declaration to the parties to the Statute eleven-and-a-half months later. Nigeria maintains, accordingly, that it had no way of knowing, and did not actually know, on the date of the filing of the Application, i.e., 29 March 1994, that Cameroon had deposited a declaration. Cameroon consequently is alleged to have "acted prematurely". By proceeding in this way, the Applicant "is alleged to have violated its obligation to act in good faith", "abused the system instituted by Article 36, paragraph 2, of the Statute" and disregarded "the condition of reciprocity" provided for by that Article and by Nigeria's Declaration. The Court consequently does not have jurisdiction to hear the Application.

23. In contrast, Cameroon contends that its Application fulfils all the conditions required by the Statute. It notes that in the case concerning *Right of Passage over Indian Territory*, the Court held that

"the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 147).

Cameroon indicates that there is no reason not to follow this precedent, at the risk of undermining the system of compulsory jurisdiction provided by the Optional Clause. It adds that the Cameroonian Declaration was in force as early as 3 March 1994, as at that date it was registered in accordance with Article 102 of the United Nations Charter. Cameroon states that in any event Nigeria has acted, since the beginning of these proceedings, in such a way that it should be regarded as having accepted the jurisdiction of the Court.

24. Nigeria argues in reply that the "case concerning the *Right of Passage over Indian Territory*, was a first impression", that the Judgment given is outdated, and that it is an isolated one; that international law, especially as it relates to good faith, has evolved since and that in accordance with Article 59 of the Statute, that Judgment only has the force of *res judicata* as between the parties and in respect of that case. For these reasons, the solution adopted in 1957 should not be adopted here. Nigeria does not accept the reasoning of Cameroon based on Article 102 of the Charter. Nigeria also contends that there is no question of its

accepté la compétence de la Cour et que de ce fait il n'y a pas *forum prorogatum*.

Le Cameroun conteste chacun de ces arguments.

25. La Cour observera en premier lieu que, selon le paragraphe 2 de l'article 36 du Statut :

«Les Etats parties au présent Statut pourront, à n'importe quel moment, déclarer reconnaître comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, la juridiction de la Cour sur tous les différends d'ordre juridique»

ayant l'un des objets prévus par cette disposition.

Le paragraphe 4 de l'article 36 précise que :

«Ces déclarations seront remises au Secrétaire général des Nations Unies qui en transmettra copie aux parties au présent Statut ainsi qu'au Greffier de la Cour.»

Au vu de ces dispositions, la Cour, dans l'affaire du *Droit de passage sur territoire indien*, a conclu que :

«par le dépôt de sa déclaration d'acceptation entre les mains du Secrétaire général, l'Etat acceptant devient partie au système de la disposition facultative à l'égard de tous autres Etats déclarants, avec tous les droits et obligations qui découlent de l'article 36. Le rapport contractuel entre les parties et la juridiction obligatoire de la Cour qui en découle sont établis «de plein droit et sans convention spéciale» du fait du dépôt de la déclaration... C'est en effet ce jour-là que le lien consensuel qui constitue la base de la disposition facultative prend naissance entre les Etats intéressés.» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957, p. 146.*)

Les conclusions auxquelles la Cour était ainsi parvenue en 1957 traduisent l'essence même de la clause facultative d'acceptation de la juridiction obligatoire. Tout Etat partie au Statut, en acceptant la juridiction de la Cour conformément au paragraphe 2 de l'article 36, accepte cette juridiction dans ses relations avec les Etats ayant antérieurement souscrit à la même clause. En même temps, il fait une offre permanente aux autres Etats parties au Statut n'ayant pas encore remis de déclaration d'acceptation. Le jour où l'un de ces Etats accepte cette offre en déposant à son tour sa déclaration d'acceptation, le lien consensuel est établi et aucune autre condition n'a besoin d'être remplie. Dès lors, et comme la Cour l'a déclaré en 1957 :

«tout Etat faisant une déclaration d'acceptation doit être censé tenir compte du fait qu'en vertu du Statut il peut se trouver à tout moment tenu des obligations découlant de la disposition facultative vis-à-vis d'un nouveau signataire, par suite du dépôt de la déclaration d'acceptation de ce dernier» (*ibid.*, p. 146).

having consented to the jurisdiction of the Court in the case and hence there is no *forum prorogatum*.

Cameroon contests each of these arguments.

25. The Court observes initially that, in accordance with Article 36, paragraph 2, of the Statute:

“The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes”

as specified in that clause.

Article 36, paragraph 4, provides:

“Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.”

In the case concerning *Right of Passage over Indian Territory*, the Court concluded, in the light of these provisions, that:

“by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, ‘*ipso facto* and without special agreement’, by the fact of the making of the Declaration . . . For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.” (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)

The conclusions thus reached by the Court in 1957 reflect the very essence of the Optional Clause providing for acceptance of the Court’s compulsory jurisdiction. Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled. Thus, as the Court stated in 1957:

“every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance” (*ibid.*, p. 146).

26. Par ailleurs, et comme la Cour l'a également déclaré dans l'affaire du *Droit de passage sur territoire indien*, l'Etat déclarant

«n'a à s'occuper ni du devoir du Secrétaire général ni de la manière dont ce devoir est rempli. L'effet juridique de la déclaration ne dépend pas de l'action ou de l'inaction ultérieure du Secrétaire général. Au surplus, contrairement à d'autres instruments, l'article 36 n'énonce aucune exigence supplémentaire, par exemple celle que la communication du Secrétaire général ait été reçue par les parties au Statut, ou qu'un intervalle doit s'écouler après le dépôt de la déclaration, avant que celle-ci ne puisse prendre effet. Toute condition de ce genre introduirait un élément d'incertitude dans le jeu du système de la disposition facultative. La Cour ne peut introduire dans la disposition facultative aucune condition de ce genre.» (*C.I.J. Recueil 1957*, p. 146-147.)

27. La Cour rappellera en outre que, contrairement à ce que soutient le Nigéria, cet arrêt n'est pas resté isolé. Il a été réaffirmé dans l'affaire du *Temple de Préah Vihéar (exceptions préliminaires, arrêt, C.I.J. Recueil 1961, p. 31)* et dans celle des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique) (compétence et recevabilité, arrêt, C.I.J. Recueil 1984, p. 392)*. Dans cette dernière affaire, la Cour a souligné que :

«en ce qui concerne l'exigence du consentement comme fondement de sa compétence et plus particulièrement les formalités exigibles pour que ce consentement soit exprimé conformément aux dispositions de l'article 36, paragraphe 2, du Statut, la Cour s'est déjà exprimée, notamment dans l'affaire du *Temple de Préah Vihéar*. Elle a alors indiqué que «la seule formalité prescrite est la remise de l'acceptation au Secrétaire général des Nations Unies, conformément au paragraphe 4 de l'article 36 du Statut (*C.I.J. Recueil 1961, p. 31*).» (*C.I.J. Recueil 1984, p. 412, par. 45*.)

28. Le Nigéria conteste néanmoins cette solution en rappelant que, conformément à l'article 59 du Statut, «[l]a décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé». Dès lors les arrêts rendus antérieurement, notamment dans l'affaire du *Droit de passage sur territoire indien*, n'auraient «manifestement pas d'effet déterminant sur la procédure actuelle».

Il est vrai que, conformément à l'article 59, les arrêts de la Cour ne sont obligatoires que pour les parties en litige et dans le cas qui a été décidé. Il ne saurait être question d'opposer au Nigéria les décisions prises par la Cour dans des affaires antérieures. La question est en réalité de savoir si, dans la présente espèce, il existe pour la Cour des raisons de s'écarter des motifs et des conclusions adoptés dans ces précédents.

*

26. Furthermore, and as the Court also declared in the case concerning *Right of Passage over Indian Territory*, the State making the declaration

“is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature.” (*I.C.J. Reports 1957*, pp. 146-147.)

27. The Court furthermore recalls that, contrary to what is maintained by Nigeria, this Judgment is not an isolated one. It has been reaffirmed in the case concerning the *Temple of Preah Vihear (Preliminary Objections, I.C.J. Reports 1961*, p. 31), and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392). In that latter case, the Court pointed out that:

“as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, *inter alia*, the case concerning the *Temple of Preah Vihear*. On that occasion it stated: ‘The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute.’ (*I.C.J. Reports 1961*, p. 31.)” (*I.C.J. Reports 1984*, p. 412, para. 45.)

28. Nigeria nonetheless contests that conclusion pointing out that, in accordance with Article 59 of the Statute, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. Thus, judgments given earlier, in particular in the case concerning *Right of Passage over Indian Territory*, “clearly [have] no direct compelling effect in the present case”.

It is true that, in accordance with Article 59, the Court’s judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.

29. Dans cette perspective, le Nigéria soutient tout d'abord que l'interprétation donnée en 1957 du paragraphe 4 de l'article 36 du Statut devrait être revue à la lumière de l'évolution du droit des traités intervenue depuis lors. A cet égard, le Nigéria se prévaut de l'article 78 *c*) de la convention de Vienne sur le droit des traités du 23 mai 1969. Cet article concerne les notifications et communications faites en vertu de la convention. Il précise que :

«Sauf dans les cas où le traité ou la présente convention en dispose autrement, une notification ou une communication qui doit être faite par un Etat en vertu de la présente convention :

-
- c) si elle est transmise à un dépositaire, n'est considérée comme ayant été reçue par l'Etat auquel elle est destinée qu'à partir du moment où cet Etat aura reçu du dépositaire [les informations requises].»

Selon le Nigéria, cette règle «doit s'appliquer à la déclaration du Cameroun». Au vu des dispositions de la convention de Vienne, la Cour devrait, d'après le Nigéria, revenir sur la solution qu'elle avait adoptée dans l'affaire du *Droit de passage sur territoire indien*. Le Cameroun expose, quant à lui, que les déclarations d'acceptation de la juridiction obligatoire de la Cour «ne sont pas des traités au sens de la convention de Vienne» et qu'«il n'était manifestement pas dans les intentions des rédacteurs de la convention ... d'aller à l'encontre de la jurisprudence établie de la Cour en la matière». Selon le Cameroun, cette jurisprudence devrait être maintenue.

30. La Cour notera que le régime de remise et de transmission des déclarations d'acceptation de la juridiction obligatoire établi au paragraphe 4 de l'article 36 du Statut de la Cour est distinct du régime prévu pour les traités par la convention de Vienne. Dès lors, les dispositions de cette convention ne sauraient éventuellement être appliquées aux déclarations que par analogie (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, compétence et recevabilité, arrêt, C.I.J. Recueil 1984, p. 420, par. 63).

31. La Cour observera par ailleurs qu'en tout état de cause les dispositions de la convention de Vienne n'ont pas la portée que leur attribue le Nigéria. L'article 78 de la convention n'a en effet pour objet que de traiter des modalités selon lesquelles les notifications et communications doivent être effectuées. Il ne gouverne pas les conditions dans lesquelles s'exprime le consentement par un Etat à être lié par un traité et celles dans lesquelles un traité entre en vigueur, ces questions étant réglées par les articles 16 et 24 de la convention. Aussi bien la Commission du droit international, dans son rapport à l'Assemblée générale sur le projet qui devait devenir par la suite la convention de Vienne, précisait-elle que, si le futur article 78 comportait *in limine* une réserve explicite, c'était «avant tout pour prévenir toute erreur sur le rapport» entre cet article et les futurs articles 16 et 24 (*Annuaire de la Commission du droit international*,

29. In this regard, Nigeria maintains first of all that the interpretation given in 1957 to Article 36, paragraph 4, of the Statute should be reconsidered in the light of the evolution of the law of treaties which has occurred since. In that connection, Nigeria relies on Article 78 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969. That Article relates to the notifications and communications made under that Convention. It provides that:

“Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

-
- (c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.”

According to Nigeria, that rule “must apply to Cameroon’s Declaration”. In the light of the provisions of the Vienna Convention, Nigeria contends that the Court should overturn the solution it adopted earlier in the case concerning *Right of Passage over Indian Territory*. Cameroon states, for its part, that the declarations of acceptance of the Court’s compulsory jurisdiction “are not treaties within the meaning of the Vienna Convention” and “it was clearly no part of the intentions of the drafters of the . . . Convention . . . to interfere with the settled jurisprudence of the Court in this matter”. This jurisprudence, Cameroon argues, should be followed.

30. The Court notes that the régime for depositing and transmitting declarations of acceptance of compulsory jurisdiction laid down in Article 36, paragraph 4, of the Statute of the Court is distinct from the régime envisaged for treaties by the Vienna Convention. Thus the provisions of that Convention may only be applied to declarations by analogy (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1984*, p. 420, para. 63).

31. The Court furthermore observes that in any event the provisions of the Vienna Convention do not have the scope which Nigeria imputes to them. Article 78 of the Convention is only designed to lay down the modalities according to which notifications and communications should be carried out. It does not govern the conditions in which a State expresses its consent to be bound by a treaty and those under which a treaty comes into force, those questions being governed by Articles 16 and 24 of the Convention. Indeed, the International Law Commission, in its Report to the General Assembly on the draft which was subsequently to become the Vienna Convention, specified that if the future Article 78 included *in limine* an explicit reservation, that was “primarily in order to prevent any misconception as to the relation” between that Article and the future Articles 16 and 24 (*Yearbook of the International Law Com-*

1966, vol. II, p. 295). Elle ajoutait que de ce fait «les dispositions particulières de ces derniers articles prévalent».

Or, selon l'article 16:

«A moins que le traité n'en dispose autrement, les instruments de ratification, d'acceptation, d'approbation ou d'adhésion établissent le consentement d'un Etat à être lié par un traité au moment:

.
b) de leur dépôt auprès du depositaire.»

Le paragraphe 3 de l'article 24 dispose en outre que:

«Lorsque le consentement d'un Etat à être lié par un traité est établi à une date postérieure à l'entrée en vigueur dudit traité, celui-ci, à moins qu'il n'en dispose autrement, entre en vigueur à l'égard de cet Etat à cette date.»

Dans son rapport à l'Assemblée générale, la Commission du droit international avait souligné que:

«Dans le cas du dépôt d'un instrument auprès d'un depositaire, la question se pose de savoir si c'est le dépôt lui-même qui établit le lien juridique entre l'Etat déposant et les autres Etats contractants ou bien si le lien juridique n'est créé qu'au moment où ces derniers sont informés du dépôt par le depositaire.» (*Annuaire de la Commission du droit international*, 1966, vol. II, p. 219.)

Après avoir décrit les avantages et les inconvénients des deux solutions, elle avait conclu que:

«Il ne fait pas de doute pour la Commission que la règle générale existante est que c'est l'acte même du dépôt qui crée le lien juridique ... Telle a été l'opinion de la Cour internationale de Justice dans l'affaire du *Droit de passage sur territoire indien (exceptions préliminaires)*, où il s'agissait d'une situation analogue concernant le dépôt de déclarations d'acceptation de la clause facultative en vertu du paragraphe 2 de l'article 36 du Statut de la Cour ... [Ainsi] la règle existante semble être bien établie.» (*Ibid.*)

Cette règle générale a trouvé son expression dans les articles 16 et 24 de la convention de Vienne: le dépôt des instruments de ratification, d'acceptation, d'approbation ou d'adhésion établit le consentement d'un Etat à être lié par un traité; ce dernier entre en vigueur à l'égard de cet Etat le jour de ce dépôt.

Ainsi, les règles adoptées en ce domaine par la convention de Vienne correspondent à la solution retenue par la Cour dans l'affaire du *Droit de passage sur territoire indien*. Cette solution doit être maintenue.

32. Le Nigéria souligne cependant qu'en tout état de cause le Cameroun ne pouvait déposer une requête devant la Cour sans laisser s'écouler un délai raisonnable «pour permettre au Secrétaire général de s'acquitter

mission, 1966, Vol. II, p. 271). It added that consequently "specific provisions [of those latter Articles] will prevail".

According to Article 16:

"Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

.....
 (b) their deposit with the depositary."

Article 24 further provides in its paragraph 3 that:

"When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides."

In its report to the General Assembly, the International Law Commission had pointed out that:

"In the case of the deposit of an instrument with a depositary, the problem arises whether the deposit by itself establishes the legal nexus between the depositing State and other contracting States or whether the legal nexus arises only upon their being informed by the depositary." (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 201.)

After describing the advantages and disadvantages of both solutions, it concluded that:

"The Commission considered that the existing general rule clearly is that the act of deposit by itself establishes the legal nexus . . . This was the view taken by the International Court of Justice in the *Right of Passage over Indian Territory* (preliminary objections) case in the analogous situation of the deposit of instruments of acceptance of the optional clause under Article 36, paragraph 2, of the Statute of the Court . . . [Therefore] the existing rule appears to be well-settled." (*Ibid.*)

This general rule is reflected in Articles 16 and 24 of the Vienna Convention: the deposit of instruments of ratification, acceptance, approval or accession to a treaty establishes the consent of a State to be bound by a treaty; the treaty enters into force as regards that State on the day of the deposit.

Thus the rules adopted in this sphere by the Vienna Convention correspond to the solution adopted by the Court in the case concerning *Right of Passage over Indian Territory*. That solution should be maintained.

32. Nigeria maintains however that, in any event, Cameroon could not file an application before the Court without allowing a reasonable period to elapse "as would . . . have enabled the Secretary-General to take the

de la tâche qu'il devait remplir pour ce qui est de la déclaration du Cameroun du 3 mars 1994». Le respect d'un tel délai s'imposerait d'autant plus que, selon le Nigéria, la Cour, dans son arrêt du 26 novembre 1984 rendu en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, a exigé un délai raisonnable pour le retrait des déclarations facultatives d'acceptation de la juridiction obligatoire.

33. La Cour, dans l'arrêt ainsi évoqué, a constaté que les Etats-Unis avaient remis en 1984 au Secrétaire général, trois jours avant le dépôt d'une requête par le Nicaragua, une notification limitant la portée de leur déclaration d'acceptation de la juridiction de la Cour. La Cour a constaté que cette déclaration comportait une clause de préavis de six mois. Elle a estimé que cette condition devait être respectée en cas de retrait ou de modification de la déclaration et en a conclu que la notification de modification de 1984 ne pouvait abolir avec effet immédiat l'obligation antérieurement assumée par les Etats-Unis (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*), compétence et recevabilité, C.I.J. Recueil 1984, p. 421, par. 65).

La Cour a noté en outre, à propos de la déclaration du Nicaragua dont les Etats-Unis se prévalaient par voie de réciprocité, qu'en tout état de cause

«le droit de mettre fin immédiatement à des déclarations de durée indéfinie est loin d'être établi. L'exigence de bonne foi paraît imposer de leur appliquer par analogie le traitement prévu par le droit des traités, qui prescrit un délai raisonnable pour le retrait ou la dénonciation de traités ne renfermant aucune clause de durée» (*ibid.*, p. 420, par. 63).

La Cour a ajouté: «la question de savoir quel délai raisonnable devrait être respecté n'a pas à être approfondie: il suffira d'observer qu'[un] laps de temps [de trois jours] ne constitue pas un «délai raisonnable» (*ibid.*).

34. La Cour estime que cette solution relative au retrait des déclarations d'acceptation de la juridiction obligatoire n'est pas transposable au cas de la remise de ces déclarations. En effet, le retrait met fin à des liens consensuels existants alors que la remise établit de tels liens. Par suite, le retrait a pour conséquence de priver purement et simplement les autres Etats ayant antérieurement accepté la compétence de la Cour du droit qu'ils avaient de saisir cette dernière d'un différend les opposant à l'Etat ayant retiré sa déclaration. A l'inverse, la remise d'une déclaration ne prive ces mêmes Etats d'aucun droit acquis. A la suite d'une telle remise, aucun délai n'est dès lors requis pour l'établissement d'un lien consensuel.

35. La Cour observera en outre qu'imposer l'écoulement d'un délai raisonnable avant qu'une déclaration puisse prendre effet serait introduire un élément d'incertitude dans le jeu du système de la clause facultative. Ainsi qu'il a été rappelé au paragraphe 26 ci-dessus, la Cour avait,

action required of him in relation to Cameroon's Declaration of 3 March 1994". Compliance with that time period is essential, the more so because, according to Nigeria, the Court, in its Judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, required a reasonable time for the withdrawal of declarations under the Optional Clause.

33. The Court, in the above Judgment, noted that the United States had, in 1984, deposited with the Secretary-General, three days before the filing of Nicaragua's Application, a notification limiting the scope of its Declaration of acceptance of the Court's jurisdiction. The Court noted that that Declaration contained a clause requiring six months' notice of termination. It considered that that condition should be complied with in cases of either termination or modification of the Declaration, and concluded that the 1984 notification of modification could not, with immediate effect, override the obligation entered into by the United States beforehand (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 421, para. 65).

The Court noted, moreover, in relation to Nicaragua's Declaration upon which the United States was relying on the grounds of reciprocity, that, in any event,

"the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity" (*ibid.*, p. 420, para. 63).

The Court added: "the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that [three days] would not amount to a 'reasonable time'" (*ibid.*).

34. The Court considers that the foregoing conclusion in respect of the withdrawal of declarations under the Optional Clause is not applicable to the deposit of those declarations. Withdrawal ends existing consensual bonds, while deposit establishes such bonds. The effect of withdrawal is therefore purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it against the withdrawing State. In contrast, the deposit of a declaration does not deprive those States of any accrued right. Accordingly no time period is required for the establishment of a consensual bond following such a deposit.

35. The Court notes moreover that to require a reasonable time to elapse before a declaration can take effect would be to introduce an element of uncertainty into the operation of the Optional Clause system. As set out in paragraph 26 above, in the case concerning *Right of Passage*

dans l'affaire du *Droit de passage sur territoire indien*, estimé ne pouvoir créer une telle incertitude. Les conclusions auxquelles elle était alors parvenue demeurent valables et s'imposent d'autant plus que l'augmentation du nombre des Etats parties au Statut et l'intensification des relations interétatiques ont depuis 1957 multiplié les occasions de différends juridiques susceptibles d'être soumis à la Cour. Celle-ci ne saurait introduire dans la clause facultative une condition supplémentaire de délai qui n'y figure pas.

*

36. Le Nigéria expose en deuxième lieu que le Cameroun a omis de l'informer du fait qu'il entendait accepter la juridiction de la Cour, puis du fait qu'il avait accepté cette juridiction et enfin qu'il avait l'intention de déposer une requête. Le Nigéria soutient en outre que le Cameroun aurait même continué, au cours du premier trimestre 1994, à entretenir avec lui des contacts bilatéraux sur les questions de frontières alors qu'il s'apprêtait à s'adresser à la Cour. Un tel comportement, selon le Nigéria, porterait atteinte au principe de la bonne foi qui jouerait aujourd'hui un rôle plus grand dans la jurisprudence de la Cour qu'autrefois; il ne saurait être accepté.

37. Le Cameroun, pour sa part, fait valoir qu'il n'avait aucune obligation d'informer à l'avance le Nigéria de ses intentions ou de ses décisions. Il ajoute qu'en tout état de cause «le Nigéria n'a nullement été pris par surprise par le dépôt de la requête camerounaise, et ... connaissait parfaitement l'intention du Cameroun en ce sens plusieurs semaines avant le dépôt». Le principe de la bonne foi n'aurait en rien été méconnu.

38. La Cour observera que le principe de la bonne foi est un principe bien établi du droit international. Il est énoncé au paragraphe 2 de l'article 2 de la Charte des Nations Unies; il a aussi été incorporé à l'article 26 de la convention de Vienne sur le droit des traités du 23 mai 1969. Il a été mentionné dès le début de ce siècle dans la sentence arbitrale du 7 septembre 1910 rendue en l'affaire des *Pêcheries de la côte septentrionale de l'Atlantique* (Nations Unies, *Recueil des sentences arbitrales*, vol. XI, p. 188). Il a en outre été consacré dans plusieurs arrêts de la Cour permanente de Justice internationale (*Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17, p. 30; Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance du 6 décembre 1930, C.P.J.I. série A n° 24, p. 12, et 1932, C.P.J.I. série A/B n° 46, p. 167*). Il a enfin été appliqué par la présente Cour dès 1952 dans l'affaire relative aux *Droits des ressortissants des Etats-Unis d'Amérique au Maroc* (arrêt, *C.I.J. Recueil 1952, p. 212*), puis dans l'affaire de la *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)* (compétence de la Cour, arrêt, *C.I.J. Recueil 1973, p. 18*), dans celles des *Essais nucléaires (C.I.J. Recueil 1974, p. 268 et 473)* et dans celle des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)* (compétence et recevabilité, arrêt, *C.I.J. Recueil 1988, p. 105*).

over *Indian Territory*, the Court had considered that it could not create such uncertainty. The conclusions it had reached then remain valid and apply all the more since the growth in the number of States party to the Statute and the intensification of inter-State relations since 1957 have increased the possibilities of legal disputes capable of being submitted to the Court. The Court cannot introduce into the Optional Clause an additional time requirement which is not there.

*

36. Nigeria's second argument is that Cameroon omitted to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application. Nigeria further argued that Cameroon even continued, during the first three months of 1994, to maintain bilateral contacts with it on boundary questions while preparing itself to address the Court. Such conduct, Nigeria contends, infringes upon the principle of good faith which today plays a larger role in the case-law of the Court than before, and should not be accepted.

37. Cameroon, for its part, argues that it had no obligation to inform Nigeria in advance of its intentions, or of its decisions. It adds that in any event "Nigeria was not at all surprised by the filing of Cameroon's Application and . . . knew perfectly well what Cameroon's intentions were in that regard several weeks before the filing". The principle of good faith was not at all disregarded.

38. The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries* case (United Nations, *Reports of International Arbitral Awards*, Vol. XI, p. 188). It was moreover upheld in several judgments of the Permanent Court of International Justice (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 30; Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 12, and 1932, P.C.I.J., Series A/B, No. 46, p. 167*). Finally, it was applied by this Court as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco* (*Judgment, I.C.J. Reports 1952, p. 212*), then in the case concerning *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18*), the *Nuclear Tests* cases (*I.C.J. Reports 1974, pp. 268 and 473*), and the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 105*).

39. La Cour notera par ailleurs que, si le principe de la bonne foi «est l'un des principes de base qui président à la création et à l'exécution d'obligations juridiques..., il n'est pas en soi une source d'obligation quand il n'en existerait pas autrement» (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 105, par. 94). Or, il n'existe en droit international aucune obligation spécifique pour les Etats d'informer les autres Etats parties au Statut qu'ils ont l'intention de souscrire à la clause facultative ou qu'ils ont souscrit à ladite clause. En conséquence, le Cameroun n'était pas tenu d'informer le Nigéria qu'il avait l'intention de souscrire ou qu'il avait souscrit à la clause facultative.

Par ailleurs:

«Un Etat qui accepte la compétence de la Cour doit prévoir qu'une requête puisse être introduite contre lui devant la Cour par un nouvel Etat déclarant le jour même où ce dernier dépose une déclaration d'acceptation entre les mains du Secrétaire général.» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 146.)

De ce fait le Cameroun n'était pas davantage tenu d'informer le Nigéria de son intention de saisir la Cour. En l'absence de telles obligations et de toute atteinte aux droits correspondants du Nigéria, ce dernier n'est pas fondé à se prévaloir du principe de la bonne foi à l'appui de ses conclusions.

40. En ce qui concerne les faits de l'espèce, sur lesquels les Parties ont beaucoup insisté, la Cour, indépendamment de toute considération de droit, ajoutera que le Nigéria n'était pas dans l'ignorance des intentions du Cameroun. En effet, ce dernier avait, le 28 février 1994, saisi le Conseil de sécurité des incidents survenus peu de temps auparavant dans la presqu'île de Bakassi. En réponse, le Nigéria avait, le 4 mars 1994, exprimé au Conseil de sécurité sa surprise de constater que «le Gouvernement camerounais avait décidé d'internationaliser cette affaire en ... c) engageant une procédure auprès de la Cour internationale de Justice». Certes, à la date du 4 mars, le Cameroun avait remis sa déclaration d'acceptation de la juridiction obligatoire de la Cour, mais n'avait pas encore saisi cette dernière. La communication du Nigéria au Conseil de sécurité n'en montrait pas moins que celui-ci n'ignorait pas les intentions du Cameroun.

En outre, la Cour fera observer que, dès le 4 mars 1994, le *Journal des Nations Unies*, diffusé au siège à New York à l'intention des organes des Nations Unies ainsi que des missions permanentes, faisait état de la remise par le Cameroun au Secrétaire général d'une «déclaration reconnaissant comme obligatoire la juridiction de la Cour internationale de Justice en application du paragraphe 2 de l'article 36 du Statut de la Cour» (*Journal des Nations Unies*, vendredi 4 mars 1994, n° 1994/43, deuxième partie).

Enfin, le 11 mars 1994, lors de la session extraordinaire de l'organe central du mécanisme de l'Organisation de l'unité africaine pour la pré-

39. The Court furthermore notes that although the principle of good faith is “one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist” (*Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). There is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause.

Moreover:

“A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance.” (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)

Thus, Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria’s corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions.

40. On the facts of the matter, to which the Parties devoted considerable attention, and quite apart from legal considerations, the Court would add that Nigeria was not unaware of Cameroon’s intentions. On 28 February 1994, Cameroon had informed the Security Council of incidents which had occurred shortly beforehand in the Bakassi Peninsula. In response, on 4 March 1994, Nigeria apprised the Security Council of its surprise in noting that “the Cameroon Government had decided to raise the matter to an international level by . . . (c) bringing proceedings before the International Court of Justice”. Indeed on 4 March, Cameroon had deposited its declaration of acceptance of the compulsory jurisdiction of the Court, but had not yet seised the Court. Nigeria’s communication to the Security Council nevertheless showed that it was not uninformed of Cameroon’s intentions.

Further the Court points out that, on 4 March 1994, the *Journal of the United Nations*, issued at Headquarters in New York to United Nations organs and to the permanent missions, reported that Cameroon had deposited with the Secretary-General a “declaration recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court” (*Journal of the United Nations*, Friday 4 March 1994, No. 1994/43 (Part II)).

Lastly, on 11 March 1994, the bringing of the matter to the Security Council and the International Court of Justice by Cameroon was men-

vention, la gestion et le règlement des conflits, consacrée au conflit frontalier entre le Cameroun et le Nigéria, la saisine par le Cameroun tant du Conseil de sécurité que de la Cour internationale de Justice avait été évoquée.

*

41. Le Nigéria rappelle en troisième lieu que, par sa déclaration remise le 3 septembre 1965, il avait reconnu

«comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, c'est-à-dire sous la seule condition de réciprocité, la juridiction de la Cour internationale de Justice conformément au paragraphe 2 de l'article 36 du Statut de la Cour».

Le Nigéria soutient qu'à la date d'introduction de la requête du Cameroun il ignorait que ce dernier avait accepté la juridiction obligatoire de la Cour. Il n'aurait donc pu présenter une requête contre le Cameroun. Il y avait dès lors absence de réciprocité à cette date. La condition contenue dans la déclaration du Nigéria jouait; en conséquence, la Cour serait incompétente pour connaître de la requête.

42. Le Cameroun conteste cette argumentation tant en fait qu'en droit. Il souligne que la condition de réciprocité n'a jamais eu dans l'esprit des Etats parties à la clause facultative le sens que lui attribue aujourd'hui le Nigéria; la Cour aurait donné à cette condition un sens tout différent dans plusieurs de ses arrêts. L'interprétation fournie aujourd'hui par le Nigéria de sa propre déclaration serait une interprétation nouvelle à l'appui de laquelle n'est citée aucune autorité. En définitive, selon le Cameroun, la déclaration nigériane aurait eu seulement pour objet de préciser qu'il y a «une seule et unique condition au caractère obligatoire de la compétence de la Cour: que le Cameroun accepte la même obligation que le Nigéria, c'est-à-dire qu'il accepte la compétence de la Cour. C'est le cas.»

43. La Cour a eu à de nombreuses reprises à s'interroger sur le sens qu'il convient de donner à la condition de réciprocité pour l'application du paragraphe 2 de l'article 36 du Statut. Dès 1952, elle a jugé dans l'affaire de l'*Anglo-Iranian Oil Co.* que, lorsque des déclarations sont faites sous condition de réciprocité, «compétence est conférée à la Cour seulement dans la mesure où elles coïncident pour la lui conférer» (*C.I.J. Recueil 1952*, p. 103). La Cour a appliqué de nouveau cette règle dans l'affaire de *Certains emprunts norvégiens* (*C.I.J. Recueil 1957*, p. 23 et 24) et l'a précisée dans l'affaire de l'*Interhandel* où elle a jugé que:

«La réciprocité en matière de déclarations portant acceptation de la juridiction obligatoire de la Cour permet à une partie d'invoquer une réserve à cette acceptation qu'elle n'a pas exprimée dans sa propre déclaration mais que l'autre partie a exprimée dans la sienne... La réciprocité permet à l'Etat qui a accepté le plus largement

tioned at the extraordinary general meeting of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity, devoted to the border conflict between Cameroon and Nigeria.

*

41. Nigeria recalls in the third place that, by its Declaration deposited on 3 September 1965, it had recognized

“as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court”.

Nigeria maintains that on the date on which Cameroon’s Application was filed, it did not know that Cameroon had accepted the Court’s compulsory jurisdiction. Accordingly it could not have brought an application against Cameroon. There was an absence of reciprocity on that date. The condition contained in the Nigerian Declaration was operative; consequently, the Court does not have jurisdiction to hear the Application.

42. Cameroon disputes this argument in fact as well as in law. It states that, in the minds of the States party to the Optional Clause, the condition of reciprocity never possessed the meaning which Nigeria now ascribes to it; the Court had ascribed a completely different meaning to it in a number of its judgments. The interpretation now provided by Nigeria of its own declaration was a new interpretation for which no authority was cited in support. In sum, the purpose of the Nigerian Declaration, according to Cameroon, was only to emphasize that there is “a sole and unique condition to the compulsory character of the Court’s jurisdiction in this case, i.e., that Cameroon should accept the same obligation as Nigeria, or in other words that it should accept the jurisdiction of the Court. This Cameroon does.”

43. The Court has on numerous occasions had to consider what meaning it is appropriate to give to the condition of reciprocity in the implementation of Article 36, paragraph 2, of the Statute. As early as 1952, it held in the case concerning *Anglo-Iranian Oil Co.* that, when declarations are made on condition of reciprocity, “jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it” (*I.C.J. Reports 1952*, p. 103). The Court applied that rule again in the case of *Certain Norwegian Loans (I.C.J. Reports 1957*, pp. 23 and 24) and clarified it in the *Interhandel* case where it held that:

“Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. . . Reciprocity enables the State which has made the wider acceptance of the

la juridiction de la Cour de se prévaloir des réserves à cette acceptation énoncées par l'autre partie. Là s'arrête l'effet de réciprocité.» (*C.I.J. Recueil 1959*, p. 23.)

En définitive, «[l]a notion de réciprocité porte sur l'étendue et la substance des engagements, y compris les réserves dont ils s'accompagnent, et non sur les conditions formelles relatives à leur création, leur durée ou leur dénonciation» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, compétence et recevabilité, arrêt, *C.I.J. Recueil 1984*, p. 419, par. 62). Elle conduit seulement la Cour à vérifier si, au moment du dépôt de la requête introductive d'instance, «les deux Etats ont accepté «la même obligation» par rapport à l'objet du procès» (*ibid.*, p. 420-421, par. 64).

Ainsi, dans une instance judiciaire, la notion de réciprocité, comme celle d'égalité, «ne sont pas des conceptions abstraites. Elles doivent être rattachées à des dispositions du Statut ou des déclarations» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 145). Par voie de conséquence, «le principe de réciprocité n'est pas affecté par un délai dans la réception par les parties au Statut des copies de la déclaration» (*ibid.*, p. 147).

Le Nigéria estime cependant que ce précédent n'est pas applicable en l'espèce. Il souligne que, s'il a dans sa déclaration de 1965 reconnu la juridiction de la Cour comme obligatoire à l'égard de tout autre Etat acceptant la même obligation, il a précisé cette phrase en y ajoutant les mots: «c'est-à-dire sous la seule condition de réciprocité». «Ces mots supplémentaires ont manifestement un sens et un effet ... celui de compléter la «coïncidence» prévue par le paragraphe 2 de l'article 36 par l'élément de mutualité inhérent au concept de «réciprocité.» La condition nigériane aurait en d'autres termes eu pour but «d'atténuer les effets» de la décision prise dans l'affaire du *Droit de passage sur territoire indien* en créant une égalité des risques et en évitant toute saisine de la Cour par surprise.

44. A l'appui de ce raisonnement, le Nigéria invoque la décision rendue dans l'affaire de l'*Anglo-Iranian Oil Co.*, dans laquelle la Cour a précisé qu'elle ne saurait fonder son interprétation de la déclaration iranienne reconnaissant la compétence de la Cour

«sur une interprétation purement grammaticale du texte. Elle doit rechercher l'interprétation qui est en harmonie avec la manière naturelle et raisonnable de lire le texte, eu égard à l'intention du Gouvernement de l'Iran à l'époque où celui-ci a accepté la compétence obligatoire de la Cour.» (*Anglo-Iranian Oil Co., exceptions préliminaires, C.I.J. Recueil 1952*, p. 104.)

La Cour en avait déduit qu'«il est peu probable que le Gouvernement de l'Iran ait été disposé, de sa propre initiative, à accepter de soumettre à une cour internationale de justice les différends relatifs» (*ibid.*, p. 105) aux conventions capitulaires qu'il venait de dénoncer.

jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends." (*I.C.J. Reports 1959*, p. 23.)

In the final analysis, "[t]he notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 419, para. 62). It simply requires that the Court ascertain whether, at the time of filing the Application instituting proceedings "the two States accepted 'the same obligation' in relation to the subject-matter of the proceedings" (*ibid.*, pp. 420-421, para. 64).

Therefore, in legal proceedings, the notion of reciprocity, and that of equality, "are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment*, *I.C.J. Reports 1957*, p. 145). Consequently, "the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute" (*ibid.*, p. 147).

Nigeria considers, however, that that precedent does not apply here. It points out that, although in its 1965 Declaration, it recognized the jurisdiction of the Court as compulsory in relation to any other State accepting the same obligation, it was more explicit in adding the words "and that is to say, on the sole condition of reciprocity". "Those additional words clearly have some meaning and effect . . . it is the supplementing of the 'coincidence' required by Article 36, paragraph 2, by the element of mutuality inherent in the concept of 'reciprocity'." The Nigerian condition, in other words, sought "to mitigate the effects" of the Court's earlier decision in the case concerning *Right of Passage over Indian Territory* by creating an equality of risk and precluding that proceedings be brought before the Court by surprise.

44. In support of its position, Nigeria invokes the decision given in the case concerning *Anglo-Iranian Oil Co.*, in which the Court stated that it could not base its interpretation of the Iranian Declaration recognizing the jurisdiction of the Court

"on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court." (*Anglo-Iranian Oil Co., Preliminary Objection*, *I.C.J. Reports 1952*, p. 104.)

The Court had concluded that "[i]t is unlikely that the Government of Iran . . . should have been willing, on its own initiative, to agree that disputes relating" (*ibid.*, p. 105) to the capitulations which it had just denounced be submitted to an international court of justice.

45. La Cour estime que la situation est en l'espèce toute différente. Le Nigéria n'apporte pas de preuve à l'appui de sa thèse selon laquelle il aurait entendu insérer dans sa déclaration du 14 août 1965 une condition de réciprocité ayant un sens différent de celui que la Cour avait donné à de telles clauses en 1957. Dans le but de se protéger contre le dépôt de requêtes par surprise, le Nigéria aurait pu, en 1965, insérer dans sa déclaration une réserve analogue à celle que le Royaume-Uni avait ajoutée à sa propre déclaration en 1958. Une dizaine d'autres Etats ont procédé de la sorte. Le Nigéria ne l'a pas fait à l'époque. Il s'est borné, comme la plupart des Etats ayant souscrit à la clause facultative, à rappeler que les engagements qu'il prenait l'étaient, conformément au paragraphe 2 de l'article 36 du Statut, à l'égard de tout autre Etat acceptant la même obligation. A la lumière de cette pratique, le membre de phrase additionnel «c'est-à-dire sous la seule condition de réciprocité» doit être considéré comme explicatif et ne posant aucune condition supplémentaire. Une telle interprétation «est en harmonie avec la manière naturelle et raisonnable de lire le texte» (*Anglo-Iranian Oil Co., exceptions préliminaires, C.I.J. Recueil 1952*, p. 104) et la condition de réciprocité du Nigéria ne saurait être regardée comme une réserve *ratione temporis*.

46. La Cour aboutit dès lors à la conclusion que la manière dont la requête camerounaise a été présentée n'a pas été contraire à l'article 36 du Statut. Le dépôt de cette requête n'a pas davantage été opéré en violation d'un droit que le Nigéria tiendrait du Statut ou de sa déclaration telle qu'en vigueur à la date d'introduction de la requête du Cameroun.

*

47. La première exception préliminaire du Nigéria doit en conséquence être rejetée. La Cour n'aura par suite pas à examiner l'argumentation tirée par le Cameroun de l'article 102 de la Charte, ni les conclusions subsidiaires du Cameroun fondées sur le *forum prorogatum*. La Cour est en tout état de cause compétente pour connaître de la requête du Cameroun.

* *

DEUXIÈME EXCEPTION PRÉLIMINAIRE

48. Le Nigéria soulève une deuxième exception préliminaire en exposant que, pendant

«au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants».

Selon le Nigéria, un accord implicite serait ainsi intervenu en vue de recourir exclusivement à ces mécanismes et de ne pas invoquer la compétence de

45. The Court considers that the situation in this case is very different. Nigeria does not offer evidence in support of its argument that it intended to insert into its Declaration of 14 August 1965 a condition of reciprocity with a different meaning from the one which the Court had drawn from such clauses in 1957. In order to protect itself against the filing of surprise applications, in 1965, Nigeria could have inserted in its Declaration an analogous reservation to that which the United Kingdom added to its own Declaration in 1958. Ten or so other States proceeded in this way. Nigeria did not do so at that time. Like the majority of States which subscribe to the Optional Clause, it merely specified that the commitments it was entering into, in accordance with Article 36, paragraph 2, of the Statute, were reciprocal in relation to any other State accepting the same obligation. In the light of this practice, the additional phrase of the sentence, "that is to say, on the sole condition of reciprocity" must be understood as explanatory and not adding any further condition. This interpretation is "in harmony with a natural and reasonable way of reading the text" (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 104) and Nigeria's condition of reciprocity cannot be treated as a reservation *ratione temporis*.

46. The Court therefore concludes that the manner in which Cameroon's Application was filed was not contrary to Article 36 of the Statute. Nor was it made in violation of a right which Nigeria may claim under the Statute, or by virtue of its Declaration, as it was in force on the date of the filing of Cameroon's Application.

*

47. Nigeria's first preliminary objection is accordingly rejected. The Court is therefore not called upon to examine the reasoning put forward by Cameroon under Article 102 of the Charter, nor Cameroon's alternative submissions based on *forum prorogatum*. In any event, the Court has jurisdiction to pass upon Cameroon's Application.

* *

SECOND PRELIMINARY OBJECTION

48. Nigeria raises a second preliminary objection stating that

"for a period of at least 24 years prior to the filing of the Application the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery".

According to Nigeria, an implicit agreement is thus said to have been reached with a view to resorting exclusively to such machinery and to

la Cour internationale de Justice. A titre subsidiaire, le Nigéria soutient que la conduite du Cameroun a créé une situation d'*estoppel* qui lui interdirait de s'adresser à la Cour. Le Nigéria invoque enfin le principe de la bonne foi et la règle *pacta sunt servanda* à l'appui de son argumentation.

49. Le Cameroun expose que les organes bilatéraux qui ont traité de diverses difficultés frontalières apparues entre les deux pays n'ont eu qu'une existence intermittente et qu'aucun mécanisme institutionnel permanent n'a été mis sur pied. Il souligne en outre qu'aucun accord explicite ou implicite n'est intervenu entre les Parties pour conférer une compétence exclusive à de tels organes. Enfin, selon le Cameroun, les conditions fixées par la jurisprudence de la Cour pour qu'existe une situation d'*estoppel* ne seraient pas réunies en l'espèce. Dès lors, il n'y aurait pas lieu à application du principe de la bonne foi et de la règle *pacta sunt servanda*.

50. L'exception nigériane comporte ainsi deux branches. Mais avant de se prononcer en droit en les examinant successivement, la Cour rappellera les faits pertinents en la matière.

51. Le premier contact bilatéral rapporté au dossier concerne un litige de caractère local dans les districts de Danare (Nigéria) et Budam (Cameroun). Ce litige donna lieu en 1965 à des «pourparlers exploratoires» concernant la démarcation de la frontière dans ce secteur. Celle-ci ayant été opérée par les autorités allemande et britannique au début du siècle, il fut convenu de rechercher les bornes existantes en vue d'identifier la frontière et de procéder à sa démarcation non seulement entre Danare et Budam, mais sur un tronçon d'environ 20 milles, des chutes d'eau d'Obokum à Bashu (bornes n^{os} 114 à 105). Les bornes existantes furent retrouvées, mais par la suite aucun des travaux envisagés ne fut effectué.

52. Cinq ans plus tard, à la suite d'incidents survenus dans la région de la Cross River et de la presqu'île de Bakassi, les deux gouvernements décidèrent de constituer une commission mixte sur les frontières. Lors de la première réunion de cette commission, les délégués du Cameroun et du Nigéria approuvèrent le 14 août 1970 une déclaration recommandant la délimitation de la frontière en trois étapes :

- «a) la délimitation de la frontière maritime;
- b) la délimitation de la frontière terrestre, telle que définie par le protocole anglo-allemand signé à Obokum le 12 avril 1913 et confirmé par l'accord anglo-allemand de Londres concernant : 1) le tracé de la frontière entre le Nigéria et le Cameroun de Yola à la mer; 2) la réglementation de la navigation sur la Cross River et l'échange de lettres entre les Gouvernements britannique et allemand du 6 juillet 1914;
- c) la délimitation du reste de la frontière terrestre».

La déclaration précisait en outre les bases sur lesquelles la délimitation maritime devait être opérée. Elle recommandait que le travail de démarcation entamé en 1965 fût poursuivi. Enfin, elle préconisait qu'à la fin de chacune des étapes un traité séparé fût signé par les deux pays afin de

refraining from relying on the jurisdiction of the International Court of Justice. In the alternative, Nigeria claims that by its conduct Cameroon is estopped from turning to the Court. Finally, Nigeria invokes the principle of good faith and the rule *pacta sunt servanda* in support of this argument.

49. Cameroon maintains that the bilateral bodies which dealt with various boundary difficulties that had emerged between the two countries had only been temporary and that no permanent institutional machinery had been set up. It contends that no explicit or implicit agreement had been established between the Parties with a view to vesting exclusive jurisdiction in such bodies. Finally, according to Cameroon, the conditions laid down in the Court's case-law for the application of estoppel to arise were not fulfilled here. Therefore, there was no occasion to apply the principle of good faith and the rule *pacta sunt servanda*.

50. Nigeria's objection thus consists of two branches. But before making a legal determination considering them in turn, the Court will review the relevant facts.

51. The first bilateral contact referred to in the pleadings concerns a local dispute in the districts of Danare (Nigeria) and Budam (Cameroon). This dispute gave rise in 1965 to "exploratory talks" concerning the demarcation of the boundary in this sector. That course having been determined by the German and British authorities at the beginning of the century, it was agreed to locate existing boundary pillars with a view to identifying the boundary and proceeding with its demarcation not only between Danare and Budam, but also on a stretch of some 20 miles from Obokum Falls to Bashu (boundary pillars Nos. 114 to 105). The existing pillars were identified but none of the work planned was subsequently carried out.

52. Five years later, in response to incidents that occurred in the Cross River region and the Bakassi Peninsula, the two Governments decided to set up a Joint Boundary Commission. At the first meeting of that Commission, the delegates from Cameroon and Nigeria approved, on 14 August 1970, a declaration recommending that the delimitation of the boundary be carried out in three stages:

- "(a) the delimitation of the maritime boundary;
- (b) the delimitation of the land boundary as defined in the Anglo-German Protocol signed at Obokum on 12 April 1913 and confirmed by the London Anglo-German agreement 'respecting (1) the settlement of Frontier between Nigeria and Cameroon from Yola to the sea; and (2) the Regulation of navigation on the Cross River', and the exchange of letters between the British and German Governments on 6 July 1914;
- (c) the delimitation of the rest of the land boundary".

The declaration further specified the bases on which the delimitation of the maritime boundary was to be carried out. It recommended that the demarcation work commenced in 1965 be resumed. Finally, it recommended that, on completion of each of these stages, a separate treaty be

donner une portée légale à la frontière ainsi délimitée et fixée sur le terrain.

Un comité technique mixte fut ensuite créé en vue de mettre en œuvre la déclaration conjointe. Comme convenu, il commença ses travaux par la délimitation maritime. Les négociations se poursuivirent à divers niveaux à ce sujet pendant près de cinq ans. Elles se conclurent le 4 avril 1971 en ce qui concerne la frontière maritime à l'embouchure de la Cross River, puis aboutirent le 1^{er} juin 1975 à Maroua à une déclaration des deux chefs d'Etat concernant le tracé de la frontière maritime depuis cette embouchure jusqu'à un point dénommé «G» situé selon les Parties à environ 17 milles marins des côtes.

53. Au cours des années qui suivirent, les contacts entre les deux pays sur les questions de frontières devinrent moins fréquents. Tout au plus peut-on noter la tenue de deux commissions mixtes. La première, en 1978, réunit les deux ministres des affaires étrangères. Ceux-ci exposèrent leurs points de vue sur certains problèmes frontaliers sans entamer de négociation et la réunion n'aboutit à aucun procès-verbal commun. La seconde, en 1987, réunit les ministres chargés du plan dans les deux pays et n'aborda pas les questions frontalières.

54. Les négociations sur ces questions, interrompues après 1975, ne reprirent entre les deux Etats que seize ans plus tard, lorsque les deux ministres des affaires étrangères adoptèrent le 29 août 1991 un communiqué conjoint selon lequel :

«Au sujet des problèmes frontaliers, les deux parties sont convenues de faire examiner en détail tous les aspects de la question par les experts de la commission nationale des frontières du Nigéria et par les experts de la République du Cameroun lors d'une réunion qui aura lieu à Abuja en octobre 1991 et dont l'objectif sera de formuler des recommandations visant à résoudre pacifiquement les problèmes de nature frontalière.»

En fait, une première réunion de ces experts avait eu lieu en même temps que celle des ministres des affaires étrangères en août 1991. Elle fut suivie d'une deuxième réunion à Abuja en décembre 1991, puis d'une troisième à Yaoundé en août 1993. Ces réunions ne permirent d'aboutir à aucun accord, notamment en ce qui concerne la déclaration de Maroua, considérée comme obligatoire par le Cameroun, mais non par le Nigéria.

55. En définitive, la Cour constate que les négociations entre les deux Etats concernant la délimitation ou la démarcation de leur frontière ont été menées dans des cadres variés à des niveaux divers : chefs d'Etat, ministres des affaires étrangères, experts. Elles ont été actives durant la période allant de 1970 à 1975, puis elles ont été interrompues jusqu'en 1991.

*

56. Abordant les questions de droit, la Cour traitera maintenant de la première branche de l'exception nigériane. Elle rappellera tout d'abord

signed by the two countries to give effect to the boundary so demarcated and surveyed.

A Joint Technical Committee was then set up for the purpose of implementing the joint declaration. As agreed, it began its work with the delimitation of the maritime boundary. Negotiations went on at various levels on this matter for almost five years. They concluded on 4 April 1971 as regards the maritime boundary at the mouth of the Cross River, then led on 1 June 1975 to a declaration in Maroua by the two Heads of State concerning the course of the maritime boundary from the mouth of the Cross River to a point denominated "G" situated, according to the Parties, some 17 nautical miles from the coast.

53. Over the following years, contacts between the two countries on these boundary issues became less frequent. At most, it may be noted that two Joint Committee meetings were held. The first, in 1978, was attended by the two Foreign Ministers. They set forth their points of view on a number of boundary problems without undertaking negotiations and the meeting did not result in any joint minutes. The second meeting, held in 1987, brought together the Ministers responsible for planning in the two countries and did not broach boundary matters.

54. The negotiations on these issues, which were interrupted after 1975, were only resumed between the two States 16 years later when, on 29 August 1991, the two Foreign Ministers adopted a joint communiqué stating:

"On border issues, the two sides agreed to examine in detail all aspects of the matter by the experts of the National Boundary Commission of Nigeria and the experts of the Republic of Cameroon at a meeting to be convened at Abuja in October 1991 with a view to making appropriate recommendations for a peaceful resolution of outstanding border issues."

Indeed, a first meeting of these experts took place at the same time as that of the Foreign Ministers in August 1991. It was followed by a second meeting at Abuja in December 1991, then by a third at Yaoundé in August 1993. No agreement could be reached at these meetings, in particular as regards the Maroua Declaration, which was considered binding by Cameroon but not by Nigeria.

55. In sum, the Court notes that the negotiations between the two States concerning the delimitation or the demarcation of the boundary were carried out in various frameworks and at various levels: Heads of State, Foreign Ministers, experts. The negotiations were active during the period 1970 to 1975 and then were interrupted until 1991.

*

56. Turning to legal considerations, the Court will now consider the first branch of the Nigerian objection. It recalls first that, "Negotiation

que «[l]a négociation et le règlement judiciaire sont l'une et l'autre cités comme moyens de règlement pacifique des différends à l'article 33 de la Charte des Nations Unies» (*Plateau continental de la mer Egée, arrêt, C.I.J. Recueil 1978*, p. 12, par. 29). Il n'existe ni dans la Charte, ni ailleurs en droit international, de règle générale selon laquelle l'épuisement des négociations diplomatiques serait un préalable à la saisine de la Cour. Un tel préalable n'avait pas été incorporé dans le Statut de la Cour permanente de Justice internationale, contrairement à ce qu'avait proposé le Comité consultatif de juristes en 1920 (Comité consultatif de juristes, *Procès-verbaux des séances du Comité (16 juin-24 juillet 1920) avec annexes*, p. 679, 725-726). Il ne figure pas davantage à l'article 36 du Statut de la présente Cour.

Un préalable de ce type peut être incorporé et est souvent inséré dans les clauses compromissaires figurant dans les traités. Il peut également figurer dans un compromis, les signataires se réservant alors de ne saisir la Cour qu'une fois écoulé un certain délai (voir par exemple *Différend frontalier (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 9). Enfin, les Etats demeurent libres d'insérer dans leur déclaration facultative d'acceptation de la juridiction obligatoire de la Cour une réserve excluant de la compétence de cette dernière les différends au sujet desquels les parties en cause seraient convenues ou conviendraient d'avoir recours à un autre mode de règlement pacifique. Au cas particulier, aucune réserve de ce type n'avait cependant été insérée dans les déclarations du Nigéria ou du Cameroun à la date d'introduction de la requête.

Par ailleurs, le fait que les deux Etats aient, dans les circonstances rappelées aux paragraphes 54 et 55 ci-dessus, tenté, lors de contacts bilatéraux, de résoudre certaines des questions frontalières les opposant, n'impliquait pas que l'un ou l'autre ait exclu la possibilité de porter tout différend frontalier le concernant dans d'autres enceintes et notamment devant la Cour internationale de Justice. Dans sa première branche, l'exception du Nigéria ne saurait en conséquence être accueillie.

57. Passant à la seconde branche de l'exception, la Cour examinera si les conditions fixées par la jurisprudence pour qu'existe une situation d'*estoppel* sont réunies en l'espèce.

L'existence d'une telle situation supposerait que le Cameroun ait adopté un comportement ou fait des déclarations qui auraient attesté d'une manière claire et constante qu'il avait accepté de régler le différend de frontières soumis aujourd'hui à la Cour par des voies exclusivement bilatérales. Elle impliquerait en outre que le Nigéria, se fondant sur cette attitude, ait modifié sa position à son détriment ou ait subi un préjudice quelconque (*Plateau continental de la mer du Nord, arrêt, C.I.J. Recueil 1969*, p. 26, par. 30; *Différend frontalier, terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 118, par. 63).

Ces conditions ne sont pas remplies en l'espèce. En effet, comme il a été précisé au paragraphe 56 ci-dessus, le Cameroun n'a pas reconnu un caractère exclusif aux négociations menées avec le Nigéria, pas plus que

and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 12, para. 29). Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920 (*Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, pp. 679, 725-726). Nor is it to be found in Article 36 of the Statute of this Court.

A precondition of this type may be embodied and is often included in compromissory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seise the Court only after a certain lapse of time (cf. *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 9). Finally, States remain free to insert into their optional declaration accepting the compulsory jurisdiction of the Court a reservation excluding from the latter those disputes for which the parties involved have agreed or subsequently agree to resort to an alternative method of peaceful settlement. In this case, however, no reservation of this type was included in the Declarations of Nigeria or Cameroon on the date of the filing of the Application.

Moreover, the fact that the two States have attempted, in the circumstances set out in paragraphs 54 and 55 above, to solve some of the boundary issues dividing them during bilateral contacts, did not imply that either one had excluded the possibility of bringing any boundary dispute concerning it before other fora, and in particular the International Court of Justice. The first branch of Nigeria's objection accordingly is not accepted.

57. Turning to the second branch of the objection, the Court will examine whether the conditions laid down in its jurisprudence for an estoppel to exist are present in the instant case.

An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63).

These conditions are not fulfilled in this case. Indeed, as pointed out in paragraph 56 above, Cameroon did not attribute an exclusive character to the negotiations conducted with Nigeria, nor, as far as it appears, did

le Nigéria ne semble l'avoir fait; en outre ce dernier n'établit pas avoir modifié sa position à son détriment ou avoir subi un préjudice du fait qu'il aurait pu sans cela rechercher une solution aux problèmes de frontières existant entre les deux Etats en recourant à d'autres procédures, mais qu'il a été empêché de le faire en se fondant sur la position prétendument adoptée par le Cameroun.

58. Enfin, la Cour n'est pas convaincue que le Nigéria aurait subi un préjudice du fait que le Cameroun a entamé une procédure devant la Cour au lieu de poursuivre des négociations qui, d'ailleurs, étaient dans une impasse au moment du dépôt de la requête.

59. Dans ces conditions, le Cameroun, en saisissant la Cour, n'a pas méconnu les règles de droit invoquées par le Nigéria à l'appui de sa deuxième exception. Le Nigéria n'est par suite pas fondé à se prévaloir du principe de la bonne foi et de la règle *pacta sunt servanda*, principe et règle qui ne concernent que l'exécution d'obligations existantes. Dans sa seconde branche, l'exception du Nigéria ne saurait être accueillie.

60. La deuxième exception préliminaire doit ainsi être rejetée dans sa totalité.

* *

TROISIÈME EXCEPTION PRÉLIMINAIRE

61. Dans sa troisième exception préliminaire, le Nigéria soutient que «le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad».

62. A l'appui de cette argumentation, le Nigéria invoque à la fois les textes conventionnels régissant le statut de la commission et la pratique des Etats membres. Il expose que «les procédures de règlement par la commission sont obligatoires pour les parties» et que le Cameroun ne pouvait par suite saisir la Cour sur la base du paragraphe 2 de l'article 36 du Statut.

63. Le Cameroun, quant à lui, expose à la Cour que:

«aucune disposition du statut de la commission du bassin du lac Tchad n'établit au bénéfice de cette organisation internationale une quelconque compétence exclusive en matière de délimitation de frontières».

Il ajoute que l'on ne saurait déduire une telle exclusivité du comportement des Etats membres. Par voie de conséquence, il demande à la Cour de rejeter la troisième exception préliminaire.

*

64. La Cour observera que le statut de la commission du bassin du lac Tchad a été fixé en annexe à une convention du 22 mai 1964 signée à cette

Nigeria. Furthermore, Nigeria does not show that it has changed its position to its detriment or that it has sustained prejudice in that it could otherwise have sought a solution to the border problems existing between the two States by having recourse to other procedures, but was precluded from doing so by reliance on the positions allegedly taken by Cameroon.

58. Finally, the Court has not been persuaded that Nigeria has been prejudiced as a result of Cameroon's having instituted proceedings before the Court instead of pursuing negotiations which, moreover, were deadlocked when the Application was filed.

59. This being so, in bringing proceedings before the Court, Cameroon did not disregard the legal rules relied on by Nigeria in support of its second objection. Consequently, Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations. The second branch of Nigeria's objection is not accepted.

60. The second preliminary objection as a whole is thus rejected.

* *

THIRD PRELIMINARY OBJECTION

61. In its third preliminary objection, Nigeria contends that "the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission".

62. In support of this argument, Nigeria invokes the treaty texts governing the Statute of the Commission as well as the practice of member States. It argues that "the procedures for settlement by the Commission are binding upon the Parties" and that Cameroon was thus barred from raising the matter before the Court on the basis of Article 36, paragraph 2, of the Statute.

63. For its part, Cameroon submits to the Court that

"no provision of the Statute of the Lake Chad Basin Commission establishes in favour of that international organization any exclusive competence in relation to boundary delimitation".

It adds that no such exclusive jurisdiction can be inferred from the conduct of member States. It therefore calls upon the Court to reject the third preliminary objection.

*

64. The Court observes that the Statute of the Lake Chad Basin Commission was annexed to an Agreement of 22 May 1964 signed on that

date par le Cameroun, le Niger, le Nigéria et le Tchad. Cette convention, relative à la mise en valeur du bassin du lac Tchad, a pour objet, selon son préambule, «de formuler les principes pour l'utilisation des ressources du bassin du lac Tchad à des fins économiques, y compris l'aménagement des eaux». L'article IV du statut développe ces principes en précisant que

«[l']exploitation du bassin et en particulier l'utilisation des eaux superficielles et souterraines s'entend au sens le plus large, et se réfère notamment aux besoins du développement domestique, industriel et agricole, et à la collecte des produits de sa faune et de sa flore».

Les Etats membres s'engagent en outre, selon l'article VII du statut, à adopter «des règlements communs pour faciliter au maximum la navigation et le transport sur le lac et les voies navigables du bassin et en assurer la sécurité et le contrôle».

La convention crée en son article premier la commission du bassin du lac Tchad. Celle-ci est constituée de deux commissaires par Etat membre. Conformément au paragraphe 3 de l'article X du statut, les décisions de la commission sont prises à l'unanimité.

Les attributions de la commission sont fixées à l'article IX du même statut. Elle prépare notamment «des règlements communs, permettant la pleine application des principes affirmés dans le présent statut et dans la convention à laquelle il est annexé, et en [assure] une application effective». Elle exerce diverses compétences en vue de coordonner l'action des Etats membres en ce qui concerne l'utilisation des eaux du bassin. Parmi ses attributions figure enfin, selon le paragraphe g) de l'article IX, celle «d'examiner les plaintes et de contribuer à la solution de différends».

65. Les Etats membres ont en outre confié à la commission certaines tâches qui n'avaient pas été initialement prévues par les textes conventionnels. A la suite d'incidents entre le Cameroun et le Nigéria survenus en 1983 dans la région du lac Tchad, une réunion extraordinaire de la commission fut convoquée du 21 au 23 juillet 1983 à Lagos sur l'initiative des chefs d'Etat intéressés, en vue de confier à la commission le soin de traiter certaines questions frontalières et de sécurité. Deux sous-commissions d'experts furent alors créées. Elles se réunirent du 12 au 16 novembre 1984. Un accord intervint immédiatement entre les experts pour retenir «comme documents de travail ... traitant de la délimitation des frontières dans le lac Tchad» diverses conventions et accords bilatéraux conclus entre l'Allemagne, la France et le Royaume-Uni entre 1906 et 1931. Les experts proposèrent en même temps que la frontière ainsi délimitée soit démarquée aussi rapidement que possible.

Cette démarcation fut opérée de 1988 à 1990 au cours de trois campagnes d'abornement lors desquelles furent posées sept bornes principales et soixante-huit bornes intermédiaires. Le rapport final de bornage fut signé par les délégués des quatre Etats intéressés. Puis, le 23 mars 1994,

date by Cameroon, Chad, Niger and Nigeria. According to its preamble, this convention concerning the development of the Lake Chad Basin is designed "to formulate principles of the utilization of the resources of the Basin for economic purposes, including the harnessing of the water". Article IV of the Statute develops those principles by providing that

"[t]he development of the said Basin and in particular the utilisation of surface and ground waters shall be given its widest connotation and refers in particular to domestic, industrial and agricultural development, the collection of the products of its fauna and flora".

In addition, under Article VII of the Statute, member States undertake to "establish common rules for the purpose of facilitating navigation on the Lake and on the navigable waters in the Basin and to ensure the safety and control of navigation".

Article I of the Convention establishes the Lake Chad Basin Commission. The Commission comprises two commissioners per member State. In accordance with Article X, paragraph 3, of the Statute, the decisions of the Commission shall be by unanimous vote.

The functions of the Commission are laid down in Article IX of the same Statute. They are *inter alia* to prepare "general regulations which will permit the full application of the principles set forth in the present Convention and its annexed Statute, and to ensure their effective application". The Commission exercises various powers with a view to co-ordinating action by member States regarding the use of the waters of the Basin. Finally, one of its responsibilities under Article IX, paragraph (g), is "to examine complaints and to promote the settlement of disputes and the resolution of differences".

65. Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts. Further to incidents between Cameroon and Nigeria in 1983 in the Lake Chad area, an extraordinary meeting of the Commission was convened from 21 to 23 July 1983 in Lagos on the initiative of the Heads of State concerned, in order to entrust to the Commission certain boundary and security matters. Two sub-commissions of experts were then set up. They met from 12 to 16 November 1984. An agreement was immediately reached between the experts to adopt "as working documents" various bilateral conventions and agreements concluded between Germany, France and the United Kingdom between 1906 and 1931 "on the delimitation of Borders in the Lake Chad area". The experts proposed at the same time that the boundary so delimited be demarcated as early as possible.

This demarcation was carried out from 1988 to 1990 in the course of three boundary-marking operations involving the setting up of seven main and 68 intermediary boundary pillars. The Final Report on Beaconing was signed by the delegates of the four States concerned. Then,

lors du huitième sommet d'Abuja de la commission du bassin du lac Tchad, les chefs d'Etat et de gouvernement furent informés de «l'achèvement des travaux de matérialisation des frontières sur le terrain». Ils décidèrent alors «d'approuver le document technique de la démarcation des frontières internationales des Etats membres dans le lac Tchad», étant entendu «que chaque pays adopte le document conformément à ses propres lois». La question de la ratification de ce document a été évoquée lors du neuvième sommet des chefs d'Etat et de gouvernement de la commission à N'Djamena, les 30 et 31 octobre 1996, en l'absence des chefs d'Etat du Cameroun et du Nigéria, sans qu'aucun progrès soit constaté. Depuis lors, le Cameroun a cependant déposé, le 22 décembre 1997, un instrument de ratification tandis que le Nigéria ne l'a pas fait.

*

66. A la lumière des textes conventionnels et de la pratique ainsi rappelés, la Cour examinera les positions des Parties sur cette question. Le Nigéria, pour sa part, soutient en premier lieu que «le rôle et le statut de la commission» doivent être compris «dans le cadre du système des organisations régionales» auquel se réfère l'article 52 de la Charte des Nations Unies. Il en conclut que «la commission exerce un pouvoir exclusif pour les questions de sécurité et d'ordre public dans la région du lac Tchad et que ces questions incluent à juste titre les affaires de délimitation frontalière».

Le Cameroun fait valoir, quant à lui, que la commission ne constitue pas un accord ou organisme régional au sens de l'article 52 de la Charte, en soulignant en particulier le fait que :

«il n'a jamais été question d'étendre cette catégorie aux organisations internationales régionales techniques qui, comme la [commission], peuvent comprendre un mécanisme de règlement pacifique des différends ou de promotion de ce règlement».

67. La Cour rappellera que le paragraphe 1 de l'article 52 de la Charte vise les accords ou les «organismes régionaux destinés à régler les affaires qui, touchant au maintien de la paix et de la sécurité internationales, se prêtent à une action de caractère régional». D'après le paragraphe 2 du même article,

«[]es Membres des Nations Unies qui concluent ces accords ou constituent ces organismes doivent faire tous leurs efforts pour régler d'une manière pacifique, par le moyens desdits accords ou organismes, les différends d'ordre local, avant de les soumettre au Conseil de sécurité».

Selon l'article 53, le Conseil de sécurité peut utiliser ces accords ou organismes «pour l'application des mesures coercitives prises sous son autorité».

Il ressort des textes conventionnels et de la pratique analysés aux para-

on 23 March 1994, at the Eighth Summit of the Lake Chad Basin Commission in Abuja, the Heads of State and Government were informed that “the physical work in the field on the border demarcation exercise was fully completed”. They then decided “to approve the technical document on the demarcation of the international boundaries of member States in Lake Chad”, on the understanding “that each country should adopt the document in accordance with its national laws”. The question of the ratification of that document came up at the Ninth Summit of Heads of State of the Commission held on 30 and 31 October 1996 in N’Djamena when Heads of State of Cameroon and Nigeria were absent and where no progress was recorded. Since then, however, on 22 December 1997, Cameroon deposited its instrument of ratification, whereas Nigeria has not done so.

*

66. In the light of the treaty texts and the practice thus recalled, the Court will consider the positions of the Parties on this matter. For its part, Nigeria first of all contends that “the role and Statute of the Commission” must be understood “in the framework of regional agencies” referred to in Article 52 of the United Nations Charter. It accordingly concludes that “the Commission has an exclusive power in relation to issues of security and public order in the region of Lake Chad and that these issues appropriately encompass the business of boundary demarcation”.

Cameroon argues, for its part, that the Commission does not constitute a regional arrangement or agency within the meaning of Article 52 of the Charter, pointing in particular to the fact that

“there has never been any question of extending this category to international regional organizations of a technical nature which, like the [Commission], can include a mechanism for the peaceful settlement of disputes or for the promotion of that kind of settlement”.

67. The Court notes that Article 52, paragraph 1, of the Charter refers to “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action”. According to paragraph 2 of that Article,

“[t]he Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council”.

Under Article 53, the Security Council may use these arrangements or agencies for “enforcement action under its authority”.

From the treaty texts and the practice analysed at paragraphs 64 and

graphes 64 et 65 ci-dessus que la commission du bassin du lac Tchad constitue une organisation internationale exerçant ses compétences dans une zone géographique déterminée; qu'elle n'a toutefois pas pour fin de régler au niveau régional des affaires qui touchent au maintien de la paix et de la sécurité internationales. Elle n'entre donc pas dans les prévisions du chapitre VIII de la Charte.

68. Mais en serait-il autrement que l'argumentation du Nigéria n'en devrait pas moins être écartée. A cet égard, la Cour rappellera que, dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, elle avait estimé que le processus de Contadora ne pouvait être «considéré comme constituant à proprement parler un «accord régional» aux fins du chapitre VIII de la Charte des Nations Unies». Mais elle avait ajouté qu'en tout état de cause

«la Cour n'est en mesure d'admettre, ni qu'il existe une obligation quelconque d'épuisement des procédures régionales de négociation préalable à sa saisine, ni que l'existence du processus de Contadora empêche la Cour en l'espèce d'examiner la requête nicaraguayenne» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (*Nicaragua c. Etats-Unis d'Amérique*), *compétence et recevabilité*, arrêt, *C.I.J. Recueil 1984*, p. 440).

L'existence de procédures régionales de négociation ne saurait, quelle qu'en soit la nature, empêcher la Cour d'exercer les fonctions qui lui sont conférées par la Charte et le Statut.

69. Le Nigéria invoque par ailleurs l'article 95 de la Charte des Nations Unies, selon lequel:

«Aucune disposition de la présente Charte n'empêche les Membres de l'Organisation de confier la résolution de leurs différends à d'autres tribunaux en vertu d'accords déjà existants ou qui pourront être conclus dans l'avenir.»

Selon le Nigéria, la commission du bassin du lac Tchad devrait être regardée comme un tribunal entrant dans les prévisions de ce texte. Il en résulterait que, si la Cour se prononçait sur ces conclusions du Cameroun, elle «porterait atteinte au principe d'autonomie juridictionnelle» et «exercerait alors un rôle de juridiction d'appel».

La Cour estime que la commission du bassin du lac Tchad ne saurait être regardée comme un tribunal. Elle ne rend ni sentence arbitrale, ni jugement et de ce fait n'est ni un organe arbitral ni un organe judiciaire. Par suite, l'argumentation du Nigéria sur ce point doit être écartée.

70. Le Nigéria soutient en outre que la convention du 22 mai 1964, confirmée par la pratique des Etats membres de la commission, donne compétence exclusive à cette dernière pour le règlement des différends frontaliers. Il en déduit que la Cour ne saurait connaître des conclusions du Cameroun tendant à ce qu'elle détermine dans ce secteur la frontière entre les deux pays.

65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.

68. However, even were it otherwise, Nigeria's argument should nonetheless be set aside. In this connection, the Court notes that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it did not consider that the Contadora process could "properly be regarded as a 'regional arrangement' for the purposes of Chapter VIII of the United Nations Charter". But it added that, in any event,

"the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 440).

Whatever their nature, the existence of procedures for regional negotiation cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute.

69. Nigeria further invokes Article 95 of the United Nations Charter according to which:

"Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

According to Nigeria, the Lake Chad Basin Commission should be seen as a tribunal falling under the provisions of this text. This would mean that, if the Court were to pronounce on this submission of Cameroon it "would be in breach of the principle of the autonomy of jurisdictional competence" and "would be exercising an appellate jurisdiction".

The Court considers that the Lake Chad Basin Commission cannot be seen as a tribunal. It renders neither arbitral awards nor judgments and is therefore neither an arbitral nor a judicial body. Accordingly, this contention of Nigeria must also be set aside.

70. Nigeria further maintains that the Convention of 22 May 1964, confirmed by the practice of the member States of the Commission, attributes to that Commission an exclusive competence for the settlement of boundary disputes. It concludes from this that the Court cannot entertain Cameroon's submissions requesting it to determine the boundary between the two countries in this sector.

La Cour ne saurait accueillir cette argumentation. Elle notera tout d'abord qu'aucune disposition de la convention ne donne compétence et à fortiori compétence exclusive à la commission en matière de règlement des différends frontaliers. Une telle compétence ne saurait notamment être déduite du paragraphe *g*) de l'article IX de la convention (voir paragraphe 64 ci-dessus).

La Cour relèvera par ailleurs que les Etats membres de la commission ont par la suite chargé cette dernière de procéder à la démarcation des frontières dans la région sur la base des accords et traités figurant dans le rapport des experts de novembre 1984 (voir paragraphe 65 ci-dessus). De ce fait, et comme le souligne le Nigéria, « la question de la démarcation de frontière relève manifestement de la compétence de la commission ». Cette démarcation était conçue par les Etats intéressés comme une opération matérielle à réaliser sur le terrain sous l'autorité de la commission en vue d'éviter le renouvellement des incidents survenus en 1983.

Mais la commission n'a jamais reçu compétence, et à fortiori compétence exclusive, pour se prononcer sur le différend territorial qui oppose actuellement le Cameroun et le Nigéria devant la Cour, différend qui au surplus n'était pas encore né en 1983. En conséquence, l'argumentation du Nigéria doit être écartée.

71. Le Nigéria expose également que, de 1983 à 1994, « le Cameroun a clairement et constamment montré son acceptation du régime de recours exclusif à la commission du bassin du lac Tchad »; puis il aurait fait appel à la Cour, contrairement aux engagements pris. Cette manière d'agir aurait été préjudiciable au Nigéria, ainsi privé des procédures de « consultation », de « négociation » qu'offrait la commission. La requête camerounaise serait frappée d'*estoppel*.

La Cour observera que les conditions fixées par sa jurisprudence pour qu'existe une situation d'*estoppel*, telles que rappelées au paragraphe 57 ci-dessus, ne sont pas remplies en l'espèce. En effet, le Cameroun n'a pas accepté la compétence de la commission pour régler le différend de frontières soumis actuellement à la Cour. L'argumentation exposée doit, là encore, être écartée.

72. A titre subsidiaire, le Nigéria expose enfin que, compte tenu de la démarcation en cours au sein de la commission du bassin du lac Tchad, la Cour « devrait, pour des raisons d'opportunité judiciaire, imposer des limites à l'exercice de sa fonction judiciaire dans la présente affaire » et se refuser à statuer au fond sur la requête du Cameroun, comme elle l'a fait en 1963 dans l'affaire du *Cameroun septentrional*.

Dans cette affaire, la Cour avait relevé que l'Assemblée générale des Nations Unies avait mis fin à l'accord de tutelle en ce qui concerne le Cameroun septentrional par sa résolution 1608 (XV); elle avait noté que le différend entre les parties « relatif à l'interprétation et à l'application [de cet accord concernait dès lors un traité] qui n'[était] plus en vigueur »; elle avait ajouté qu'« il n'y [avait] plus aucune possibilité que ce traité fasse à l'avenir l'objet d'un acte d'interprétation ou d'application

The Court cannot subscribe to that reasoning. It notes first of all that no provision in the Convention ascribes jurisdiction and *a fortiori* exclusive jurisdiction to the Commission as regards the settlement of boundary disputes. In particular, such a jurisdiction cannot be deduced from Article IX, paragraph (g), of the Convention (see paragraph 64 above).

The Court further notes that the member States of the Commission subsequently charged it with carrying out the demarcation of boundaries in the region on the basis of the agreements and treaties referred to in the experts' report of November 1984 (see paragraph 65 above). Thus, as pointed out by Nigeria, "the question of boundary demarcation was clearly within the competence of the [Commission]". This demarcation was designed by the States concerned as a physical operation to be carried out in the field under the authority of the Commission with a view to avoiding the reoccurrence of the incidents that had arisen in 1983.

But the Commission has never been given jurisdiction, and *a fortiori* exclusive jurisdiction, to rule on the territorial dispute now involving Cameroon and Nigeria before the Court, a dispute which moreover did not as yet exist in 1983. Consequently, Nigeria's argument must be dismissed.

71. Nigeria also argues that, from 1983 to 1994, "Cameroon had clearly and consistently evinced acceptance of the régime of exclusive recourse to the Lake Chad Basin Commission"; Cameroon then appealed to the Court contrary to the commitments it had entered into. This course of conduct, it was argued, had been prejudicial to Nigeria, deprived as it was of the "consultation" and "negotiation" procedures afforded by the Commission. Nigeria claims that Cameroon is estopped from making its Application.

The Court points out that the conditions laid down in its case-law for an estoppel to arise, as set out in paragraph 57 above, are not fulfilled in this case. Indeed, Cameroon has not accepted that the Commission has jurisdiction to settle the boundary dispute now submitted to the Court. This argument must also be set aside.

72. In the alternative, Nigeria finally argues that, on account of the demarcation under way in the Lake Chad Basin Commission, the Court "cannot rule out the consideration of the need for judicial restraint on grounds of judicial propriety" and should decline to rule on the merits of Cameroon's Application, as it did in 1963 in the case concerning *Northern Cameroons*.

In that case, the Court had noted that the United Nations General Assembly had terminated the trusteeship agreement in respect of the Northern Cameroon by resolution 1608 (XV); it observed that the dispute between the parties "about the interpretation and application [of that agreement therefore concerned a treaty] no longer in force"; it went on to say that "there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the

conforme à un jugement rendu par la Cour». Elle en avait conclu que toute décision judiciaire serait dès lors «sans objet» et qu'il ne servirait «à rien d'entreprendre l'examen de l'affaire au fond». Relevant que les limites qui sont celles de sa fonction judiciaire «ne lui permett[ai]ent pas d'accueillir ... les demandes [du Cameroun, elle avait estimé ne pouvoir] statuer au fond sur [ces] demande[s]» (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963, p. 37-38*).

La Cour estime que la situation en l'espèce est toute différente. En effet, alors que le Cameroun ne contestait pas en 1963 la validité de la résolution de l'Assemblée générale mettant fin à la tutelle, le Nigéria, dans la présente affaire, ne considère pas le document technique sur la démarcation des frontières approuvé lors du sommet d'Abuja de la commission du bassin du lac Tchad comme un document réglant de manière définitive les problèmes de frontières dans cette région. Le Nigéria a réservé sa position devant la Cour en ce qui concerne le caractère contraignant de ce document. Il soutient que ce dernier doit être ratifié et rappelle qu'il ne l'a pas ratifié. Il a enfin précisé, lors du neuvième sommet de la commission à N'Djamena en 1996, qu'il ne «peut même pas engager le processus de ratification si la question n'est pas retirée de la Cour».

Le Cameroun, de son côté, estime que le Nigéria est dans l'obligation d'achever le processus d'approbation du document en cause et que, même en l'absence d'une telle action, la frontière entre les deux pays dans ce secteur «est définie juridiquement», «matérialisée sur le terrain» et «internationalement reconnue».

La Cour n'a pas à ce stade à prendre partie sur ces thèses adverses. Il lui suffira de constater que le Nigéria ne saurait soutenir à la fois que la procédure de démarcation engagée au sein de la commission du lac Tchad n'est pas parvenue à son terme et que cette procédure a en même temps rendu sans objet les conclusions du Cameroun. Il n'y a dès lors aucune raison d'opportunité judiciaire qui puisse amener la Cour à se refuser à statuer au fond sur ces conclusions.

73. Il résulte de ce qui précède que la troisième exception préliminaire du Nigéria doit être rejetée.

* *

QUATRIÈME EXCEPTION PRÉLIMINAIRE

74. La Cour abordera maintenant la quatrième exception préliminaire soulevée par le Nigéria. Selon cette exception :

«La Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.»

75. Le Nigéria soutient que la localisation du tripoint dans le lac Tchad affecte directement un Etat tiers, la République du Tchad, et que

Court might render". It had concluded that any adjudication would thus be "devoid of purpose" and that no purpose "would be served by undertaking an examination of the merits in the case". Observing that the limits of its judicial function "do not permit it to entertain the claims submitted to it [by Cameroon, it had considered itself unable to] adjudicate upon the merits of [those] claim[s]" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 37-38).

The Court considers that the situation in the present case is entirely different. Indeed, whereas in 1963 Cameroon did not challenge the validity of the General Assembly resolution terminating the trusteeship, Nigeria, in the present case, does not regard the technical document on the demarcation of the boundaries, approved at the Abuja Summit of the Lake Chad Basin Commission, as a document definitively settling boundary problems in that region. Nigeria reserved its position before the Court as regards the binding character of that document. It contends that the document requires ratification and recalls that it has not ratified it. Lastly, it specified at the Ninth Summit of the Commission at N'Djamena in 1996 that "Nigeria could not even start processing ratification unless the issue was out of Court".

Cameroon for its part considers that Nigeria is obliged to complete the process of approval of the document concerned and, that, even in the absence of so doing, the boundary between the two countries in this sector is "legally defined", "marked out on the ground" and "internationally recognized".

It is not for the Court at this stage to rule upon these opposing arguments. It need only note that Nigeria cannot assert both that the demarcation procedure initiated within the Lake Chad Commission was not completed and that, at the same time, that procedure rendered Cameroon's submissions moot. There is thus no reason of judicial propriety which should make the Court decline to rule on the merits of those submissions.

73. In the light of the above considerations, Nigeria's third preliminary objection must be rejected.

* *

FOURTH PRELIMINARY OBJECTION

74. The Court will now turn to the fourth preliminary objection raised by Nigeria. This objection contends that:

"The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake."

75. Nigeria holds that the location of the tripoint within Lake Chad directly affects a third State, the Republic of Chad, and that the Court

la Cour ne saurait dès lors déterminer l'emplacement de ce tripoint. Le Nigéria prétend que sont inapplicables en l'espèce les conclusions auxquelles était parvenue la Chambre dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* selon lesquelles sa compétence

«ne se trouve pas limitée du seul fait que le point terminal de la frontière se situe sur la frontière d'un Etat tiers non partie à l'instance. En effet les droits de l'Etat voisin, le Niger, sont sauvegardés en tout état de cause par le jeu de l'article 59 du Statut...» (*C.I.J. Recueil 1986*, p. 577, par. 46.)

Il affirme que la présente affaire se distingue de celle du *Différend frontalier* de 1986 en ce que celle-ci avait été introduite par un compromis traduisant l'accord des Parties de faire procéder à la délimitation de l'ensemble de la frontière. De plus, dans l'affaire du *Différend frontalier*, le Niger avait été considéré comme étant un Etat tiers «à part entière», alors qu'en l'espèce existe la commission du bassin du lac Tchad au sein de laquelle coopèrent les Etats riverains. Du fait de cette coopération, les accords frontaliers ou les autres accords conclus entre le Nigéria et le Cameroun en ce qui concerne le lac Tchad ne seraient pas *res inter alios acta* pour les autres Etats membres de cette commission. Ni le Niger, ni le Tchad ne seraient dès lors de simples tierces parties en l'espèce. Selon le Nigéria, «[l]e régime du lac Tchad fait l'objet d'une coopération multilatérale et ne se prête pas à la bilatéralisation complète» que la Chambre a adoptée dans l'affaire du *Différend frontalier*.

Le Nigéria fait aussi valoir que ce n'est pas simplement de manière théorique ou fortuite que le Tchad, en sa qualité d'Etat tiers, est concerné par la question des frontières; des incidents ont eu lieu entre le Nigéria et le Tchad sur le lac Tchad et à son sujet. Enfin, le Nigéria conteste la distinction que la Chambre a opérée dans l'affaire du *Différend frontalier* entre délimitation maritime et délimitation terrestre. «Des critères d'équidistance, de proportionnalité et d'équité ... ont été appliqués pour délimiter des frontières lacustres, notamment celles de grands lacs.» La position du Nigéria est telle qu'on serait fondé à en déduire que sa quatrième exception préliminaire est dirigée non seulement contre la compétence de la Cour (par analogie avec le principe énoncé dans l'affaire de l'*Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 19), mais encore contre la recevabilité de la requête, étant donné que cette exception est selon cet Etat fondée sur l'un et l'autre terrain.

76. Le Cameroun, pour sa part, soutient que la Cour doit exercer sa compétence sur l'ensemble de la frontière qui fait l'objet du différend, jusqu'au point terminal septentrional situé dans le lac Tchad; la quatrième exception préliminaire du Nigéria irait directement à l'encontre de la jurisprudence constante en matière de tripoint. Le Cameroun rejette tout particulièrement la thèse du Nigéria selon laquelle il faut établir une distinction entre la décision rendue en l'affaire du *Différend frontalier* et la présente espèce: l'absence de compromis et partant le défaut de consentement du Nigéria pour ce qui est de l'introduction de l'instance ne sont

therefore cannot determine this tripoint. Nigeria maintains that the finding of the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*

“that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute . . .”
(*I.C.J. Reports 1986*, p. 577, para. 46)

is not applicable in the present case. It says there is a difference because the 1986 *Frontier Dispute* case was instituted by Special Agreement, which reflected the agreement of the Parties to have the entire boundary delimited. In addition, in the *Frontier Dispute* case Niger was treated as a wholly third party, while in the present case there is the Lake Chad Basin Commission in which the States bordering Lake Chad co-operate. Because of that co-operation, boundary or other agreements relating to Lake Chad between Nigeria and Cameroon are not *res inter alios acta* for the other member States of the Commission. Therefore, neither Niger nor Chad are simple third parties in this case. According to Nigeria, “the régime of Lake Chad is subject to multilateral co-operation, and is not susceptible to the thorough-going bilateralization” which the Chamber adopted in the *Frontier Dispute* case.

Nigeria also alleges that it is not the case that Chad as a third party is merely theoretically or contingently involved in the question of boundaries; there had been clashes between Nigeria and Chad in and in relation to Lake Chad. Finally, Nigeria questions the distinction which the Chamber in the *Frontier Dispute* case drew between maritime and land delimitation. “Criteria of equidistance, proportionality and equity have been applied to the delimitation of lacustrine boundaries, especially in large lakes.” Nigeria’s position is such that it would warrant the conclusion that its fourth preliminary objection goes not only to the jurisdiction of the Court (by analogy with the principle in the case of the *Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19), but also to the admissibility of the Application, as the objection is in its view well founded on either basis.

76. Cameroon claims that the Court must exercise its jurisdiction over the totality of the disputed boundary, as far as the northern end-point within Lake Chad; Nigeria’s fourth preliminary objection directly conflicts with consistent case-law relating to tripoints. Cameroon particularly rejects the Nigerian argument which distinguishes the *Frontier Dispute* decision from the present case: the absence of a special agreement, and therefore the consent of Nigeria to the institution of the proceedings, is irrelevant; Nigeria does not cite any precedent in which a differentiation was made between “wholly third States” and States which would not be

pas des éléments pertinents ; le Nigéria n'invoque aucun précédent où ait été opérée une distinction entre « Etats tiers à part entière » et ceux qui ne seraient pas de véritables Etats tiers. Les accords frontaliers *inter se*, conclus sans la participation d'Etats tiers, seraient fréquents, et l'article 59 suffirait à protéger les droits de ceux-ci. Le concept d'implication théorique d'un Etat tiers dans une question frontalière est, de l'avis du Cameroun, dénué de pertinence. Rien ne vient étayer un tel concept, et ses conséquences ne sont pas clairement expliquées. Le Cameroun conteste enfin les efforts déployés par le Nigéria pour écarter l'application de l'arrêt rendu dans l'affaire du *Différend frontalier* à la délimitation des frontières lacustres.

77. Dans la mesure où le Nigéria entend se prévaloir de la compétence exclusive de la commission du bassin du lac Tchad en matière de délimitation des frontières dans le lac Tchad, la Cour notera qu'elle a déjà répondu à ce moyen en examinant la troisième exception préliminaire. Celle-ci n'ayant pas été retenue, la Cour n'a pas à en traiter à nouveau.

78. La Cour observera en outre que les conclusions que le Cameroun lui a soumises dans la requête additionnelle (par. 17), telles que formulées dans son mémoire (mémoire du Cameroun, p. 669-671, par. 9), ne contiennent aucune demande spécifique tendant à ce que soit déterminé l'emplacement du tripoint Nigéria-Cameroun-Tchad dans le lac. La requête additionnelle prie la Cour de « préciser définitivement la frontière entre elle [la République du Cameroun] et la République fédérale du Nigéria du lac Tchad à la mer » (requête additionnelle, par. 17 *f*), tandis que le mémoire prie la Cour de dire et juger :

« que la frontière lacustre et terrestre entre le Cameroun et le Nigéria suit le tracé suivant :

— du point de longitude 14° 04' 59" 9999 à l'est de Greenwich et de latitude de 13° 05' 00" 0001, nord, elle passe ensuite par le point situé à 14° 12' 11" 7 de longitude est et 12° 32' 17" 4 de latitude nord » (p. 669, par. 9.1 *a*)).

Ces conclusions ont néanmoins une incidence sur l'emplacement du tripoint. Elles pourraient mener soit à la confirmation de l'emplacement du tripoint tel qu'il a été accepté en pratique jusqu'à présent sur la base d'actes et d'accords des anciennes puissances coloniales et des démarcations opérées par la commission (voir paragraphe 65 ci-dessus), soit à une nouvelle détermination de l'emplacement du tripoint, comme suite éventuellement aux revendications que fait valoir le Nigéria sur Darak et des îles avoisinantes. Ces revendications ne sauraient être examinées au fond par la Cour au présent stade de la procédure. Mais la Cour notera à ce stade qu'elles sont dirigées contre le Cameroun et qu'elle pourra, le moment venu, prendre sa décision à cet égard sans se prononcer sur les intérêts du Tchad, comme elle va le montrer ci-après.

79. La Cour abordera donc maintenant l'élément clé de la quatrième exception préliminaire du Nigéria, à savoir l'affirmation selon laquelle la

real third States. *Inter se* boundary agreements from which third States are absent are frequent. Article 59 suffices as protection of the third States' rights. The concept of theoretical involvement of a third State in a boundary question is, in the view of Cameroon, not pertinent. There is no support for this concept, the implications of which are not clearly explained. Lastly Cameroon contests the efforts made by Nigeria to exclude the applicability of the *Frontier Dispute* Judgment to delimitation in lakes.

77. The Court notes that, to the extent that Nigeria's reference to the Lake Chad Basin Commission is to be understood as referring to an exclusive competence of the Commission for boundary delimitation in Lake Chad, this argument has been dealt with under the third preliminary objection. As the third preliminary objection has not been upheld, the Court need not deal with this argument again.

78. The Court moreover notes that the submissions of Cameroon addressed to it in the Additional Application (para. 17) and as formulated in the Memorial of Cameroon (Memorial of Cameroon, pp. 669-671, para. 9) do not contain a specific request to determine the localization of the tripoint Nigeria-Cameroon-Chad in the Lake. The Additional Application requests the Court "to specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea" (para. 17 (*f*) of the Additional Application), while the Memorial requests the Court to adjudge and declare:

"that the lake and land boundary between Cameroon and Nigeria takes the following course:

— from the point at longitude 14° 04' 59" 9999 E of Greenwich and latitude 13° 05' 00" 0001 N, it then runs through the point located at longitude 14° 12' 11" 7 E and latitude 12° 32' 17" 4 N" (p. 669, para. 9.1 (*a*)).

These submissions nevertheless bear upon the localization of the tripoint. They could lead either to a confirmation of the localization of the tripoint as accepted in practice up to now on the basis of acts and agreements of the former colonial powers and the demarcation carried out by the Commission (see paragraph 65 above), or they could lead to a redetermination of the situation of the tripoint, possibly as a consequence of Nigeria's claims to Darak and adjacent islands. Thus these claims cannot be considered on the merits by the Court at this stage of the proceedings. However, the Court notes, at the present stage, that they are directed against Cameroon and that in due course the Court will be in a position to take its decision in this regard without pronouncing on interests that Chad may have, as the Court will demonstrate hereafter.

79. The Court therefore now turns to the crux of Nigeria's fourth preliminary objection, namely the assertion that the legal interests of Chad

détermination du tripoint porterait atteinte aux intérêts juridiques du Tchad et que la Cour ne pourrait par suite procéder à cette détermination.

La Cour rappelle qu'elle a toujours reconnu comme un des principes fondamentaux de son Statut qu'aucun différend entre Etats ne peut être tranché sans le consentement de ces derniers à sa compétence (*Or monétaire pris à Rome en 1943, arrêt, C.I.J. Recueil 1954*, p. 32). Néanmoins, la Cour a également souligné qu'elle n'est pas nécessairement empêchée de statuer lorsque la décision qu'il lui est demandé de rendre est susceptible d'avoir des incidences sur les intérêts juridiques d'un Etat qui n'est pas partie à l'instance; et la Cour n'a refusé d'exercer sa compétence que lorsque les intérêts d'un Etat tiers «constituent ... l'objet même de la décision à rendre sur le fond» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 261, par. 55; *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 104-105, par. 34).

La Cour observera que les conclusions que le Cameroun lui a soumises visent sa frontière avec le Nigéria et uniquement cette frontière. Ces conclusions, que l'on se réfère à celles qui figurent dans la requête additionnelle du Cameroun ou à celles qui sont formulées dans son mémoire, ne visent nullement la frontière entre le Cameroun et la République du Tchad. Certes, l'invitation faite à la Cour de «préciser définitivement la frontière entre elle [la République du Cameroun] et la République fédérale du Nigéria du lac Tchad à la mer» (requête additionnelle, par. 17 f)) est susceptible d'affecter le tripoint, c'est-à-dire le point où les frontières du Cameroun, du Nigéria et du Tchad se rejoignent. Toutefois, la demande tendant à ce que soit précisée la frontière entre le Cameroun et le Nigéria du lac Tchad à la mer n'implique pas que le tripoint pourrait s'écarter de la ligne constituant la frontière entre le Cameroun et le Tchad. Ni le Cameroun ni le Nigéria ne contestent le tracé actuel de cette frontière au centre du lac, tel que décrit dans le «document technique de la démarcation des frontières» mentionné au paragraphe 65 ci-dessus. Les incidents survenus entre le Nigéria et le Tchad dans le lac, dont fait état le Nigéria, concernent celui-ci et le Tchad et non le Cameroun ou sa frontière avec le Tchad. Procéder à une nouvelle détermination du point où la frontière entre le Cameroun et le Nigéria rejoint celle entre le Tchad et le Cameroun ne pourrait conduire en l'espèce qu'au déplacement du tripoint le long de la ligne de la frontière, dans le lac, entre le Tchad et le Cameroun. Ainsi, les intérêts juridiques du Tchad, en tant qu'Etat tiers non partie à l'instance, ne constituent pas l'objet de la décision à rendre sur le fond de la requête du Cameroun; dès lors, l'absence du Tchad n'empêche nullement la Cour de se prononcer sur le tracé de la frontière entre le Cameroun et le Nigéria dans le lac.

80. La Cour relèvera aussi que, dans l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)*, le tripoint où la frontière entre la Libye et le Tchad rejoint la frontière occidentale du Soudan, sur le 24^e méridien est de Greenwich, a été déterminé sans la participation du

would be affected by the determination of the tripoint, and that the Court can therefore not proceed to that determination.

The Court recalls that it has always acknowledged as one of the fundamental principles of its Statute that no dispute between States can be decided without their consent to its jurisdiction (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.) Nevertheless, the Court has also emphasized that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case; and the Court has only declined to exercise jurisdiction when the interests of the third State “constitute the very subject-matter of the judgment to be rendered on the merits” (*Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, pp. 104-105, para. 34).

The Court observes that the submissions presented to it by Cameroon refer to the frontier between Cameroon and Nigeria and to that frontier alone. These submissions do not refer to the frontier between Cameroon and the Republic of Chad either as contained in the Additional Application of Cameroon or as formulated in the Memorial. Certainly, the request to “specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea” (para. 17 (f) of the Additional Application) may affect the tripoint, i.e., the point where the frontiers of Cameroon, Chad and Nigeria meet. However, the request to specify the frontier between Cameroon and Nigeria from Lake Chad to the sea does not imply that the tripoint could be moved away from the line constituting the Cameroon-Chad boundary. Neither Cameroon nor Nigeria contests the current course of that boundary in the centre of Lake Chad as it is described in the “technical document on the demarcation of the . . . boundaries” mentioned in paragraph 65 above. Incidents between Nigeria and Chad in the Lake, as referred to by Nigeria, concern Nigeria and Chad but not Cameroon or its boundary with Chad. Any redefinition of the point where the frontier between Cameroon and Nigeria meets the Chad-Cameroon frontier could in the circumstances only lead to a moving of the tripoint along the line of the frontier in the Lake between Chad and Cameroon. Thus, the legal interests of Chad as a third State not party to the case do not constitute the very subject-matter of the judgment to be rendered on the merits of Cameroon’s Application; and therefore, the absence of Chad does not prevent the Court from proceeding to a specification of the border between Cameroon and Nigeria in the Lake.

80. The Court notes also that, in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the tripoint where the boundary between Libya and Chad meets the western boundary of the Sudan, on the 24th meridian east of Greenwich, was determined without involve-

Soudan. Les points terminaux à l'est des principales lignes prises en considération par la Cour dans cette affaire, pour la délimitation de la frontière entre la Libye et le Tchad, étaient situés à divers emplacements sur la frontière occidentale du Soudan.

En outre, la Cour a, dans cette même affaire, fixé, en l'absence du Niger, la frontière occidentale entre la Libye et le Tchad jusqu'au point d'intersection du 15° méridien est et du 23° parallèle nord, point où, selon le Tchad, se rejoindraient les frontières de la Libye, du Niger et du Tchad.

81. Les faits de l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* sont tout à fait différents de ceux de la présente espèce, étant donné que la section en cause de la frontière du Niger n'était pas délimitée à l'époque considérée. La détermination du tripoint dans cette affaire concernait donc directement le Niger en tant qu'Etat tiers, ce qui d'ailleurs n'a pas empêché la Chambre de tracer la frontière entre le Burkina Faso et la République du Mali jusqu'à son point extrême. La question de savoir s'il faudra effectivement déplacer l'emplacement du tripoint dans le lac Tchad par rapport à la position où il se situe actuellement sera résolue lorsque la Cour aura rendu son arrêt sur le fond. Ce déplacement serait sans conséquence pour le Tchad.

82. Finalement, la Cour observera que, du fait que ni le Cameroun ni le Nigéria ne contestent le tracé actuel de la frontière, au centre du lac Tchad, entre le Cameroun et la République du Tchad (voir paragraphe 79 ci-dessus), elle n'a pas — à supposer même que cela fût possible au stade préliminaire actuel — à examiner l'argumentation présentée par le Nigéria en ce qui concerne les principes juridiques applicables à la détermination des frontières lacustres, spécialement dans le cas de grands lacs comme le lac Tchad.

83. La quatrième exception préliminaire doit donc être rejetée.

* *

CINQUIÈME EXCEPTION PRÉLIMINAIRE

84. Dans sa cinquième exception préliminaire, le Nigéria fait valoir qu'il n'existe pas de différend concernant «la délimitation de la frontière en tant que telle» sur toute sa longueur entre le tripoint du lac Tchad et la mer sous réserve, dans le lac Tchad, de la question du titre sur Darak et sur des îles avoisinantes et sous réserve de la question du titre sur la presqu'île de Bakassi.

85. Lors des plaidoiries, il est devenu clair que, outre les revendications sur Darak et Bakassi, le Nigéria et le Cameroun ont des prétentions contraires en ce qui concerne le village de Tipsan qui, selon l'une et l'autre des Parties, serait situé de son côté de la frontière. Un membre de la Cour a également demandé aux Parties lors de la procédure orale si le fait que le Nigéria soutient devant la Cour qu'il n'existe pas de différend

ment of the Sudan. The eastern end-points of the principal lines taken into consideration by the Court in that case for the delimitation of the boundary between Libya and Chad were situated at various locations on the western boundary of the Sudan.

Furthermore, in that case, the Court, in the absence of Niger, fixed the western boundary between Libya and Chad as far as the point of intersection of the 15th meridian east and the parallel 23° of latitude north, a point at which, according to Chad, the frontiers of Chad, Libya and Niger meet.

81. The factual situation underlying the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* was quite different from the present case in the sense that the relevant part of the boundary of Niger at the time was not delimited; in that case the fixing of the tripoint therefore immediately involved Niger as a third State, which, however, did not prevent the Chamber from tracing the boundary between Burkina Faso and the Republic of Mali to its furthest point. Whether the location of the tripoint in Lake Chad has actually to be changed from its present position will follow from the judgment on the merits of Cameroon's Application. Such a change would have no consequence for Chad.

82. Finally the Court observes that, since neither Cameroon nor Nigeria challenge the current course of the boundary, in the centre of Lake Chad, between Cameroon and the Republic of Chad (see paragraph 79 above), it does not have to address — even if that was possible at the present preliminary stage — the argument presented by Nigeria concerning the legal principles applicable to the determination of boundaries in lakes and especially in large lakes like Lake Chad.

83. The fourth preliminary objection is accordingly rejected.

* *

FIFTH PRELIMINARY OBJECTION

84. In its fifth preliminary objection Nigeria alleges that there is no dispute concerning "boundary delimitation as such" throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, subject, within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula.

85. In the course of the oral proceedings, it became clear that in addition to Darak and Bakassi, there are competing claims of Nigeria and Cameroon in respect of the village of Tipsan, which each Party claims to be on its side of the boundary. Also, in the course of the oral proceedings, a question was asked of the Parties by a Member of the Court as to whether Nigeria's assertion that there is no dispute as regards the land

en ce qui concerne la frontière terrestre entre les deux Etats (sous réserve des problèmes existants dans la presqu'île de Bakassi et la région de Darak) signifie

«que, en dehors de ces deux secteurs, il y a accord du Nigéria avec le Cameroun sur les coordonnées géographiques de cette frontière, telles qu'elles résulteraient des textes invoqués par le Cameroun dans sa requête et son mémoire».

La réponse donnée par le Nigéria à cette question sera examinée ci-après (paragraphe 91).

86. Pour le Cameroun, sa frontière actuelle avec le Nigéria a été délimitée avec précision par les anciennes puissances coloniales ainsi que par des décisions de la Société des Nations et des actes de l'Organisation des Nations Unies.

Ces délimitations ont été confirmées ou complétées par des accords conclus directement entre le Cameroun et le Nigéria après leur indépendance. Le Cameroun demande à la Cour «de bien vouloir préciser définitivement la frontière entre elle et le Nigéria du lac Tchad à la mer» (requête additionnelle, par. 17 f)) le long d'une ligne dont les coordonnées sont indiquées dans le mémoire du Cameroun.

Le fait que le Nigéria revendique des titres sur la presqu'île de Bakassi et Darak ainsi que sur des îles avoisinantes signifie, selon le Cameroun, que le Nigéria conteste la validité de ces instruments juridiques et remet ainsi en cause l'ensemble de la frontière qui est fondé sur ceux-ci. Pour le Cameroun, la survenance le long de la frontière de nombreux incidents et incursions en est la confirmation. Les revendications du Nigéria sur la presqu'île de Bakassi ainsi que sa position quant à la déclaration de Maroua mettent également en question le fondement de la frontière maritime entre les deux pays. Selon le Cameroun, contrairement à ce qu'affirme le Nigéria, un différend s'est élevé entre les deux Etats au sujet de l'ensemble de la frontière.

87. La Cour rappellera que :

«au sens admis dans sa jurisprudence et celle de sa devancière un différend est un désaccord sur un point de droit ou de fait, un conflit, une opposition de thèses juridiques ou d'intérêts entre des parties (voir *Concessions Mavrommatis en Palestine*, arrêt n° 2, 1924, C.P.J.I. série A n° 2, p. 11; *Cameroun septentrional*, arrêt, C.I.J. Recueil 1963, p. 27, et *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies*, avis consultatif, C.I.J. Recueil 1988, p. 27, par. 35)» (*Timor oriental (Portugal c. Australie)*, arrêt, C.I.J. Recueil 1995, p. 99-100, par. 22),

et que,

«[p]our établir l'existence d'un différend: «Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre» (*Sud-Ouest africain, exceptions préliminaires*, arrêt, C.I.J.

boundary between the two States (subject to the existing problems in the Bakassi Peninsula and the Darak region) signifies,

“that, these two sectors apart, there is agreement between Nigeria and Cameroon on the geographical co-ordinates of this boundary as they result from the texts relied on by Cameroon in its Application and its Memorial”.

The reply given to this question by Nigeria will be examined below (paragraph 91).

86. For Cameroon its existing boundary with Nigeria was precisely delimited by the former colonial powers and by decisions of the League of Nations and acts of the United Nations.

These delimitations were confirmed or completed by agreements made directly between Cameroon and Nigeria after their independence. Cameroon requests that the Court “specify definitively the frontier between Cameroon and Nigeria from Lake Chad to the sea” (Additional Application, para. 17 (*f*)) along a line the co-ordinates of which are given in Cameroon’s Memorial.

The fact that Nigeria claims title to the Bakassi Peninsula and Darak, and adjacent islands, means, in the view of Cameroon, that Nigeria contests the validity of these legal instruments and thus calls into question the entire boundary which is based on them. That, in the view of Cameroon, is confirmed by the occurrence, along the boundary, of numerous incidents and incursions. Nigeria’s claims to Bakassi as well as its position regarding the Maroua Declaration also throw into doubt the basis of the maritime boundary between the two countries. In Cameroon’s view, and contrary to what Nigeria asserts, a dispute has arisen between the two States concerning the whole of the boundary.

87. The Court recalls that,

“in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 35)” (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22);

and that,

“[i]n order to establish the existence of a dispute, ‘It must be shown that the claim of one party is positively opposed by the other’ (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*,

Recueil 1962, p. 328); par ailleurs, «l'existence d'un différend international demande à être établie objectivement» (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74)» (*C.I.J. Recueil 1995*, p. 100).

Sur la base de ces critères, il existe bel et bien des différends en ce qui concerne Darak et des îles avoisinantes, Tipsan ainsi que la presqu'île de Bakassi. Ce dernier différend pourrait, comme il a été indiqué par le Cameroun, avoir une influence sur la frontière maritime entre les deux Parties.

88. Tous ces différends concernent la frontière entre le Cameroun et le Nigéria. Etant donné toutefois la longueur totale de cette frontière qui s'étend sur plus de 1600 kilomètres, du lac Tchad jusqu'à la mer, on ne saurait affirmer que ces différends par eux-mêmes concernent une portion si importante de la frontière qu'il existerait de ce fait et nécessairement un différend portant sur l'ensemble de celle-ci.

89. En outre, la Cour relèvera que le Nigéria ne conteste pas expressément l'ensemble de la frontière. Mais un désaccord sur un point de droit ou de fait, un conflit, une opposition de thèses juridiques ou d'intérêts ou le fait que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre ne doivent pas nécessairement être énoncés *expressis verbis*. Pour déterminer l'existence d'un différend, il est possible, comme en d'autres domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie. A cet égard, la Cour ne trouve pas convaincante la thèse du Cameroun selon laquelle la contestation par le Nigéria de la validité des titres existants sur Bakassi, Darak et Tipsan met nécessairement en cause la validité en tant que telle des instruments sur lesquels repose le tracé de la totalité de la frontière depuis le tripoint dans le lac Tchad jusqu'à la mer et prouve ainsi l'existence d'un différend concernant l'ensemble de cette frontière.

90. Il convient certainement dans ce contexte de tenir compte de la survenance d'incidents frontaliers. Mais chaque incident frontalier n'implique pas une remise en cause de la frontière. De plus, certains des incidents dont le Cameroun fait état sont survenus dans des zones difficiles d'accès, où la démarcation de la frontière est inexistante ou imprécise. Et chaque incursion ou incident signalé par le Cameroun n'est pas nécessairement imputable à des personnes dont le comportement serait susceptible d'engager la responsabilité du Nigéria. Même considérés conjointement avec les différends frontaliers existants, les incidents et incursions dont fait état le Cameroun n'établissent pas par eux-mêmes l'existence d'un différend concernant l'ensemble de la frontière entre le Cameroun et le Nigéria.

91. La Cour relèvera cependant que le Nigéria s'est constamment montré réservé dans la manière de présenter sa propre position sur ce point. Bien qu'il ait été au courant des préoccupations et des inquiétudes du Cameroun, il a répété, sans en dire davantage, qu'il n'existe pas de

p. 328); and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74*)" (*I.C.J. Reports 1995, p. 100*).

On the basis of these criteria, there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the Peninsula of Bakassi. This latter dispute, as indicated by Cameroon, might have a bearing on the maritime boundary between the two Parties.

88. All of these disputes concern the boundary between Cameroon and Nigeria. However, given the great length of that boundary, which runs over more than 1,600 km from Lake Chad to the sea, it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary.

89. Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party. In this respect the Court does not find persuasive the argument of Cameroon that the challenge by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the sea is based, and therefore proves the existence of a dispute concerning the whole of the boundary.

90. The occurrence of boundary incidents certainly has to be taken into account in this context. However, not every boundary incident implies a challenge to the boundary. Also, certain of the incidents referred to by Cameroon took place in areas which are difficult to reach and where the boundary demarcation may have been absent or imprecise. And not every incursion or incident alleged by Cameroon is necessarily attributable to persons for whose behaviour Nigeria's responsibility might be engaged. Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.

91. However, the Court notes that Nigeria has constantly been reserved in the manner in which it has presented its own position on the matter. Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no

différend concernant «la délimitation de la frontière en tant que telle». La même prudence caractérise la réponse donnée par le Nigéria à la question qu'un membre de la Cour a posée à l'audience (voir paragraphe 85 ci-dessus). La question était de savoir s'il y avait accord entre les Parties sur les coordonnées géographiques de la frontière, telles que revendiquées par le Cameroun sur la base des textes qu'il invoque. La réponse du Nigéria se lit comme suit :

«La frontière terrestre entre le Nigéria et le Cameroun n'est pas décrite par référence à des coordonnées géographiques. Ce sont plutôt les instruments pertinents (qui sont tous antérieurs à l'indépendance du Nigéria et du Cameroun) ainsi que la pratique bien établie, tant avant qu'après l'indépendance, qui fixent la frontière par référence à des caractéristiques physiques telles que ruisseaux, rivières, montagnes et routes, comme c'était couramment le cas à cette époque. Depuis l'indépendance, les deux Etats n'ont pas conclu d'accord bilatéral qui confirme expressément ou définit de toute autre manière, par référence à des coordonnées géographiques, la frontière préexistant à l'indépendance. Le tracé de la frontière, qui était bien établi avant l'indépendance et les procédures de l'Organisation des Nations Unies qui s'y rapportent, a néanmoins continué d'être accepté en pratique depuis lors par le Nigéria et le Cameroun.»

92. La Cour notera que, dans cette réponse, le Nigéria n'indique pas s'il est ou non d'accord avec le Cameroun sur le tracé de la frontière ou sur sa base juridique, encore qu'il soit clairement en désaccord avec le Cameroun en ce qui concerne Darak et des îles avoisinantes, Tipsan et Bakassi. Le Nigéria déclare que la frontière terrestre existante est décrite par référence non à des coordonnées géographiques, mais à des caractéristiques physiques. S'agissant de la base juridique de la frontière, le Nigéria se réfère à des «instruments pertinents» sans préciser de quels instruments il s'agit; il déclare cependant qu'ils étaient antérieurs à l'indépendance et que depuis lors aucun accord bilatéral «qui confirme expressément ou définit de toute autre manière, par référence à des coordonnées géographiques, la frontière préexistant à l'indépendance» n'a été conclu entre les Parties. Une telle formulation semble suggérer que les instruments existants appellent une confirmation. En outre, le Nigéria évoque la «pratique bien établie tant avant qu'après l'indépendance» comme une des bases juridiques de la frontière dont le tracé, déclare-t-il, a «continué d'être accepté en pratique»; il n'indique pas cependant de quelle pratique il s'agit.

93. La Cour est saisie de conclusions du Cameroun tendant à ce que sa frontière avec le Nigéria soit précisée définitivement du lac Tchad à la mer (voir paragraphe 86 ci-dessus). Le Nigéria soutient qu'il n'existe pas de différend concernant la délimitation de cette frontière en tant que telle sur toute sa longueur depuis le tripoint du lac Tchad jusqu'à la mer (voir paragraphe 84 ci-dessus) et que la demande du Cameroun aux fins de

dispute concerning “boundary delimitation as such”. Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the oral proceedings (see paragraph 85 above). This question was whether there is agreement between the Parties on the geographical co-ordinates of the boundary as claimed by Cameroon on the basis of the texts it relies upon. The reply given by Nigeria reads as follows:

“The land boundary between Nigeria and Cameroon is not described by reference to geographical co-ordinates. Rather, the relevant instruments (all of which pre-date the independence of Nigeria and Cameroon) and well-established practice, both before and after independence, fix the boundary by reference to physical features such as streams, rivers, mountains and roads, as was common in those days. Since independence, the two States have not concluded any bilateral agreement expressly confirming or otherwise describing the pre-independence boundary by reference to geographical co-ordinates. Nevertheless, the course of the boundary, which was well established before independence and related United Nations procedures, has continued to be accepted in practice since then by Nigeria and Cameroon.”

92. The Court notes that, in this reply, Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or on its legal basis, though clearly it does differ with Cameroon about Darak and adjacent islands, Tipsan and Bakassi. Nigeria states that the existing land boundary is not described by reference to geographical co-ordinates but by reference to physical features. As to the legal basis on which the boundary rests, Nigeria refers to “relevant instruments” without specifying which these instruments are apart from saying that they pre-date independence and that, since independence, no bilateral agreements “expressly confirming or otherwise describing the pre-independence boundary by reference to geographical co-ordinates” have been concluded between the Parties. That wording seems to suggest that the existing instruments may require confirmation. Moreover, Nigeria refers to “well-established practice both before and after independence” as one of the legal bases of the boundary whose course, it states, “has continued to be accepted in practice”; however, it does not indicate what that practice is.

93. The Court is seised with the submission of Cameroon which aims at a definitive determination of its boundary with Nigeria from Lake Chad to the sea (see paragraph 86 above). Nigeria maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length from the tripoint in Lake Chad to the sea (see paragraph 84 above) and that Cameroon’s request definitively to determine

fixer définitivement la frontière n'est pas recevable en l'absence d'un tel différend. Le Nigéria n'a cependant pas marqué son accord avec le Cameroun sur le tracé de cette frontière ou sur sa base juridique (voir paragraphe 92 ci-dessus) et il n'a pas fait connaître à la Cour la position qu'il adoptera ultérieurement sur les revendications du Cameroun. Le Nigéria est en droit de ne pas avancer, au présent stade de la procédure, des arguments qu'il considère comme relevant du fond, mais en pareille circonstance la Cour se trouve dans une situation telle qu'elle ne saurait se refuser à examiner les conclusions du Cameroun par le motif qu'il n'existerait pas de différend entre les deux Etats. Du fait de la position prise par le Nigéria, l'étendue exacte de ce différend ne saurait être déterminée à l'heure actuelle; un différend n'en existe pas moins entre les deux Parties, à tout le moins en ce qui concerne les bases juridiques de la frontière et il appartient à la Cour d'en connaître.

94. La cinquième exception préliminaire soulevée par le Nigéria doit donc être rejetée.

* *

SIXIÈME EXCEPTION PRÉLIMINAIRE

95. La Cour examinera maintenant la sixième exception préliminaire soulevée par le Nigéria, selon laquelle aucun élément ne permet au juge de décider que la responsabilité internationale du Nigéria est engagée en raison de prétendues incursions frontalières.

96. Selon le Nigéria, les conclusions du Cameroun ne satisfont pas aux exigences de l'article 38 du Règlement de la Cour et des principes généraux du droit qui prescrivent que soient clairement présentés les faits sur lesquels repose la requête du Cameroun, y compris les dates, les circonstances et les lieux précis des incursions et incidents allégués sur le territoire camerounais. Le Nigéria soutient que les éléments que le Cameroun a soumis à la Cour ne lui fournissent pas les informations dont il a besoin et auxquelles il a droit aux fins de préparer sa réponse. De même, selon le Nigéria, les éléments fournis sont si fragmentaires qu'ils ne permettent pas à la Cour de trancher équitablement et utilement, sur le plan judiciaire, les questions de responsabilité d'Etat et de réparation soulevées par le Cameroun. Tout en reconnaissant qu'un Etat dispose d'une certaine latitude pour développer ultérieurement le contenu de sa requête et de son mémoire, le Nigéria affirme que le Cameroun doit pour l'essentiel s'en tenir, dans ses développements, à l'affaire telle qu'elle a été présentée dans la requête.

97. Le Cameroun souligne qu'il a clairement indiqué dans ses écritures et plaidoiries que c'est seulement à titre indicatif qu'il s'est référé à certains faits pour établir la responsabilité du Nigéria et qu'il pourrait, le cas échéant, développer ces faits lors de la phase de l'examen au fond. Le Cameroun renvoie aux prescriptions du paragraphe 2 de l'article 38 du Règlement, qui fait mention d'un exposé «succinct» des faits. Il prétend

that boundary is not admissible in the absence of such a dispute. However, Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis (see paragraph 92 above) and it has not informed the Court of the position which it will take in the future on Cameroon's claims. Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute.

94. The fifth preliminary objection raised by Nigeria is thus rejected.

* *

SIXTH PRELIMINARY OBJECTION

95. The Court will now turn to Nigeria's sixth preliminary objection which is to the effect that there is no basis for a judicial determination that Nigeria bears international responsibility for alleged frontier incursions.

96. Nigeria contends that the submissions of Cameroon do not meet the standard required by Article 38 of the Rules of Court and general principles of law regarding the adequate presentation of facts on which Cameroon's request is based, including dates, the circumstances and precise locations of the alleged incursions and incidents into and on Cameroonian territory. Nigeria maintains that what Cameroon has presented to the Court does not give Nigeria the knowledge which it needs and to which it is entitled in order to prepare its reply. Similarly, in Nigeria's view, the material submitted is so sparse that it does not enable the Court to carry out fair and effective judicial determination of, or make determination on, the issues of State responsibility and reparation raised by Cameroon. While Nigeria acknowledges that a State has some latitude in expanding later on what it has said in its Application and in its Memorial, Cameroon is said to be essentially restricted in its elaboration to the case as presented in its Application.

97. Cameroon insists that it stated clearly in its pleadings that the facts referred to in order to establish Nigeria's responsibility were only of an indicative nature and that it could, where necessary, amplify those facts when it comes to the merits. Cameroon refers to the requirements established in Article 38, paragraph 2, of the Rules and which call for a "succinct" presentation of the facts. It holds that parties are free to develop

qu'il est loisible aux parties de développer ou de préciser au cours de la procédure les faits de l'affaire tels que présentés dans la requête.

98. La décision sur la sixième exception préliminaire du Nigéria dépend de la question de savoir si sont réunies en l'espèce les conditions que doit remplir une requête, telles qu'énoncées au paragraphe 2 de l'article 38 du Règlement de la Cour. Aux termes de ce paragraphe, la requête «indique ... la nature précise de la demande et contient un exposé succinct des faits et moyens sur lesquels cette demande repose». La Cour relève que le mot «succinct», au sens ordinaire de ce terme, ne signifie pas «complet» et que, ni le contexte dans lequel ce terme est employé au paragraphe 2 de l'article 38 du Règlement de la Cour, ni l'objet et le but de cette disposition ne conduisent à une telle interprétation. Le paragraphe 2 de l'article 38 n'exclut donc pas que l'exposé des faits et des motifs sur lesquels repose une demande soit complété ultérieurement.

99. Il ne découle pas davantage du paragraphe 2 de l'article 38 que la latitude dont dispose l'Etat demandeur pour développer ce qu'il a exposé dans sa requête soit strictement limitée, comme le suggère le Nigéria. Une telle conclusion ne saurait être tirée du terme «succinct»; elle ne saurait non plus être tirée des prononcés de la Cour selon lesquels la date pertinente pour apprécier la recevabilité d'une requête est la date de son dépôt; en effet, ces prononcés ne se réfèrent pas au contenu des requêtes (*Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 26, par. 44, et *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 130, par. 43). Une interprétation aussi restrictive ne correspondrait pas davantage aux conclusions de la Cour selon lesquelles

«si, en vertu de l'article 40 du Statut, l'objet d'un différend porté devant la Cour *doit être* indiqué, l'article 32, paragraphe 2, du Règlement de la Cour [aujourd'hui l'article 38, paragraphe 2] impose au demandeur de se conformer «autant que possible» à certaines prescriptions. Cette expression s'applique non seulement à la mention de la disposition par laquelle le requérant prétend établir la compétence de la Cour mais aussi à l'indication précise de l'objet de la demande et à l'exposé succinct des faits et des motifs par lesquels la demande est prétendue justifiée.» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 28.)

La Cour rappellera également que, selon une pratique établie, les Etats qui déposent une requête à la Cour se réservent le droit de présenter ultérieurement des éléments de fait et de droit supplémentaires. Cette liberté de présenter de tels éléments trouve sa limite dans l'exigence que «le différend porté devant la Cour par requête ne se trouve pas transformé en

the facts of the case presented in the application or to render them more precise in the course of the proceedings.

98. The decision on Nigeria's sixth preliminary objection hinges upon the question of whether the requirements which an application must meet and which are set out in Article 38, paragraph 2, of the Rules of Court are met in the present instance. The requirements set out in Article 38, paragraph 2, are that the Application shall "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". The Court notes that "succinct", in the ordinary meaning to be given to this term, does not mean "complete" and neither the context in which the term is used in Article 38, paragraph 2, of the Rules of Court nor the object and purpose of that provision indicate that it should be interpreted in that way. Article 38, paragraph 2, does therefore not preclude later additions to the statement of the facts and grounds on which a claim is based.

99. Nor does Article 38, paragraph 2, provide that the latitude of an applicant State, in developing what it has said in its application is strictly limited, as suggested by Nigeria. That conclusion cannot be inferred from the term "succinct"; nor can it be drawn from the Court's pronouncements on the importance of the point of time of the submission of the application as the critical date for the determination of its admissibility; these pronouncements do not refer to the content of applications (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 130, para. 43). Nor would so narrow an interpretation correspond to the finding of the Court that,

"whilst under Article 40 of its Statute the subject of a dispute brought before the Court *shall be* indicated, Article 32 (2) of the Rules of Court [today Article 38, paragraph 2] requires the Applicant 'as far as possible' to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving a succinct statement of the facts and grounds on which the claim is based." (*Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28.)

The Court also recalls that it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations. The limit of the freedom to present such facts and considerations is "that the result is not to transform the dispute brought before the Court by the application into

un autre différend dont le caractère ne serait pas le même» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*), compétence et recevabilité, arrêt, C.I.J. Recueil 1984, p. 427, par. 80). En l'espèce, le Cameroun n'a pas opéré une telle transformation du différend.

100. En ce qui concerne le sens à donner au terme «succinct», la Cour se bornera à noter que dans la présente affaire la requête du Cameroun contient un exposé suffisamment précis des faits et moyens sur lesquels s'appuie le demandeur. Cet exposé remplit les conditions fixées par le paragraphe 2 de l'article 38 du Statut et la requête est par suite recevable.

Cette constatation ne préjuge cependant en rien la question de savoir si, compte tenu des éléments fournis à la Cour, les faits allégués par le demandeur sont ou non établis et si les moyens invoqués par lui sont ou non fondés. Ces questions relèvent du fond et il ne saurait en être préjugé dans la présente phase de l'affaire.

101. La Cour ne saurait enfin accepter l'idée selon laquelle le Nigéria se trouverait dans l'impossibilité de répondre utilement aux allégations présentées ou qu'elle-même se trouverait en définitive dans l'impossibilité de se prononcer équitablement et utilement à la lumière des preuves et moyens dont elle dispose du fait que, selon le Nigéria, la requête du Cameroun ne serait pas suffisamment claire et complète et serait inadéquate. C'est au demandeur de subir les conséquences d'une requête qui ne contiendrait pas un exposé satisfaisant des faits et motifs sur lesquels repose sa demande. Comme la Cour l'a dit dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*:

«c'est en définitive au plaideur qui cherche à établir un fait qu'incombe la charge de la preuve; lorsque celle-ci n'est pas produite, une conclusion peut être rejetée dans l'arrêt comme insuffisamment démontrée, mais elle ne saurait être déclarée irrecevable *in limine* parce qu'on prévoit que les preuves feront défaut» (*ibid.*, p. 437, par. 101).

102. En conséquence, la Cour rejette la sixième exception préliminaire soulevée par le Nigéria.

* *

SEPTIÈME EXCEPTION PRÉLIMINAIRE

103. Dans sa septième exception préliminaire, le Nigéria a soutenu qu'il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour.

104. Le Nigéria déclare qu'il en est ainsi pour deux motifs: en premier lieu, il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi. En second lieu, dans l'éventualité où une décision serait prise sur la question du titre

another dispute which is different in character” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80). In this case, Cameroon has not so transformed the dispute.

100. As regards the meaning to be given to the term “succinct”, the Court would simply note that Cameroon’s Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible.

This observation does not, however, prejudice the question whether, taking account of the information submitted to the Court, the facts alleged by the Applicant are established or not, and whether the grounds it relies upon are founded or not. Those questions belong to the merits and may not be prejudged in this phase of the proceedings.

101. Lastly, the Court cannot agree that the lack of sufficient clarity and completeness in Cameroon’s Application and its inadequate character, as perceived by Nigeria, make it impossible for Nigeria to respond effectively to the allegations which have been presented or makes it impossible for the Court ultimately to make a fair and effective determination in the light of the arguments and the evidence then before it. It is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based. As the Court has stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*:

“[u]ltimately . . . however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof.” (*Ibid.*, p. 437, para. 101.)

102. The Court consequently rejects the sixth preliminary objection raised by Nigeria.

* *

SEVENTH PRELIMINARY OBJECTION

103. In its seventh preliminary objection Nigeria contends that there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court.

104. Nigeria says that this is so for two reasons: in the first place, no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula. Secondly, at the juncture when there is a determination of the question of title over the Bakassi

concernant la presqu'île de Bakassi, les demandes concernant les questions de délimitation maritime n'en seraient pas moins irrecevables faute d'action antérieure suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international». De l'avis du Nigéria, la Cour ne saurait être valablement saisie par voie de requête unilatérale d'un Etat de la délimitation d'une zone économique exclusive ou d'un plateau continental, si l'Etat en cause n'a fait aucune tentative pour parvenir à un accord avec l'Etat défendeur au sujet de cette frontière, contrairement aux prescriptions des articles 74 et 83 de la convention des Nations Unies sur le droit de la mer. Selon le Nigéria, une telle requête unilatérale est irrecevable.

105. Le Cameroun estime que le premier moyen invoqué par le Nigéria ne se rapporte ni à la compétence de la Cour ni à la recevabilité de la requête, mais concerne simplement la méthode la plus indiquée pour examiner l'affaire au fond, décision qui relève du pouvoir discrétionnaire de la Cour. Quant au second moyen avancé par le Nigéria, le Cameroun conteste que des négociations soient une condition préalable à l'introduction d'une instance devant la Cour dans des affaires de délimitation. Le Cameroun considère le paragraphe 2 de l'article 74 et le paragraphe 2 de l'article 83 de la convention des Nations Unies sur le droit de la mer, dont les libellés sont identiques, non comme interdisant le recours au règlement par tierce partie, mais comme rendant obligatoire un tel recours en vue d'éviter des délimitations unilatérales.

Le Cameroun indique, en tout état de cause, qu'il a suffisamment négocié avec le Nigéria avant de saisir la Cour, et qu'il n'a saisi cette dernière que lorsqu'il est devenu évident que toute nouvelle négociation serait vouée à l'échec. Sur ce point, il soutient que depuis l'occupation effective de la presqu'île de Bakassi par le Nigéria, toute négociation concernant la délimitation de la frontière maritime est devenue impossible.

106. La Cour examinera tout d'abord le premier moyen présenté par le Nigéria. La Cour reconnaît qu'il serait difficile, sinon impossible, de déterminer quelle est la délimitation de la frontière maritime entre les Parties aussi longtemps que la question du titre concernant la presqu'île de Bakassi n'aura pas été réglée. La Cour relèvera, toutefois, que, dans sa requête, le Cameroun prie non seulement la Cour

«de procéder au prolongement du tracé de sa frontière maritime avec la République fédérale du Nigéria jusqu'à la limite des zones maritimes que le droit international place sous leur juridiction respective» (requête du Cameroun du 29 mars 1994, p. 14, par. 20, alinéa f)),

mais aussi:

«de dire et juger:

- a) que la souveraineté sur la presqu'île de Bakassi est camerounaise, en vertu du droit international, et que cette presqu'île fait partie intégrante du territoire de la République du Cameroun» (*ibid.*, par. 20).

Peninsula, the issues of maritime delimitation will not be admissible in the absence of prior sufficient action by the Parties, on a footing of equality, to effect a delimitation “by agreement on the basis of international law”. In Nigeria’s view, the Court cannot properly be seised by the unilateral application of one State in relation to the delimitation of an exclusive economic zone or continental shelf boundary if that State has made no attempt to reach agreement with the respondent State over that boundary, contrary to the provisions of Articles 74 and 83 of the United Nations Convention on the Law of the Sea. Any such unilateral application, in the view of Nigeria, is inadmissible.

105. Cameroon is of the view that the first argument invoked by Nigeria concerns neither jurisdiction nor the admissibility of its Application, but simply the method whereby the merits of the case are best addressed, a decision which falls within the discretion of the Court. As to the second argument put forward by Nigeria, Cameroon denies that the conduct of negotiations is a precondition for instituting proceedings before the Court in cases of delimitation. Cameroon views the identical paragraphs 2 of Articles 74 and 83 of the United Nations Convention on the Law of the Sea not as barring recourse to third party settlement, but as an obligation for such recourse in order to avoid unilateral delimitations.

Cameroon says that, in any event, it had sufficiently negotiated with Nigeria before it seised the Court, and it seised the Court only when it became clear that any new negotiation would be doomed to failure. In this respect, it contends that since the actual occupation of the Bakassi Peninsula by Nigeria, any negotiation on the delimitation of the maritime boundary has become impossible.

106. The Court will initially address the first argument presented by Nigeria. The Court accepts that it will be difficult if not impossible to determine the delimitation of the maritime boundary between the Parties as long as the title over the Peninsula of Bakassi has not been determined. The Court notes, however, that Cameroon’s Application not only requests the Court

“to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions” (Application of Cameroon of 29 March 1994, p. 15; para. 20 (*f*)),

but also,

“to adjudge and declare:

- (a) that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon” (*ibid.*, para. 20).

Les deux questions étant ainsi soumises à la Cour, c'est à elle qu'il appartient de régler l'ordre dans lequel elle examinera ces questions, de telle sorte qu'elle puisse traiter au fond chacune d'entre elles. C'est là une question qui relève du pouvoir discrétionnaire de la Cour et qui ne saurait fonder une exception préliminaire. Par voie de conséquence, le moyen doit être écarté.

107. Quant au second moyen du Nigéria, la Cour notera tout d'abord qu'alors que son premier moyen concernait la totalité de la frontière maritime, le second ne semble viser que la délimitation à partir du point G vers le large. C'est ce qu'a reconnu un conseil du Nigéria et cela semble correspondre au fait que de nombreuses négociations ont eu lieu entre les Parties de 1970 à 1975 en ce qui concerne la frontière maritime à partir des atterrages de Bakassi jusqu'au point G, négociations qui ont abouti à la déclaration de Maroua sur laquelle les Parties sont en désaccord.

La Cour rappellera en outre que, lorsqu'elle traite des affaires qui sont portées devant elle, elle doit s'en tenir aux demandes précises qui lui sont soumises. Or, le Nigéria demande ici à la Cour de conclure que :

«dans l'éventualité où la question du titre concernant la presqu'île de Bakassi serait réglée, les demandes concernant les questions de délimitation maritime ne seront pas recevables faute de mesures suffisantes des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international».

Ainsi, ce qui est en litige entre les Parties et ce que la Cour doit trancher dès maintenant est la question de savoir si l'absence alléguée d'efforts suffisants pour négocier empêche la Cour de déclarer ou non recevable la demande du Cameroun.

Une telle question revêt un caractère véritablement préliminaire et doit être tranchée conformément aux dispositions de l'article 79 du Règlement de la Cour.

108. A cet égard, le Cameroun et le Nigéria se réfèrent à la convention des Nations Unies sur le droit de la mer à laquelle ils sont parties. L'article 74 de la convention, relatif à la zone économique exclusive, et l'article 83, concernant le plateau continental, disposent en leur paragraphe 1, en termes identiques, que la délimitation

«entre Etats dont les côtes sont adjacentes ou se font face est effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à une solution équitable».

Ces paragraphes sont suivis de paragraphes 2 identiques qui se lisent comme suit : «S'ils ne parviennent pas à un accord dans un délai raisonnable, les Etats concernés ont recours aux procédures prévues à la partie XV.» L'une de ces procédures consiste à soumettre l'affaire à la Cour en vue de son règlement par la voie contentieuse.

109. La Cour observera cependant qu'en l'espèce elle n'a pas été saisie sur la base du paragraphe 1 de l'article 36 du Statut et, par application de

Since, therefore, both questions are before the Court, it becomes a matter for the Court to arrange the order in which it addresses the issues in such a way that it can deal substantively with each of them. That is a matter which lies within the Court's discretion and which cannot be the basis of a preliminary objection. This argument therefore has to be dismissed.

107. As to the second argument of Nigeria, the Court notes that, while its first argument concerned the whole maritime boundary, the second one seems only to concern the delimitation from point G seawards. That was accepted by counsel for Nigeria and seems to correspond to the fact that there were extensive negotiations between the two Parties in the period between 1970 and 1975 on the maritime boundary from the land-fall on Bakassi to point G, which resulted in the disputed Maroua Declaration.

Moreover, the Court recalls that, in dealing with the cases brought before it, it must adhere to the precise request submitted to it. Nigeria here requests the Court to hold that,

“at the juncture where there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation ‘by agreement on the basis of international law’”.

What is therefore in dispute between the Parties and what the Court has to decide now is whether the alleged absence of sufficient effort at negotiation constitutes an impediment for the Court to accept Cameroon's claim as admissible or not.

This matter is of a genuinely preliminary character and has to be decided under Article 79 of the Rules of Court.

108. In this connection, Cameroon and Nigeria refer to the United Nations Convention on the Law of the Sea, to which they are parties. Article 74 of the Convention, relating to the exclusive economic zone, and Article 83, concerning the continental shelf, provide, in their first identical paragraphs, that the delimitation

“between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

These are followed by identical paragraphs 2 which provide that “If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.” One of these procedures is the submission of the case to the Court for settlement by contentious proceedings.

109. However, the Court notes that, in this case, it has not been seised on the basis of Article 36, paragraph 1, of the Statute, and, in pursuance

cet article, conformément à la partie XV de la convention des Nations Unies sur le droit de la mer, relative au règlement des différends surgissant entre les parties à la convention à propos de l'interprétation ou de l'application de cette dernière. Elle a été saisie sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut, déclarations qui ne contiennent aucune condition relative à des négociations préalables à mener dans un délai raisonnable.

Le second moyen du Nigéria ne peut donc être retenu.

*

110. En sus de ce qui a été avancé par les Parties, la question pourrait se poser de savoir si, au-delà du point G, le différend entre les Parties a été défini de manière suffisamment précise pour que la Cour puisse en être valablement saisie. La Cour observera non seulement que les Parties n'ont pas soulevé ce point, mais que le Cameroun et le Nigéria ont entamé des négociations en vue de la fixation de l'ensemble de leur frontière maritime. C'est au cours de ces négociations que la déclaration de Maroua, relative au tracé de la frontière maritime jusqu'au point G, avait été arrêtée. Par la suite, cette déclaration a été considérée comme obligatoire par le Cameroun, mais non par le Nigéria. Les Parties n'ont pas été en mesure de se mettre d'accord sur la continuation des négociations au delà du point G, comme le Cameroun le souhaite. Il en résulte qu'il existe à ce sujet un différend entre les Parties qui, en définitive et compte tenu des circonstances de l'espèce, est suffisamment précisé pour pouvoir être porté devant la Cour.

*

111. La Cour, par voie de conséquence, rejette la septième exception préliminaire.

* *

HUITIÈME EXCEPTION PRÉLIMINAIRE

112. La Cour examinera maintenant la huitième et dernière exception préliminaire présentée par le Nigéria. Selon cette exception, le Nigéria soutient, dans le contexte de la septième exception préliminaire et aux fins de compléter celle-ci, que la question de la délimitation maritime met nécessairement en cause les droits et intérêts d'Etats tiers et que la demande correspondante est pour ce motif irrecevable.

113. Le Nigéria évoque la configuration particulière du golfe de Guinée et sa forme concave, le fait que cinq Etats sont riverains de ce golfe et qu'aucune délimitation n'a été effectuée par voie d'accord entre ces Etats

of it, in accordance with Part XV of the United Nations Convention on the Law of the Sea relating to the settlement of disputes arising between the parties to the Convention with respect to its interpretation or application. It has been seised on the basis of declarations made under Article 36, paragraph 2, of the Statute, which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period.

The second argument of Nigeria cannot therefore be upheld.

*

110. In addition to what has been put forward by the Parties, the question could arise whether, beyond point G, the dispute between the Parties has been defined with sufficient precision for the Court to be validly seised of it. The Court observes not only that the Parties have not raised this point, but Cameroon and Nigeria entered into negotiations with a view to determining the whole of the maritime boundary. It was during these negotiations that the Maroua Declaration relating to the course of the maritime boundary up to point G was drawn up. This declaration was subsequently held to be binding by Cameroon, but not by Nigeria. The Parties have not been able to agree on the continuation of the negotiations beyond point G, as Cameroon wishes. The result is that there is a dispute on this subject between the Parties which, ultimately and bearing in mind the circumstances of the case, is precise enough for it to be brought before the Court.

*

111. The Court therefore rejects the seventh preliminary objection.

* *

EIGHTH PRELIMINARY OBJECTION

112. The Court will now deal with the eighth and last of the preliminary objections presented by Nigeria. With that objection Nigeria contends, in the context of and supplementary to the seventh preliminary objection, that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that extent inadmissible.

113. Nigeria refers to the particular concave configuration of the Gulf of Guinea, to the fact that five States border the Gulf and that there are no agreed delimitations between any two of those States in the disputed

pris deux à deux dans la zone en litige. Dans ces conditions, la délimitation des zones maritimes relevant de deux des Etats riverains du golfe aura nécessairement des incidences directes sur les autres. Le Nigéria soutient aussi que la situation existant entre le Cameroun et le Nigéria est différente de celle qui était à la base de l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* (arrêt, C.I.J. Recueil 1986, p. 554), puisque cette affaire concernait une frontière terrestre pour la délimitation de laquelle les principes applicables sont différents de ceux qui gouvernent la délimitation de frontières maritimes. L'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)* (requête à fin d'intervention, arrêt, C.I.J. Recueil 1984, p. 3) diffère aussi de la présente affaire en ce sens que les zones auxquelles avaient trait les revendications d'un Etat tiers (l'Italie) étaient connues; enfin, dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* (requête à fin d'intervention, arrêt, C.I.J. Recueil 1981, p. 3), la Cour s'est bornée à énoncer des principes applicables à la délimitation du plateau continental dans un contexte donné sans pour autant tracer une ligne particulière. Le Nigéria reconnaît qu'en vertu de l'article 59 du Statut les Etats tiers ne sont pas formellement liés par les décisions de la Cour; il soutient néanmoins que la protection qu'offre l'article 59 du Statut est insuffisante, du fait qu'en dépit des dispositions de cet article des décisions de la Cour pourraient, dans certaines situations particulières, avoir à l'évidence des effets juridiques et pratiques directs à l'égard d'Etats tiers, ainsi que sur le développement du droit international.

114. Le Cameroun soutient que la délimitation maritime qu'il prie la Cour de confirmer pour une partie et de déterminer pour une autre concerne exclusivement les Parties au présent différend. De l'avis du Cameroun, les intérêts de tous les autres Etats sont préservés par l'article 59 du Statut et par le principe selon lequel toute délimitation entre deux Etats est *res inter alios acta*. Se référant à la jurisprudence de la Cour, le Cameroun soutient que la Cour n'a pas hésité à procéder à des délimitations maritimes dans des affaires dans lesquelles les droits des Etats tiers étaient plus clairement en cause qu'ils ne le sont dans la présente espèce. Le Cameroun estime aussi que la pratique conventionnelle des Etats confirme qu'une délimitation n'est nullement rendue impossible par l'existence des intérêts d'Etats voisins.

115. La Cour estime, comme les Parties, que le problème des droits et des intérêts des Etats tiers ne se pose en l'espèce qu'en ce qui concerne le prolongement, au-delà du point G, de la frontière maritime vers le large, tel que le Cameroun le demande. Quant à la section de la frontière maritime allant du point G vers la côte jusqu'aux atterrages de la presqu'île de Bakassi, il est certain qu'un différend est né du fait des revendications contraires des Parties concernant Bakassi et du fait que la déclaration de Maroua est considérée comme obligatoire par le Cameroun mais non par le Nigéria.

Mais ce différend ne met pas en cause les droits et intérêts d'Etats tiers. Cela tient au fait que l'emplacement géographique du point G est nette-

area. In these circumstances, the delimitation of the maritime zones appertaining to two of the States bordering the Gulf will necessarily and closely affect the others. Nigeria also holds that the situation between Cameroon and Nigeria is distinct from that underlying the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*Judgment, I.C.J. Reports 1986*, p. 554) as that case concerned a land boundary to the delimitation of which apply principles that are different from those applying to the delimitation of maritime boundaries. The case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 3) was different from the present case in the sense that the areas to which the claims of the third State (Italy) related, were known; and in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 3) the Court was merely laying down principles applicable to the delimitation of the continental shelf in a given context without actually drawing any particular line. Nigeria acknowledges that by virtue of Article 59 of the Statute, third States are not formally bound by decisions of the Court; it maintains nevertheless that Article 59 of the Statute gives insufficient protection, since in specific situations, in spite of that Article, decisions of the Court may have clear and direct legal and practical effects on third States, as well as on the development of international law.

114. Cameroon holds that the maritime delimitation which it is requesting the Court in part to confirm and in part to determine, concerns only the Parties to the present dispute. In Cameroon's view, the interests of all other States are preserved by Article 59 of the Statute and by the principle according to which any delimitation as between two States is *res inter alios acta*. Referring to the jurisprudence of the Court, Cameroon claims that the Court has not hesitated to proceed to maritime delimitations in cases where the rights of third States were more clearly in issue than they are in the present case. Cameroon also finds that practice of State treaties confirms that a delimitation is in no way made impossible by the existence of the interests of neighbouring States.

115. The Court notes, as do the Parties, that the problem of rights and interests of third States arises only for the prolongation, as requested by Cameroon, of the maritime boundary seawards beyond point G. As to the stretch of the maritime boundary from point G inwards to the point of landfall on the Bakassi Peninsula, certainly a dispute has arisen because of the rival claims of the Parties to Bakassi and the fact that the Maroua Declaration is considered binding by Cameroon but not by Nigeria.

That dispute however does not concern the rights and interests of third States. That is so because the geographical location of point G is clearly

ment plus proche de la côte continentale du Nigéria et du Cameroun que ne l'est le tripoint Cameroun-Nigéria-Guinée équatoriale.

116. Ce que la Cour doit examiner au titre de la huitième exception préliminaire est donc de savoir si le fait de prolonger la frontière maritime au-delà du point G mettrait en cause les droits et intérêts d'Etats tiers, et si cela aurait pour effet d'empêcher la Cour de procéder à un tel prolongement. La Cour note que la situation géographique des territoires des autres Etats riverains du golfe de Guinée, et en particulier de la Guinée équatoriale et de Sao Tomé-et-Principe, démontre qu'en toute probabilité le prolongement de la frontière maritime entre les Parties vers le large au-delà du point G finira par atteindre les zones maritimes dans lesquelles les droits et intérêts du Cameroun et du Nigéria chevaucheront ceux d'Etats tiers. Ainsi, les droits et intérêts d'Etats tiers seront, semble-t-il, touchés si la Cour fait droit à la demande du Cameroun. La Cour rappelle qu'elle a affirmé «que l'un des principes fondamentaux de son Statut est qu'elle ne peut trancher un différend entre des Etats sans que ceux-ci aient consenti à sa juridiction» (*Timor oriental (Portugal c. Australie)*, arrêt, C.I.J. Recueil 1995, p. 101, par. 26). Toutefois, elle a précisé dans la même espèce «qu'elle n'est pas nécessairement empêchée de statuer lorsque l'arrêt qu'il lui est demandé de rendre est susceptible d'avoir des incidences sur les intérêts juridiques d'un Etat qui n'est pas partie à l'instance» (*ibid.*, p. 104, par. 34).

De même, dans l'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, elle a suivi la même ligne de pensée:

«toute décision de la Cour sur l'existence ou le contenu de la responsabilité que Nauru impute à l'Australie pourrait certes avoir des incidences sur la situation juridique des deux autres Etats concernés, mais la Cour n'aura pas à se prononcer sur cette situation juridique pour prendre sa décision sur les griefs formulés par Nauru contre l'Australie. Par voie de conséquence, la Cour ne peut refuser d'exercer sa juridiction.» (*C.I.J. Recueil 1992*, p. 261-262, par. 55.)»

La Cour ne saurait donc, en la présente espèce, prendre sa décision sur la huitième exception préliminaire en la considérant simplement comme une question préliminaire. Pour pouvoir déterminer quel serait le tracé d'une frontière maritime prolongée au-delà du point G, en quel lieu et dans quelle mesure elle se heurterait aux revendications éventuelles d'autres Etats, et comment l'arrêt de la Cour affecterait les droits et intérêts de ces Etats, il serait nécessaire que la Cour examine la demande du Cameroun au fond. En même temps, la Cour ne saurait exclure que l'arrêt demandé par le Cameroun puisse avoir sur les droits et intérêts des Etats tiers une incidence telle que la Cour serait empêchée de rendre sa décision en l'absence de ces Etats, auquel cas la huitième exception préliminaire du Nigéria devrait être retenue, tout au moins en partie. La question de savoir si ces Etats tiers décideront d'exercer leurs droits à intervention dans l'instance conformément au Statut reste entière.

117. La Cour conclut que, par voie de conséquence, la huitième excep-

closer to the Nigerian/Cameroonian mainland than is the location of the tripoint Cameroon-Nigeria-Equatorial Guinea to the mainland.

116. What the Court has to examine under the eighth preliminary objection is therefore whether prolongation of the maritime boundary beyond point G would involve rights and interests of third States and whether that would prevent it from proceeding to such prolongation. The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties seawards beyond point G will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request. The Court recalls that it has affirmed, "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 101, para. 26). However, it stated in the same case that, "it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case" (*ibid.*, p. 104, para. 34).

Similarly, in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, it adopted the same approach:

"a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

The Court cannot therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. Whether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen.

117. The Court concludes that therefore the eighth preliminary objec-

tion préliminaire du Nigéria n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire.

* * *

118. Par ces motifs,

LA COUR,

1) a) Par quatorze voix contre trois,

Rejette la première exception préliminaire;

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge*; M. Ajibola, *juge ad hoc*;

b) Par seize voix contre une,

Rejette la deuxième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; MM. Mbaye, Ajibola, *juges ad hoc*;

CONTRE: M. Koroma, *juge*;

c) Par quinze voix contre deux,

Rejette la troisième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: M. Koroma, *juge*; M. Ajibola, *juge ad hoc*;

d) Par treize voix contre quatre,

Rejette la quatrième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: MM. Oda, Koroma, Parra-Aranguren, *juges*; M. Ajibola, *juge ad hoc*;

e) Par treize voix contre quatre,

Rejette la cinquième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: MM. Oda, Koroma, Vereshchetin, *juges*, M. Ajibola, *juge ad hoc*;

tion of Nigeria does not possess, in the circumstances of the case, an exclusively preliminary character.

* * *

118. For these reasons,

THE COURT,

(1) (a) By fourteen votes to three,

Rejects the first preliminary objection;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge ad hoc* Ajibola;

(b) By sixteen votes to one,

Rejects the second preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judges ad hoc* Mbaye, Ajibola;

AGAINST: *Judge* Koroma;

(c) By fifteen votes to two,

Rejects the third preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judge* Koroma; *Judge ad hoc* Ajibola;

(d) By thirteen votes to four,

Rejects the fourth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judges* Oda, Koroma, Parra-Aranguren; *Judge ad hoc* Ajibola;

(e) By thirteen votes to four,

Rejects the fifth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judges* Oda, Koroma, Vereshchetin; *Judge ad hoc* Ajibola;

f) Par quinze voix contre deux,

Rejette la sixième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: M. Koroma, *juge*, M. Ajibola, *juge ad hoc*;

g) Par douze voix contre cinq,

Rejette la septième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: MM. Oda, Koroma, M^{me} Higgins, M. Kooijmans, *juges*; M. Ajibola, *juge ad hoc*;

2) Par douze voix contre cinq,

Déclare que la huitième exception préliminaire n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: MM. Oda, Koroma, M^{me} Higgins, M. Kooijmans, *juges*; M. Ajibola, *juge ad hoc*;

3) Par quatorze voix contre trois,

Dit qu'elle a compétence, sur la base du paragraphe 2 de l'article 36 du Statut, pour statuer sur le différend;

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge*; M. Ajibola, *juge ad hoc*;

4) Par quatorze voix contre trois,

Dit que la requête déposée par la République du Cameroun le 29 mars 1994, telle qu'amendée par la requête additionnelle du 6 juin 1994, est recevable.

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^{me} Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge ad hoc*;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge*; M. Ajibola, *juge ad hoc*.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le onze juin mil neuf cent quatre-vingt-dix-huit, en

(f) By fifteen votes to two,

Rejects the sixth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judge* Koroma; *Judge ad hoc* Ajibola;

(g) By twelve votes to five,

Rejects the seventh preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judges* Oda, Koroma, Higgins, Kooijmans; *Judge ad hoc* Ajibola;

(2) By twelve votes to five,

Declares that the eighth preliminary objection does not have, in the circumstances of the case, an exclusively preliminary character;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Judges* Oda, Koroma, Higgins, Kooijmans; *Judge ad hoc* Ajibola;

(3) By fourteen votes to three,

Finds that, on the basis of Article 36, paragraph 2, of the Statute, it has jurisdiction to adjudicate upon the dispute;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge ad hoc* Ajibola;

(4) By fourteen votes to three,

Finds that the Application filed by the Republic of Cameroon on 29 March 1994, as amended by the Additional Application of 6 June 1994, is admissible.

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge ad hoc* Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge ad hoc* Ajibola.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eleventh day of June, one thousand

trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République du Cameroun et au Gouvernement de la République fédérale du Nigéria.

Le président,

(Signé) Stephen M. SCHWEBEL.

Le greffier,

(Signé) Eduardo VALENCIA-OSPINA.

MM. ODA, VERESHCHETIN, M^{me} HIGGINS, MM. PARRA-ARANGUREN et KOOLJMANS, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

M. WEERAMANTRY, vice-président, M. KOROMA, juge, et, M. AJIBOLA, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) S.M.S.

(Paraphé) E.V.O.

nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Cameroon and the Government of the Federal Republic of Nigeria, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN and KOOIJMANS append separate opinions to the Judgment of the Court.

Vice-President WEERAMANTRY, Judge KOROMA and Judge *ad hoc* AJIBOLA append dissenting opinions to the Judgment of the Court.

(Initialed) S.M.S.

(Initialed) E.V.O.