LIST OF EXHIBITS

Exhibit No.	Description
C-59	ICANN, Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018)
C-60	VeriSign Inc. (VRSN) - Q3 2018 Earnings Conference Call Transcript (25 Oct. 2018)
C-61	Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016)
C-62	Email from ICANN Global Support to J. Kane (7 June 2018)
C-63	ICANN, *Vistaprint Limited v. ICANN (.WEBS)*: Case Information, *available at* https://www.icann.org/resources/pages/vistaprint-v-icann-2014-06-19-en (last accessed at 25 Nov. 2018)
C-64	Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018)
C-65	Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018)
C-66	Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018)
C-67	United Nations General Assembly, Resolution 811, *Universal Declaration of Human Rights* (16 Dec. 1948)
C-68	United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2010)

LIST OF LEGAL AUTHORITIES

Authority No.	Description
CA-4	*Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection (23 Dec. 2014)
CA-5	*DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014)
CA-6	*Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015)
CA-7	*Burlington Resources Inc. and Others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (29 June 2009)
CA-8	*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures*, Order, 2011 I.C.J. Reports 6 (8 Mar.)
CA-9	*Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 Oct. 1999) *reprinted in* 16 ICSID Rev.—FILJ 207 (2001)
CA-10	*Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30 (2d Cir. 2010)

Legal Authority CA-4

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PANEL

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,

Claimant

v.

Internet Corporation for Assigned Names and Numbers,

Respondent

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

EMERGENCY INDEPENDENT REVIEW PANELIST'S ORDER ON REQUEST FOR EMERGENCY MEASURES OF PROTECTION

Mark C. Morril
Emergency Independent Review Panelist

December 23, 2014

This Order determines Claimant Dot Registry, LLC.'s ("Dot Registry") application to the undersigned as Emergency Independent Review Panelist for emergency relief under Article 6 of the International Centre for Dispute Resolution ("ICDR") International Dispute Resolution Rules.

Dot Registry applied to Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate three new generic Top Level Domains ["gTLDs"].[1] In the underlying proceeding, Dot Registry has invoked ICANN's Independent Review Process ("IRP") to review the July 24, 2014 Determination of ICANN's Board Governance Committee ("BGC") denying reconsideration of a Community Priority Evaluation ("CPE") panel report finding that Dot Registry's applications did not qualify for "community-based" status.

ICANN has announced its intention to proceed with an auction of the gTLDs at issue on January 21, 2015. Dot Registry seeks an order enjoining ICANN from taking any further steps toward delegating the gTLDs at issue pending the conclusion of its IRP. I find emergency relief to be required to preserve the pending IRP as a process capable of providing an effective remedy.

The Parties

1. Claimant Dot Registry is a limited liability company registered in the State of Kansas. It was formed in 2011 to apply for the rights to operate certain new gTLDs, including .CORP, .LTD and .LLP (collectively "the corporate identifier strings"), which are at issue in the underlying proceeding.

2. Respondent ICANN is a California non-profit public benefit corporation established "for the benefit of the Internet community as a whole." It is responsible, among other things, for administering certain aspects of the Internet Domain Name System.

Applicable Law

3. The parties agree that international law principles, applicable international conventions and local law govern this application.[2] Although there are a variety of formulations, the tests listed below are commonly applied in both international and U.S. matters to determine an application for preliminary relief or interim measures.

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[1] Top-Level Domain or "TLDs" are the string of letters following the rightmost dot in domain names, such as the original gTLDs - .com, gov, .org, .net, .mil and .edu. ICANN began planning for the introduction of new TLDs in 2007 and in 2011 launched its "New gTLD Program" which provided policies and procedures to accomplish the expansion of available TLDs.

[2] ICANN Article of Incorporation ("Articles"), Article 4.

i. The existence of a right to be protected

Interim measures are available in international arbitration to preserve a party's rights or property pending a resolution on the merits. Article 6 of the ICDR rules, applicable here by consent of the parties, empowers the Emergency Independent Review Panelist to order or award any interim or conservancy measures deemed "necessary." The ICSID convention similarly refers to provisional measures "to preserve the specific rights of either party." The UNCITRAL Arbitration Rules provide in Article 26 for interim measures, among other things, to preserve the *status quo* and prevent action that might prejudice the arbitration process. Some formulations also identify the public interest as an interest to be protected.[3]

ii. Urgency

This factor requires a showing that in the absence of interim measures, actions prejudicial to the rights sought to be protected are likely to be taken before the arbitration panel has the opportunity to determine the merits.

iii. Necessity

This factor assesses a) the nature and risk of the harm interim measures are intended to avoid; and b) the balance of hardships as between the parties resulting from the grant or withholding of interim measures.

iv. Possibility of success on the merits

It generally is required that the party seeking interim measures makes some showing on the merits of its underlying claim. Article 26 of the UNCITRAL Arbitration Rules requires demonstration of a "reasonable possibility that the requesting party will succeed on the merits of the claim."

Procedural History and Jurisdiction of the Emergency Independent Review Panelist

4. Dot Registry commenced the underlying IRP by a Request for Independent Review Process submitted on September 22, 2014 ("the IRP Request.") Article IV, Section 3 of ICANN's Bylaws provides in pertinent part that:

> 2. Any person materially affected by a decision or action by 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] See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

> 7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider.")
>
> 8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures....

5. ICANN's Board appointed the ICDR as the IRP Provider. The parties agree that the current IRP is governed by the ICDR International Dispute Resolution Rules as in effect from June 1, 2014 ("the ICDR Rules") and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.

6. The parties agreed that Article 6 of the ICDR Rules would apply to any application Dot Registry might make for emergency relief during the pendency of the IRP.[4] Dot Registry filed a Request for Emergency Independent Review Panelist and Interim Measures of Protection dated November 19, 2014 ("the Emergency Request.") The undersigned was appointed Emergency Independent Review Panelist on November 24, 2014 and made certain disclosures in connection with the appointment.

7. I conducted a telephonic preliminary hearing on November 25, 2014, which was attended by counsel for both parties and a Dot Registry executive. During the preliminary hearing, the parties confirmed their acceptance of the undersigned as Emergency Independent Review Panelist. Following that preliminary hearing, I issued Procedural Order No. 1, dated November 26, 2014, which provided *inter alia* that:

   a) ICANN confirmed that Dot Registry would not be required to pay any deposits associated with the auctions for the gTLD strings that are the subject of this dispute until sometime after January 2, 2015 and that no auction would be conducted for the gTLD strings prior thereto;
   b) The Emergency Independent Review Panelist would conduct a telephonic hearing on December 16, 2014; and
   c) The Emergency Independent Review Panelist would provide a reasoned order or award.

8. I have reviewed on this application the IRP Request, ICANN's Response thereto dated October 27, 2014 ("ICANN Merits Response"), the Emergency Request, ICANN's Response thereto dated December 8, 2014 ("ICANN Emergency Response"), a letter from Dot Registry's counsel Weil, Gotshal & Manges LLP

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[4] See C-ER-40 (Email from Jeffrey LeVee dated October 29, 2014 to Ali Arif and others); Procedural Order No. 1, ¶ 1.

dated December 15, 2014, a post-hearing submission from each party and exhibits to each of the foregoing documents.[5]

9. I conducted a telephonic hearing on December 16, 2014. Both parties appeared through their respective counsel. Executives from Dot Registry and ICANN also were in attendance. With the agreement of both parties, the record on this application was closed on December 18, 2014.

Factual Background

ICANN Governance and Accountability

10. ICANN's governance documents include the Articles and ICANN's Bylaws. The Articles require ICANN to carry "out its activities in conformity with relevant principles of international law and applicable international conventions and local law."[6] The Bylaws provide enumerated "Core Values" to "guide the decisions and actions of ICANN."[7] The Core Values include "making decisions by applying documented policies neutrally and objectively with integrity and fairness" and "remaining accountable to the Internet community..." Article III of the Bylaws, "Transparency," provides that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

11. Article IV of the Bylaws, "Accountability and Review" sets out two formal review tiers for persons materially affected by an action of ICANN – A Reconsideration Request and the Independent Review Process.[8] The stated purpose is to hold ICANN "accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values."

12. The Bylaws provide that a Reconsideration Request is available to review "one or more staff actions or inactions that contradict established ICANN policies" as well as Board actions or inactions where the Board failed to consider material information

[5] The exhibits are cited herein as: "C-[number]" (IRP Petition); "C-ER-[number]" (Emergency Request); "I-[number]" (ICANN Merits Response); "I-ER-[number] (ICANN Emergency Response.)

[6] Articles ¶4

[7] Bylaws, Article 1, §2

[8] In addition to the these formal review processes, the Bylaws provide complainants a voluntary period of "cooperative engagement" with ICANN prior to initiating an IRP for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. Upon the filing of an IRP request, the Bylaws provide for a further voluntary "conciliation period" for the purpose of narrowing the issues that are stated within the IRP request. ICANN also maintains an ombudsman program.

or relied on false or inaccurate material information.[9] ICANN's board has designated its Board Governance Committee ("BGC") to review and consider Reconsideration Requests.[10] The Bylaws do not provide a standard of review for Reconsideration Requests. At the hearing, ICANN's counsel stated that the BGC has determined that review of staff or agent action on a Reconsideration Requests would be limited to whether there were any "procedural irregularities" in the activity reviewed. Counsel stated that the BGC's Determination on Dot Registry's Request applied that standard. ICANN's Merits Response asserts here that the Board made a "considered decision" not to review the substance of any agent or staff action on a Reconsideration Request.[11]

13. The Independent Review Process is available to any "person materially affected by a decision or action by the Board that he or she asserts is inconsistent" with the Articles or the Bylaws.[12] Requests for Independent Review are referred to an Independent Process Panel which is "charged with comparing contested actions of the Board" to the Articles and Bylaws.[13]

14. The Government Advisory Committee ("GAC") is an Advisory Committee to the Board, comprised of representatives of national governments, distinct economies and multinational and treaty organizations, whose role is to provide advice on ICANN's activities as they relate to concerns of governments. [14]

The New gTLD Program

15. The ICANN Board delegated authority to its New GTLD Program Committee ("NGPC") to manage "any and all issues that may arise relating to the New gTLD Program," including the administration of applications to register new gTLDs.[15] In June, 2011 ICANN published its "gTLD Applicant Guidebook" ("AGB"), a detailed handbook which sets out policies and procedures to guide applicants seeking to register new gTLDs.[16]

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[9] The BGC determined that the reconsideration process is available also to challenge expert determinations rendered by panels formed by third party service providers. See C-ER-18 at fn. 41
[10] Article IV, §2 (3); The BGC is empowered to request additional information and to conduct a meeting with the requester. Article IV, §2 (12)
[11] ICANN Merits Response at 21
[12] Bylaws Article IV, §3 (2)
[13] Id. The section also states that the IRP Panel "must apply a defined standard of review" "focusing on" whether the Board acted without conflict of interest and exercised due diligence and care in having a reasonable amount of facts in front of them and exercised independent judgment in taking the decision, believed to be in the best interests of the company." Article IV, §3 (4)
[14] Article XI, §2 (1)
[15] Resolution of 10 April 2012, cited at Merits Response R-3.
[16] C-ER-6

16. The AGB provided for ICANN to appoint Community Priority Panels to Review Community applications.[17] ICANN engaged the Economist Intelligence Unit ("EIU") to conduct the CPE panels. EIU is the "business information arm" of the Economist Group, publisher of the Economist magazine.[18]

17. The AGB provides that applications for a gTLD "operated for the benefit of a clearly-defined community" may be designated as "community-based." All applications not so designated are designated as "standard" applications. An applicant for a community-based gTLD is expected to i) demonstrate an ongoing relationship with a clearly delineated community; ii) have applied for a gTLD string strongly and specifically related to the community; iii) have proposed dedicated registration and use policies... including appropriate security verification procedures; and iv) have the application endorsed in writing by one or more established institutions representing the community it has named.[19]

18. The GAC recommended in its Beijing Communiqué of 11 April 2013 that certain categories of gTLDs be designated "Category I" on the basis that they are "likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm." It recommended a series of "safeguards" to be applied to this category.[20] GAC identified the corporate identifier strings as Category I gTLDs. By Resolution of 5 February 2014, ICANN's NGPC classified the corporate identifier strings as involving a "highly-regulated" sector and required applicants for these strings to implement certain "Safeguards as Public Interest Commitments." One such safeguard was to mandate that Registrars include in their Registration Agreements a provision requiring any applicant for a corporate identifier string to "represent that it possesses any necessary authorizations ...for participation in the sector associated with the Registry TLD string."[21]

19. The AGB provides a "string contention process" to resolve competing applications to register the same gTLD.[22] Applications determined to have Community status are entitled to priority over all Standard applications. In the case of competing applications within either the Community or the Standard category, the string contention process culminates in an auction of the gTLD. The AGB denominates the auction the "Mechanism of Last Resort." It states the expectation that "most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants."[23]

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[17] AGB 4.2.2
[18] C-16
[19] AGB 1.2.3
[20] C-10.
[21] I-3 at 8.
[22] AGB 4.1
[23] AGB 4.3

20. ICANN issued Auction Rules for New gTLDs ("the Auction Rules.") Auction Rule 8 provides that no auction may take place unless all active applications in the contention set have "no pending ICANN Accountability Measures."[24]

21. At the hearing, ICANN's counsel stated that ICANN has applied Auction Rule 8 to preclude all auctions during the pendency of Reconsideration Requests. ICANN has determined to make case-by-case determinations whether to schedule an auction during the pendency of an IRP request. Counsel stated that ICANN determined to proceed with the auction in this case because it deemed Dot Registry's position in the IRP to be "frivolous." ICANN's counsel stated that the question of whether to proceed with an auction while an IRP is outstanding has arisen in only a few instances.[25]

22. The new gTLD application form included in the AGB contains a mandatory broad waiver of any remedies other than those expressly set forth in the Bylaws:

> Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application and irrevocably waives any right to sue or proceed in court or any other judicial fora on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.[26]

23. The waiver contains a proviso "that applicant may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application." ("the Proviso")

Review of Dot Registry's CPE Applications

24. Dot Registry submitted separate applications for the .INC, .LLP and .LLC gTLDs on or about 13 June 2012, designating each as a community-based application. Dot Registry identified the relevant "community" in its .INC application as "the Community of Registered Corporations."[27] Dot Registry's application stated the "Mission/Purpose" of its proposed gTLD to be "authenticating each of our registrant's right to conduct business in the United States." It cited to the "rise of business identity thefts online which in turn creates a loss of consumer confidence" and an NASS White Paper on Business Identity Theft. Dot Registry stated its

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[24] ICANN Auction Rules for New gTLDs, Version 2014-11-03 at 1.

[25] In at least one such instance, the IRP Panel enjoined the auction during the pendency of the IRP. See Decision on Interim Measures of Protection, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (C-ER-60) It appears that ICANN has agreed to put other contention sets on hold pending IRPs. See IRP Request at fn. 73.

[26] See Top Level Domain Application – Terms and Conditions at AGB Module 6 (C-5)

[27] The .LLC and .LLP applications had similar community descriptions. Dot Registry submitted the only community based application as to each of the corporate identifier strings.

intention to verify the identity of each registrant through the records of Secretaries of State "by the creation of a seamless connection and strong communication channel between our organization and the governmental authority charged with monitoring the creation and good standing of corporations." [28] It claimed to be a "corporate affiliate" of the NASS and cited support from "various Secretaries of States offices."[29]

25. The record before the CPE Panel included letters from several Secretaries of State expressing concerns about fraudulent use of corporate entities and business identity theft online, stating the need to "protect consumers and the community of interest that exists among validly registered U.S. companies and ...secretaries of state ...that are responsible for administering the nation's legal entity registration system."[30] The NASS in a letter dated 1 April 2014 to EUI affirmed its position that "the community application process is the only option to ensure that safeguards and restrictions to protect U.S. businesses can and will be enforced...." It noted Dot Registry's work as the only community applicant with NASS and Secretaries of State over "several years" and urged that "Any award by ICANN should be to the applicant that will commit to maintaining and enforcing a system with regular, real-time verification of each company's legal status, in accordance with state law."[31]

26. EIU issued its CPE panel determinations of Dot Registry's applications on 11 June 2014. The panels awarded each of Dot Registry's applications a score of 5 of the available 16 points. Since a score of 14 was required to achieve Community Priority status, each of Dot Registry's applications for priority failed.

27. Among EIU's most significant findings in its evaluation of Dot Registry's applications were that the applications failed to identify a "community" within the AGB definition because businesses "typically do not associate themselves with being part of the community as defined by the applicant" and instead "Research showed that firms are typically organized around specific industries, locales and other criteria not related to the entities' structure...." EIU also found that the Secretaries of State could not represent the community Dot Registry stated because they "are not mainly dedicated to the community as they have other functions beyond processing corporate registrations." [32]

28. Dot Registry applied for reconsideration of the CPE Panel determination on 25 June 2014. Dot Registry cited numerous instances in which it alleged EUI mismanaged the CPE process, as well as scoring errors in each of the four categories by which

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[28] C-ER-12 at 7-9.
[29] Id. at 15.
[30] C-ER 18 at Annex 1 (letter dated 20 March 2012 from Jeffrey W. Bullock, Secretary of State of the State of Delaware to ICANN.) The FTC Office of International Affairs expressed similar concerns about the need for a "proactive approach ...to combat fraudulent websites" in a letter dated 29 January 2014. Id.
[31] C-ER 18 at Annex 1
[32] C-18, 19, 20

EIU evaluated the applications. Dot Registry also asserted that EIU had a conflict of interest in respect to the corporate identifier strings. NASS was a co-Requester on the face of the Reconsideration Request Form.[33]

29. The BGC denied Dot Registry's Reconsideration Request in a written Determination dated 24 July 2014. The BGC did not list NASS on its Determination and did not discuss NASS or the interests it asserted in the body of its Determination. The BGC stated that it had not evaluated the CPE Panels substantive conclusions that Dot Registry's applications did not prevail in the CPE process. Rather its review was limited to whether the Panels violated any established policy or procedure.[34] It found that Dot Registry had not demonstrated any procedural violation or that it had been adversely affected by the challenged actions of the Panels.

The Parties' Contentions

Dot Registry's contentions regarding the scope of the IRP process

30. The IRP Request alleges broad and detailed errors in EIU's management of the CPE process, including "conflating applications, deducting points when requisite criteria were admittedly met, engaging in double-counting, failing to verify statements of support and objection, engaging in unprofessional and arbitrary harassment and conclusively disposing of the rights of applicant based upon undisclosed and unverifiable "research."[35]

31. The IRP petition attributes responsibility for EIU's alleged mismanagement of the CPE process and EIU's alleged errors in the scoring of Dot Registry's applications to ICANN and its Board. It asserts that ICANN failed to operate in a transparent and accountable manner, consistent with applicable principles of international law and its Bylaws, by allowing EIU to act in an "arbitrary and unprofessional manner" in numerous respects, and by failing to ensure that its policies were implemented accurately and in a transparent, unbiased manner and failing to address the EIU's violations when brought explicitly to the Board's attention.

32. The IRP petition further alleges that ICANN violated the forgoing obligations by appointing EIU which, it alleges, lacked the "requisite skill and expertise" to carry out the CPE review, and had a conflict of interest in relation to the corporate identifier strings.[36]

Dot Registry's contentions regarding the Reconsideration Request

33. Dot Registry asserts that the Board, acting through its BGC, failed to exercise diligence and care on Dot Registry's Reconsideration Request. The BGC also mischaracterized Dot Registry's claims as challenges to the substantive

[33] C-ER-18
[34] C-ER-17 at 8
[35] IRP Request at 23
[36] Id.

determinations of the CPE panels rather than acknowledging that its challenges were to violations of established policies and procedures. ICANN "deliberately ignored" the role of the NASS and NASS' participation as a co-Requester on Dot Registry's Reconsideration Request. [37]

Dot Registry's contentions regarding the Board's response to GAC advice

34. Dot Registry further avers that ICANN breached its Articles of Incorporation and Bylaws by failing to address adequately the GAC Beijing Communiqué findings relating to the risks inherent in the corporate identifier strings. [38]

ICANN's contentions regarding the scope of the IRP process

35. ICANN alleges that Dot Registry cannot succeed in the IRP because IRPs are not a vehicle to challenge third party reports such as the EIU scoring of Dot Registry's application. The creation or acceptance of CPE panel reports is not Board action and the fact that a CPE panel may have come to a particular conclusion on an application is not evidence that the panel lacked skill and expertise and does not constitute a violation of ICANN's Articles or Bylaws. The IRP Panel is tasked with providing a non-binding opinion, applying a defined deferential standard of review, as to whether challenged Board actions violated ICANN's Articles or Bylaws.[39]

36. Reserving its position regarding the proper scope of of an IRP (and a Reconsideration Request), ICANN nonetheless responded to Dot Registry's claims in relation to EIU's management of the CPE. Among other things, ICANN asserts i) the BGC properly found no evidence that the CPE panel had mismanaged the support and opposition letters relating to Dot Registry's application ii) Dot Registry's separate applications were separately evaluated to the extent required notwithstanding some degree of permitted collaboration between CPE panels; iii) the CPE panels were authorized to conduct independent research and not required to make any disclosure in relation thereto; and iv) there is no evidence that EIU's alleged conflict of interest ever was brought to the attention of ICANN's board since it is the obligation of third party providers, not ICANN, to address potential conflicts of interest.[40]

37. Any error in EIU's CPE scoring caused no harm to Dot Registry. Since Dot Registry received only 5 of the 14 points required to achieve community priority status, the errors it alleges would not have changed the result of the CPE review.

ICANN's Contentions Regarding the Reconsideration Request

38. ICANN asserts that the BGC acted properly in denying Dot Registry's Reconsideration Request. The BGC is not required on a reconsideration petition to

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[37] IRP Request at 17-19, 24

[38] GAC also criticized ICANN for adopting the "looser requirement" of requiring registrants to represent their status, as opposed to the "validation and verification" process it had recommended in the Beijing Communiqué. C-13, 14.

[39] IR at 8.

[40] ICANN Merits Response at 7.

perform a substantive review of CPE panel reports. Rather, its role is to review whether the panel violated any policy or procedure in scoring the application.[41] The BGC's failure to list NASS as a co-Requester on BGC's determination of the Reconsideration Request was inadvertent and "had no effect on the substance of the BGC's determination."

ICANN's contentions regarding the Board's response to GAC advice

39. ICANN argued that it instituted additional safeguards applicable to the operation of the corporate identifier strings, responsive to the recommendations of the GAC Beijing Communiqué, which will be included as non-negotiable terms of binding Registry Agreements. Dot Registry lacks standing to raise harm to consumers or other businesses and the CPE review of its application was not affected by the content of any other application.[42]

Relief Sought

40. Dot Registry's application seeks interim measures
    - Enjoining ICANN from taking any further steps towards delegating the corporate identifier strings until the conclusion of the IRP proceedings commenced by Dot Registry; and
    - Requiring ICANN to placed the contention sets and each active application for .INC, .LLC and .LLP "on hold" and designate them "ineligible for auction" pending the outcome of the IRP proceedings commenced by Dot Registry.

41. On December 15, 2014, Dot Registry's counsel submitted a letter addressing its interactions with ICANN regarding the deadline to submit an "Auction Date Advancement/Postponement Request Form" pursuant to Auction Rule 10. It sought to extend the emergency relief requested in its application to "freeze all deadlines and actions in connection with the auction or disposition of the corporate identifier strings." ICANN's counsel responded at the hearing.

Issues To Be Decided

I find that the following are the issues to be decided on this application:

42. Has Dot Registry established the existence of one or more rights potentially requiring protection by means of interim measures?

43. Is there an urgent need for interim measures?

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[41] ICANN Merits Response at 17-18; statement of ICANN counsel at hearing that BGC review is limited to "procedural irregularities"

[42] ICANN Merits Response at 13-15

44. Are interim measures necessary, including i) has Dot Registry shown a risk of irreparable injury in the absence of such measures; and ii) does the potential harm to Dot Registry from the withholding of interim measures outweigh the potential harm to ICANN or other parties by imposing interim measures?

45. Has Dot Registry demonstrated the existence of substantial questions going to the merits in the underlying IRP?

Analysis

Rights subject to protection

46. I find the preservation of the IRP as a process that is capable of providing an effective remedy in the IRP to be a substantial right at issue on this application. ICANN's Bylaws provide a narrowly tailored tiered dispute resolution process with a defined and limited set of remedies. The stated core values of fairness and accountability, together with the Bylaw commitment to "procedures designed to ensure fairness," reinforce the importance of preserving an opportunity for the IRP Panel to provide an effective remedy to the extent the Panel deems relief to be required.[43]

47. The terms and structure of the litigation waiver likewise reinforce the rights of applicants in the New gTLD registry process to a meaningful IRP process with the potential for an effective remedy. The structure of the broad waiver, coupled with the Proviso, suggests that the availability of "any accountability mechanism... for the purposes of challenging any final decision made by ICANN with respect to the application" is the *quid pro quo* for the relinquishment of substantial rights

48. The underlying substantive rights at issue in the IRP, priority registration rights available to a successful applicant in the Community Priority Evaluation process, also are substantial and potentially subject to preservation on the current application.

Urgency

49. I find the need for interim measures to be urgent since ICANN has stated its unequivocal intention to auction registry rights to the corporate identifier strings on January 21, 2015. Consummation of the procedures set out in the Auction Rules will confer unconditional and irrevocable rights to the prevailing party.

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[43] I find the preservation of an opportunity for the IRP Panel to rule before an irrevocable auction of the corporate identifier strings takes place to be a substantial right, whether the IRP Panel determination is merely advisory, as ICANN contends, or is binding, as some authority has found. See *Declaration on the IRP Procedure, DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (holding that IRP Panel decision will be binding); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 at 22 (C-ER-38) (holding preservation of the effectiveness of a potential future award to be a right subject to protection by provisional measures)

Accordingly, the need for interim measures is urgent to prevent the imminent dissipation of substantial rights.[44]

Necessity

Irreparable Injury

50. Recognizing that a common basis for the denial of preliminary relief is the availability of monetary damages to compensate any claimed injury, I consider here the nature of the injury Dot Registry claims is threatened. Commonly stated in U.S. jurisprudence as "irreparable injury," the Model Law requirement is that the asserted harm is "not adequately repaired by an award of damages. "[45]

51. The potential harm to Dot Registry is the irrevocable loss of the priority registration rights it sought to obtain and the ongoing operation of the corporate identifier strings under the terms and conditions set out in its application. The loss of those rights would not be compensable by monetary damages.

52. ICANN has not claimed here that monetary damages will be available to compensate Dot Registry if it is determined in the IRP process that Dot Registry's rights were violated, but in the meantime another bidder has obtained registry rights to the corporate identifier strings in the auction. Emergency relief is necessary to preserve the *status quo* of the corporate identifier strings remaining undelegated.

Balance of Harms

53. The UNCITRAL Rule requires a finding that the harm "substantially outweighs the harm that is likely to result to the party against whom the measure is directed..." [46] I find that the balance of hardships as between the parties from the grant or withholding of interim measures tips decidedly in favor of Dot Registry. As discussed, Dot Registry has at stake significant procedural and substantive rights, which may be irrevocably lost and cannot be compensated with monetary damages.

54. While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. [47] ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.

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[44] In light of the interim measures provided here, I find that the relief requested in Dot Registry's letter of December 15 is not urgent. Of course, Dot Registry may renew that application to the IRP Panel if it chooses to do so.

[45] UNCITRAL Arbitration Rule Article 26 (3)(a)

[46] Id.

[47] At least some of the timing of the IRP process and the review by ICANN's board of the IRP panel's determination will be within ICANN's control. The IRP process itself is quite limited and streamlined.

55. Moreover, it appears that the requested relief does not differ greatly from that provided in ICANN's Auction Rule 8 which provides on its face that no auction will be scheduled while an accountability measure is pending. While ICANN at the hearing stated that it has applied a different standard when the pending accountability measure is an IRP, its claim of hardship is at least tempered by the plain language of its own rule.

56. ICANN argues that competing applicants for the strings will suffer substantial harm if further processing is delayed. It does not specify such harm beyond noting that a number of new gTLDs have been delegated and that there is "growing competition" in the gTLD space. However, Dot Registry's December 15 letter stated, and ICANN's counsel confirmed at the hearing, that all of the contending applicants for the corporate identifier strings, save one applicant for .INC, already have submitted formal Auction Rule 10 requests to postpone the January 21 auction date.[48]

57. I also find that there is a significant public interest element at stake on this application. NASS, an association of public officials which supported Dot Registry's application and was a co-Requester on its Reconsideration Request, asserted that safeguards are important to protect consumers and that the Community Application process is the most appropriate to secure the necessary safeguards. The FTC and ICANN's own Government Advisory Committee raised similar concerns. The GAC expressed continuing concerns even after ICANN implemented a set of safeguards after the Beijing Communiqué. It is not appropriate to determine on this emergency application the merits of Dot Registry's proposals for safeguards to protect the interests it asserts, the sufficiency of the safeguards ICANN states it would imposed instead or Dot Registry's standing to challenge this aspect of ICANN's actions. However, the expressed interest of accountable public officials in the subject matter of the IRP, coupled with an identified potential risk to the public interest, weighs in favor of granting the application.

Dot Registry's Possibility of Success on the Merits

58. ICANN relies primarily on this factor, arguing that it determined to move forward with the auction process because it deems Dot Registry's IRP "frivolous and unlikely to succeed on the merits."

59. UNCITRAL Arbitration Rule 26 (3) (b) conditions the grant of interim measures on a showing of a "reasonable possibility that the requesting party will succeed on the merits of the claim." The parties are not in full agreement on the strength of the required showing. Where, as here, the balance of hardships tips decidedly in favor of the party seeking relief, some courts have held that the required showing on the

[48] Auction Rule 10 permits a delay of up to two scheduled auction dates in ICANN's discretion if all applicants in a string contention so request. Dot Registry asserts that did not file a timely Auction Rule 10 request to postpone the January 21 auction date because it was seeking the same relief on this application and it did not want to use up the sole Auction Rule 10 request permitted by the ICANN rules.

merits maybe somewhat relaxed.[49] For purposes of this application, I adopt ICANN's formulation that the requesting party must, at a minimum, show that it has raised "substantial questions going to the merits" on its underlying claim, a formulation that recognizes the flexible interplay among the various factors.[50]

60. I find that Dot Registry has raised "substantial questions going to the merits" on this application. I do not attempt a comprehensive listing of such questions, but identify here some examples:

> ***i) BGC Determination of the Reconsideration Request***
> ICANN states in its Merits Response, and emphasized at the hearing, that the Board made a "considered decision" not to perform any substantive reviews of third party evaluators' reports in the Reconsideration process. Rather, the BGC consistently is applying a policy of reviewing CPE determinations solely for procedural irregularities. Dot Registry has raised a substantial question going to the merits whether the standard the BGC applied to its Reconsideration Request is consistent with ICANN's Bylaws and the New gTLD application form.
>
> ***ii) Failure to recognize NASS as a co-Requester on Dot Registry's Reconsideration Request***
> ICANN concedes that the BGC "inadvertently failed to list the NASS as a co-Requester," but argues that this "omission has no effect on the substance of the BGC's Determination."[51] I cannot conclude at this preliminary stage that the omission in the heading of the BGC Determination was harmless error, given that the text of the Determination likewise lacks any reference to NASS or the positions that it (as well as the GAC and the FTC) asserted in respect to such issues as the existence of a cognizable community and the importance of invoking the Community process in relation to the corporate identifier strings.
>
> **(iii)** ***Scope of IRP review as applied to new gTLD application***
> ICANN's principal defense to the IRP is that Dot Registry cannot succeed because most of its claims are no more than a challenge to the substance of EIU's evaluation of its applications. ICANN asserts that IRPs are not a forum for challenging third party expert reports, which it contends, involve no board action.[52] I find that Dot Registry has raised a colorable argument that the term "Board action," when read against the broad accountability and review provisions in Articles III and IV of the Bylaws, and against the Proviso, should be construed to encompass some aspects of Dot Registry's claims in respect to the selection of EUI and the processes EIU applied to

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[49] See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)
[50] Id.
[51] ICANN Merits Response at fn. 25
[52] ICANN Merits Response at 10; ICANN Emergency Response at 9

the CPE review of Dot Registry's applications.[53] This substantial question of scope and construction will be for the IRP Panel to determine.

iv) Board's response to the recommendations of the GAC's Beijing Communiqué

ICANN contends that it responded adequately to the GAC's recommendations as to special safeguards required for the corporate identifier strings. It further contends that Dot Registry lacks standing to question the Board's response. The NASS nonetheless urged both EIU and the BGC to consider the importance of the collaboration of NASS and its members with Dot Registry over several years to develop a "regular, real time verification system."[54] Dot Registry has raised substantial questions going to the merits as to its standing to address the issue and, if it is found to have standing, as to the adequacy of the Board's responses as a substitute for the safeguards proposed in Dot Registry's application.

iii) EIU's Conduct of the CPE

If the IRP Panel determines that review of any aspect of EIU's management of the CPE process (or the BGC's review thereof) is within the scope of the IRP, I find that Dot Registry has raised substantial questions going to the merits in relation to some of the processes EIU applied in the CPE panel review. These questions include whether each of Dot Registry's applications was independently evaluated to the extent required by the AGB and whether EIU made sufficient disclosure in relation to its independent research to enable Dot Registry to obtain a meaningful review of its findings at the Reconsideration stage. [55]

Conclusion

61. I conclude that emergency measures of protection are required to preserve the pending IRP as a process that is capable of providing a meaning remedy should Dot Registry prevail in whole or in part. The IRP Panel will not be in a position to award effective relief should it find in favor of Dot Registry on some or all of its claims if ICANN previously has delegated to another party in an auction irrevocable and unconditional rights to the corporate identifier strings.

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[53] I note that even the "deferential" IRP review standard ICANN cites requires examination of whether the Board exercised "due diligence and care in having a reasonable amount of facts in front of them." Bylaws Article IV, §3.4; See also *Declaration of the Independent Review Panel in the Matter of an Independent Review Process between ICM Registry, LLC and ICANN* ("[T]he 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.") (C-ER-5)

[54] C-ER-18 at Annex 1

[55] I cannot conclude on this preliminary application that the errors Dot Registry alleges in respect to EIU's management of the CPE process would be harmless individually or in the aggregate even if sustained.

62. Mindful that interim measures are not to be imposed lightly, I find the least intrusive measure adequate to protect the interests identified to be to require ICANN to apply its Auction Rule 8 in this IRP. Specifically, ICANN will be ordered to refrain from scheduling an Auction for the corporate identifier strings while the current IRP is pending.

Costs of the Application for Emergency Relief

63. I have carefully reviewed all of the facts and circumstances of this application for emergency relief and carefully considered the allocation of costs. I have considered Dot Registry's request for an award of costs, including its legal fees and expenses, and ICANN's response to that request. Based on such careful review, I find it appropriate that the costs of the application should be borne as incurred, the Emergency Independent Review Panelist's compensation should be shared equally and each party should bear its own attorneys' fees and expenses.

Order

Upon consideration of the parties' submissions, including the evidence submitted therewith, and the arguments made by counsel, it is hereby ORDERED as follows:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that that the award of relief is appropriate.

2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC until the conclusion of the pending Independent Review Process.

3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Emergency Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on Claimant's Request for Emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied.

Dated: December 23, 2014
New York, New York

Mark C. Morril
Emergency Independent Review Panelist

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

On this 23rd day of December, 2014, before me came Mark C. Morril, known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Date: December 23, 2014

Notary Public

JEFF DUMONT
Notary Public - State of New York
NO. 01DU6277064
Qualified in Kings County
My Commission Expires 02/25/17

Legal Authority CA-5

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
A Division of the American Arbitration Association (AAA)
CASE # 50 117 T 1083 13

In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

Between: **DotConnectAfrica (DCA) Trust**;
("Claimant")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 2005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

DECISION ON INTERIM MEASURES OF PROTECTION

Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

12 May 2014

BACKGROUND

1. DotConnectAfrica ("DCA") Trust ("Claimant"), is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.

2. In March 2012, DCA Trust applied to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), an internet resource available for delegation under that program.

3. ICANN ("Respondent") is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICCAN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.

4. On 4 June 2013, the ICANN Board New gTLD Program Committee ("NGPC") posted a notice that it had decided not to accept DCA's application.

5. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee ("BGC"), which denied the request on 1 August 2013.

6. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN's Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process ("CEP") to try and resolve the issues relating to DCA Trust's application. Despite several meetings, however, no resolution was reached.

7. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN's Bylaws.

INDEPENDENT REVIEW PROCESS

8. According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process invoked by DCA Trust in October 2013 and

described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

> "(1) ICANN's breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"); and (2) ICANN's wrongful decision that DCA's application for .AFRICA should not proceed [...]."[1]

9. According to DCA Trust, "ICANN's administration of the New gTLD Program and its decision on DCA'S application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN's Articles of Incorporation and Bylaws." [2] DCA Trust also advanced that "ICANN's violations materially affected DCA's right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program."[3]

10. In its Response to Claimant's Amended Notice submitted to DCA Trust on 10 February 2014[4], ICANN submitted that in these proceedings, "DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee ("NGPC"), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN's Governmental Advisory Committee ("GAC") that DCA application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC's advice. DCA also argues that ICANN's subsequent decision to reject DCA's Request for Reconsideration was improper."[5]

11. ICANN argued that the challenged decisions of ICANN's Board "were well within the Board's discretion" and the Board "did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook ("Guidebook") that the Board adopted for implementing the New gTLD Program."[6]

12. Specifically, ICANN also advanced that "ICANN properly investigated and rejected DCA's assertion that two of ICANN's Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African

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[1] Claimant's Amended Notice of Independent Review Process, *para.* 2.

[2] *Ibid.*

[3] *Ibid.*

[4] ICANN's Response to Claimant's Amended Notice contains a typographical error, it is dated "February 10, 2013" rather than 2014.

[5] ICANN's Response to Claimant's Amended Notice, *para.* 4

[6] *Ibid. para.* 5

countries issued "warnings" to ICANN regarding DCA's application, a signal from those governments that they had serious concerns regarding DCA's application; following the issuance of those warnings, the GAC issued "consensus advice" against DCA's application; ICANN then accepted the GAC's advice, which was entirely consistent with ICANN's Bylaws and the Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."[7]

13. In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."[8]

REQUEST FOR INTERIM MEASURES OF PROTECTION

14. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules. In addition, DCA Trust indicated that it believed it had the right to seek such relief because there is no standing panel (as anticipated in the Supplementary Procedures for ICANN Independent Review Process), which would otherwise hear requests for emergency relief.

15. In response, in an email dated 5 February 2014, ICANN wrote:

> "Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA's IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others."[9]

16. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted to ICANN on 28 March 2014, DCA Trust argued, *inter alia*, that, "in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so."[10]

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[7] *Ibid.*

[8] *Ibid. para.* 6

[9] ICANN counsel's email to DCA Trust counsel dated 5 February 2014.

[10] Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 3

17. DCA Trust also argued that "on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA's competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN's website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*"[11]

18. According to DCA Trust, that same day, "ICANN then responded to DCA's request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR's application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith."[12] DCA Trust also argued that on 25 March 2014, as per ICANN's email to the ICDR, "ICANN for the first time informed DCA that it would accept the application of Article 37 [of the ICDR International Dispute Resolution Procedures, amended and effective June 1, 2009 ("ICDR Rules")] to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process."[13]

19. In its Request, DCA Trust argued that it "is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA's only competitor – which took actions that were instrumental in the process leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of it's rights under ICANN's own constitutive instruments and international law."[14]

20. Finally, DCA Trust requested, among other things, the following interim relief:

> a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...][15]

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid., para.* 4.

[14] *Ibid., para.* 5.

[15] *Ibid., para.* 6.

21. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection submitted on 4 April 2014, ICANN urged that DCA's request for a stay be denied. ICANN also reproached DCA for having waited five months before initiating its Request for Interim Measures of Protection pursuant to Article 37 of the ICDR Rules.

22. ICANN further argued that Claimant's Request for Interim Relief ought to be denied because "DCA has not demonstrated a reasonable possibility that it will succeed on the merits of this IRP, which the law requires DCA to demonstrate."[16]

23. According to ICANN, "DCA's decision to wait five months before seeking a stay reflects the weakness of DCA's claims and the lack of any corresponding irreparable harm to DCA. This is compounded by the fact that DCA has done nothing to try to expedite these proceedings. To the contrary, DCA has failed to file its fees timely, it sought multiple extensions of time to file its papers, and it requested a very leisurely amount of time for the parties to select the IRP Panel. ICANN, and not the DCA, has been the party trying to expedite these proceedings, and DCA has resisted at every turn."[17]

24. DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, initially scheduled for a hearing on 14 April 2014 before an emergency arbitrator pursuant to ICDR Rules 21 and 37, was instead referred to this Panel on 13 April 2014 for review and consideration pursuant to Article 37.6 of the ICDR Rules.

25. On 22 April 2014, this Panel held an organizational telephone conference call with the Parties. During that call, it was agreed, among other things, that the telephone hearing for DCA's Request for Interim Measures of Protection will be heard on 5 May 2014, and that ICANN would not take any further steps that would in any way prevent this Panel from granting the full relief requested by DCA Trust in its Request. These and a number of directions given by the Panel to the Parties were reflected in a Procedural Order No. 1 issued on 24 April 2014.

26. On 5 May 2014 this Panel heard the Parties' submissions on their respective written submissions and the Panel's questions sent to them in advance on 2 May 2014.

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[16] ICANN's Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 3.

[17] *Ibid., para.* 30.

DECISION AND REASONS OF THE IRP PANEL

27. After having carefully read DCA Trust's written submissions and the responses filed by ICANN, and after listening to the Parties' respective oral presentations made by telephone on 5 May 2014, for reasons set forth below, the Panel is unanimously of the view that a stay ruling in the form described below is in order in this proceeding and that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its final decision regarding the same.

28. The Panel finds that interim relief in this proceeding is warranted based on two independent and equally sufficient grounds.

29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:

> "There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

31. In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN's failure to create the standing panel.

32. Whether the Panel's decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN's unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important

responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

> "[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:
>
> > 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial to public interest.
> >
> > [...]
> >
> > 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.

34. Second, interim relief in this case is independently warranted for reasons unrelated to ICANN's role in creating the need for such relief as explained above.

35. DCA Trust argues that four criteria must be satisfied before interim relief is granted under international law and in international proceedings: urgency, necessity, protection of an existing right, and existence of a *prima facie* case on the merits, without the necessity of prejudging the matter.

36. ICANN agrees with the first three criteria identified by DCA Trust, but disagrees with the fourth. For ICANN, the Panel needs to find more than a *prima facie* case on the merits before ordering interim relief in this proceeding. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, ICANN submits that the standard must be the one set out in article 17(A)(1)(b) of the UNCITRAL *Model Law on International Commercial Arbitration*. ICANN explains:

> "In fact, it is generally accepted under both international and U.S. law that, in order to demonstrate entitlement to interim relief, the party seeking relief must <u>also</u> demonstrate a reasonable possibility of success on the merits. For example, Article 27 [*sic.*] (A)(1)(b) of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on International Commercial Arbitration states that a party requesting an interim measure must demonstrate

> that "there is a reasonable possibility that the requesting party will succeed on the merits of the claim." [...] Likewise, under U.S. law, a party seeking a preliminary injunction must at least demonstrate that "the likelihood of success is such that serious questions going to the merits were raised."[18]

37. The Panel agrees with the Parties that the four criteria listed above in paragraph 35 form a part of the criteria most commonly used by international and national courts and arbitral tribunals[19] to evaluate a party's request for interim relief. The Panel, however, does not see a distinction between the demonstration of "a prima facie case" or "a reasonable possibility that the requesting party will succeed on the merits of the claim". Like the International Law Association ("ILA"), the Panel is of the view that the demonstration of "a prima facie case" and "a reasonable possibility that the requesting party will succeed on the merits of the claim" are in reality one and the same standard.

38. Indeed, as the ILA recommended in its resolution of 1996[20], the granting of an interim relief should be available "on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law".

Urgency

39. Both DCA Trust and ICANN agree that urgency is one of the criteria that this Panel must consider before it decides to grant interim relief. DCA Trust in particular argues that the orders it requests are needed urgently, because:

> "[w]ithout the order compelling ICANN to stay processing of ZACR's application, DCA will suffer irreparable harm before the IRP process can be concluded... A request for interim measures of protection is considered urgent, if absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given. This standard is sometimes termed "imminent harm". In light of ICANN's response to DCA'S request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent ay effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received

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[18] *Ibid., para.* 21.

[19] By "most commonly used", the Panel means that this standard is used by international or regional courts and tribunals, but also by many domestic courts under their own laws.

[20] ILA Report of the Sixty-Seventh Conference, Helsinki, 1996, p. 202.

all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014."[21]

40. The Panel is satisfied that the urgency test is met in the present case. Indeed, DCA Trust argues, without being contradicted by ICANN, that in March 2014 the latter officially signed the registry agreement for the .Africa gTLD with ZACR, DCA Trust's competitor.

41. The urgency test is met as well when the Panel takes into consideration, ICANN's noncommittal email to it and DCA Trust of 23 April 2014, in which ICANN writes:

> "I am writing to follow up...with respect to the timing of the ultimate delegation by ICANN to ZA Central Registry of .AFRICA into the root zone...ICANN will not, as a practical matter, be able to conclude the delegation process prior to 15 May 2014. As a result, the schedule adopted by the Panel...would give ICANN the opportunity to consider the Panel's recommendation in the event the Panel recommends a stay." [Emphasis added]

42. The registry agreement being signed, the countdown for the launch of the .Africa gTLD could commence. ZACR announces on its website (https://www.registry.net.za/launch.php) that the launch should take place in June 2014. This Panel, even if it works very rapidly, will not be in a position to decide on the merits of DCA's Request for an Independent Review before June 2014. Therefore, there is absolutely no doubt in the Panel's mind that DCA Trust's need for interim relief in this matter is urgent.

Necessity

43. Both DCA Trust and ICANN agree that a test of necessity must be met before granting the requested interim relief. Indeed, in its Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, ICANN writes:

> "As DCA acknowledges in its Request, in order to show necessity under international law, it must demonstrate proportionality, *i.e.* that the harm it would occur in the absence of interim relief measures would "exceed [] greatly the damage caused to the party affected" by these measures. DCA contends that it would suffer serious harm in the absence of interim relief because the "operation of .AFRICA is a unique right" and "DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA." But DCA fails to acknowledge that, whatever its unilateral plans might have been, its

[21] Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 30.

actual probability of harm is greatly diminished by its scant probability of success on the merits. DCA also fails to note the substantial potential harm that ZACR could suffer if the processing of its application for, and the ultimate delegation of, .AFRICA is delayed."

"ICANN'S decision to proceed with the processing of ZACR's application for .AFRICA despite DCA's pending IRP is a reflection of ICANN's belief that: (i) DCA's IRP is frivolous and unlikely to succeed on the merits; and (ii) ZACR potentially could suffer substantial harm if the delegation of .AFRICA to it is further delayed."[22]

44. The Panel is of the opinion that the necessity test requires the Panel to consider the proportionality of the relief requested. The Panel thus must balance the harm caused to DCA Trust if a stay is not granted and the harm that would be caused to ICANN if interim relief were to be ordered. As explained by DCA Trust:

> "If [DCA Trust] is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate [...] By contrast, ICANN will suffer no similar harm...Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA. [Similarly, ZACR may receive the rights to "AFRICA even if DCA is permitted to compete with it pursuant to ICANN's rules and procedures for the new gTLD program.] The IRP is meant to be an expedited dispute resolution process. A slight delay in delegation is hardly an undue burden compared to the issues at stake."[23]

45. It is abundantly clear to the Panel from the facts as explained by both Parties in this case that if a stay is not granted and the registry agreement between ICANN and ZACR is implemented further, the chances of DCA Trust having its Request for an independent review heard and properly considered will be jeopardized.

46. The Panel considers that a stay in the implementation of the registry agreement between ICANN and ZACR is therefore proportionate and adequate to the particular circumstances of this case. Indeed, neither ICANN, nor ZACR will suffer from a few more months of delay if a stay of processing of ZACR's .AFRICA application is ordered. Indeed, neither ICANN nor ZACR has pointed to any specific prejudice or harm that it will suffer if DCA Trust's request for interim relief is granted. The same cannot be said about the

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[22] ICANN's Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 25 and 26.

[23] Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 27 and 29.

absence of such a relief for DCA Trust, which clearly would suffer irreparable harm if interim relief is not granted.

Protection of an existing right

47. DCA Trust has demonstrated, to the satisfaction of this Panel that, beyond the procedural rights it must enjoy to have its case heard, DCA Trust also enjoys, according to ICANN's own Bylaws, the right to have ICANN's Board decision reviewed by an independent panel, a right which will be lost if interim relief is not granted in this case. Indeed, Article IV, Section 3, paragraph 1 of ICANN's Bylaws unequivocally indicates that:

> "In addition to the reconsideration process described in Section 2 of this Article, 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." [Emphasis added]

Consequently, the Panel has determined that this criterion for the granting of interim relief in this case has also been met.

A reasonable possibility that the requesting party will succeed on the merits

48. This criterion was most heavily debated between the Parties. ICANN argues that DCA Trust does not have a case on the merits. In fact, ICANN goes as far as saying that Claimant's Request for an Independent Review Process is frivolous. Therefore, ICANN argues that DCA Trust has not demonstrated that there is a reasonable possibility it would succeed on the merits. In the Panel's view, by doing so, ICANN is asking for more than is required of DCA Trust at this stage of the independent review process.

49. Contrary to ICANN'S submissions, the Panel is of the view that it need not, at this stage, make a full appraisal of the merits of DCA Trust's case, given that the standard of proof for interim relief is lower than the standard of proof required for the evaluation of the merits of the case[24].

50. Having carefully examined the written submissions of the Parties, heard their oral submissions by telephone and deliberated on the various issues raised by them to date, the Panel is of the view that DCA Trust's case must proceed to the next stage.

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[24] See the report accompanying the ILA resolution of 1996 mentioned in footnote 2. On page 195, the report says that the "standard of proof propounded (...) was one which found wide acceptance" among all the countries studied, except one.

DECISION OF THE IRP PANEL

51. The Panel therefore concludes that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same.

52. The Panel reserves its views with respect to the other requests for relief made by DCA Trust in its Request for Emergency Arbitrator and Interim Measures of Protection. The Panel will consider the Parties' respective arguments in that regard if and when required by the Parties and if appropriate.

53. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Decision on Interim Measures of Protection has thirteen (13) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 12 May 2014.

Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.) as consented to by the Parties in their respective emails to the Panel of 7 May 2014

Legal Authority CA-6

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Internet Corporation for Assigned Names and Number's (ICANN) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process.*

Gulf Cooperation Council ("GCC")
Gulf Cooperation Council Building
Contact Information Redacted

(Claimant)

Represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld,
Contact Information Redacted

And

Internet Corporation for Assigned Names Numbers ("ICANN")
12055 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2

(Respondent)

Represented by Eric Enson, Rachel Zernik, and Jeffrey LeVee of Jones Day,
Contact Information Redacted
Contact Information Redacted

ICDR Case No. 01-14-0002-1065

INTERIM DECLARATION ON EMERGENCY REQUEST FOR INTERIM MEASURES OF PROTECTION

John A.M. Judge
Emergency IRP Panel
12 February 2015

I. INTRODUCTION

1. The Claimant Gulf Cooperation Council (the "Claimant" or "GCC") commenced this proceeding by filing a Notice of Independent Review with the International Centre for Dispute Resolution ("ICDR") on December 5, 2014 in accordance with the Bylaws of the Respondent, the Internet Corporation for Assigned Names and Numbers ("ICANN"). The purpose of this filing is to review the approval by ICANN of a new generic top level domain ("gTLD") for .PERSIANGULF and its proposed action to enter into a registry agreement with a third party for the award and operation of that top level domain under the New gTLD Program of ICANN. On the same day, December 5, 2014, the GCC also has sought emergency interim measures pursuant to the Rules of the (ICDR) for the appointment of an Emergency Arbitrator and also for an order compelling ICANN to refrain from taking any further steps to sign a registry agreement for .PERSIANGULF until the Independent Review Panel has been concluded.
2. Although the ICANN Bylaws and paragraph 12 of the Supplementary Rules for ICANN's Independent Review Process expressly preclude the grant of emergency measures of protection, ICANN has consented to the appointment of an Emergency IRP Panellist and to the consideration and disposition of GCC's Request for Emergency Measures in accordance with the Rule 6 of the ICDR Rules in effect June 1, 2014. By appointment dated 9 December 2014, John A.M. Judge was appointed by the ICDR as the Emergency IRP Panellist to consider the Claimant's Request for Emergency Measures.
3. The applicant for the proposed gTLD .PERSIANGULF is a private Turkish company which is not a party to the Independent Review Process nor to this Request for Emergency Measures of Protection. However in resisting the application for emergency measures, counsel for ICANN advanced not only the interests of ICANN but also those of that applicant which is seeking to secure a registry agreement for the proposed domain in dispute.
4. The Emergency IRP Panellist has carefully reviewed the following written submissions, evidence and authorities filed by the Claimant and the Respondent:
    a. The Notice of Independent Review and the accompanying Request for Independent Review Process, both dated 5 December 2014, with Annexes 1-34 (392 Pages) (the "Claimant IRP Request") and the Expert Report of Steven Tepp filed by the GCC;

b. The Request for Emergency Arbitrator and Interim Measures of Protection also dated 5 December 2014, with Annexes 1 - 18 (269 pages), filed by the GCC (the "Claimant ER Request") ;

c. ICANN's Response to the Request for Emergency Relief dated 17 December 2014 with Annexes R-ER-1-18 (approximately 665 pages) (the "ICANN Response");

d. The Reply of GCC dated 22 December 2014 with the Witness Statement of Abdulrahman Al Marzouqi signed 22 December 2014, with attached letter exhibit (the "Claimant Reply" or the "Reply");

e. ICANN'S Cooperative Engagement Process provided by counsel for ICANN on 23 December 2014.

Oral submissions from counsel for each party were also received by way of telephone conference call on 23 December 2014.

5. Based on the review of these materials, filed, and the oral submissions, this Emergency Panellist is satisfied for the reasons more fully set out herein that interim relief is warranted and therefore hereby declares on an interim basis that ICANN shall refrain from taking any steps to sign a registry agreement for the new gTLD .PERSIANGULF, until further order by an Independent Review Panel to be constituted, such declaration being expressly conditional on the terms and conditions as set out in paragraph 96 hereof.

II. BACKGROUND FACTS

a. The Parties

6. The GCC is a political and economic alliance of six Arab nations whose members are: (1) United Arab Emirates; (2) Saudi Arabia; (3) Kuwait; (4) Qatar; (5) Bahrain; and, (6) Oman. All of the member states border on that body of water separating the Arabian peninsula and the geographic area of the Islamic Republic of Iran ("Iran"), an area formerly known as Persia. That body of water is referred to in these reasons by way of the neutral term the "Gulf". Among other things, the GCC promotes common economic, cultural, religious and geographic beliefs shared by these Arab nations, including a belief that the proper name for the Gulf is the "Arabian Gulf".

7. ICANN is a California not-for-profit public benefit corporation formed in 1998 for the express purpose of promoting the public interest in the operational stability of the Internet by, inter alia, "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" (Exhibit R-ER-1, Articles of Incorporation, para. 3). According to ICANN's Bylaws, Article 1 Section 1, its mission is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operations of the Internet's unique identifier systems" including the DNS.

8. ICANN is itself a complex organization which facilitates input from stakeholders around the world and acts, as submitted by counsel, "as a community of participants". ICANN's Articles of Incorporation further provide that in carrying out its mandate, 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 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." (Ex. R-ER-1, Articles of Incorporation, para. 4).

b. The Historical Name Dispute: "Persian Gulf" vs. "Arabian Gulf"

9. There has been a long standing dispute for more than fifty years between Arab states, many of which are in the GCC, and Iran, which is a non-Arab nation bordering the Gulf, over the proper name for the Gulf. Iran uses the term Persian Gulf while the Arab states refer to it as the Arabian Gulf.

10. This naming dispute is part of a broader series of historical differences and conflicts between Iran and one or more Arabian members of the GCC involving various matters of culture, religion, contested sovereignty of lands and islands, the use of commercial air space, participation in sporting events and even censorship of publications due to the use of one or other of the disputed terms to describe the Gulf. As a result of this history of disputes, the GCC and its members are extremely sensitive to use of the term "Persian Gulf" in virtually any context, including its use as a top level domain. Various examples of the ongoing dispute are more particularly described in the Claimant's IRP Request at paras. 25-29.

11. ICANN does not dispute that the GCC holds strong beliefs in its position regarding this naming dispute. However, ICANN challenges the merits of GCC's position in this IRP proceeding and on this Request for Emergency Measures on numerous grounds discussed below.

c. ICANN's Structure and the New gTLD Program

12. Organizational Structure. As a not for profit corporation, the business and affairs of ICANN are controlled and conducted by the ICANN Board, like any other corporation (Bylaws Article II, Section 1). However, ICANN has created a complex organization and governing structure, quite unlike that of any private or public corporation. It is a structure which promotes diversity, inclusion and participation on a global basis not only through its Board and staff, but also through various Supporting Organizations and Advisory Committees (see the Bylaws, Articles V to XI).

13. One such committee is the Governmental Advisory Committee (the "GAC") consisting of members appointed by and representing governments from around the world to consider and to advise ICANN on internet related issues and concerns of governments, particularly where there is an interaction between ICANN policies and national laws and international agreements or on matters otherwise engaging other public policy issues (Bylaws, Article XI, Section 2). Members of the Claimant GCC are members of the GAC.

14. Since the deliberations and advice of the GAC at specific times play an important role in the narrative of events on this application, it is appropriate to clarify the function of the GAC in relation to ICANN. According to ICANN's Bylaws, the GAC itself does not act for or on behalf of ICANN. Instead, it acts as an important advisory resource for ICANN. The interaction between the GAC and ICANN, acting through its Board, is specifically addressed in various provisions of the Bylaws including Article XI 2.1 as follows:

> j. 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.
>
> k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee 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.

It is clear that the ICANN Board is not bound by the GAC Advice. However, it must consider it and provide an explanation if that advice is not followed.

15. While complex in its structure, ICANN also emphasizes and promotes accountability and transparency in its practices and decision making, objectives which are critical for its work in relation to the Internet and its global community of users and participants to ensure fairness in its procedures (see Bylaws Article III). Indeed, the Bylaws establish various procedures for the review of various actions or inactions of the ICANN Board. The Independent Review Process is one such process intended to facilitate the review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. It is this Independent Review Process (the "IRP") which has been invoked by the GCC. The material procedures and requirements for the IRP are reviewed more fully below.

16. **The New gTLD Program.** Historically, there have been a limited number of top level domain names, such as .com, .net and .org, as well as the country specific domains. As confirmed in the Articles of Incorporation, Article 3.(iii), the mandate of ICANN, pursued over many years, has been to develop procedures for expanding the number of top level domains and increasing the number of companies to act as registrars for the sale of domain name registrations. These efforts ultimately led to the introduction of the New gTLD Program to significantly expand the Internet's naming system and to thereby expand consumer choice and encourage competition and innovation. ICANN, with its community of supporting organizations and advisory committees, painstakingly developed through many iterations over time an Applicant Guidebook to set out the application instructions and procedures for the delegation of new generic domain names.

17. **GAC Input for the Applicant Guidebook.** As the Guidebook was under development, the GAC prepared its GAC Principles Regarding New gTLDs dated March 28, 2007 which set out certain GAC consensus advice to the ICANN Board on public policy principles to apply to the delegation of new gTLDs. The GAC recommended, inter alia, that the New gTLDs should respect the "sensitivities regarding terms with national, cultural, geographic and religious significance"(Claimant ER Request, Annex 1, Section 2.2.1.b). Furthermore, the GAC advised that "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." (Annex 1, Section 2.2.2). Finally, with respect to the implementation of these principles, the GAC advised that if "individual members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them" (Annex 1, Section 3.3). While these set out the expectations of the GAC, it must be recalled that the GAC serves only an advisory role and does not bind ICANN.

18. The gTLD Application Guidebook version 2012-06-04 (the "Guidebook") is the final version material to the application for and evaluation of the requested domain .PERSIANGULF as well as for the objection procedures which may be taken to the delegation of a proposed domain.

d. The Application for .PERSIANGULF and the Opposition of the GCC

19. On July 8, 2012, the Turkish company, Asia Green IT System Bilgisayar San. ve. Tic. Ltd. Sti ("Asia Green") applied for the registration of the gTLD .PERSIANGULF in accordance with the Guidebook. The founders of Asia Green are said to be of Persian origin (see Claimant Request for Interim Measures at p. 34 of 269; Annex 3, Asia Green application at page 4 of 50). The purpose of the gTLD .PERSIANGULF is said to provide a forum for serving people of Persian descent and heritage who are living around the world (see Asia Green application at page 5 of 50) and who share common business, cultural and religious interests in the Middle East and Persia specifically.

20. Asia Green also applied for the new gTLD .PARS. The term Pars refers to the ancient country located in southwestern Iran, and in particular Fars province, which is regarded as the cultural capital of Iran and is the original homeland of ancient Persians (Claimant Application, Annex 18, Application for PARS, page 5 of 53). The application for .PARS is essentially the same as that for .PERSIANGULF. Asia Green has in fact been granted the gTLD for .PARS and a registry agreement was signed in early September 2014 for the operation of the .PARS registry and the sale of domain names under that gTLD.

21. While the Asia Green application for .PARS proceeded without objection or opposition, the opposite is true of the .PERSIANGULF application. The GCC has opposed the .PERSIANGULF application consistently since the fall of 2012 throughout the application process.

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.

23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:

    a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;

    b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).

    c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

the gTLD domain may be explicitly or implicitly targeted(Guidebook at Article 3.2.1);

d. Independent Objection. The Independent Objector is a person appointed by ICANN with significant experience in the Internet community who exercises independent judgement in the public interest in determining whether to file and pursue a Limited Public Interest Objection or a Community Objection to an application (Guidebook, Module 3, Articles 3.2.1; 3.2.2.3; 3.2.2.4; 3.2.5).

e. Mandatory Government Support for certain Geographic Names. If the proposed domain is a geographic name, as defined in the Guidebook, then the applicant must also file documented support from or non-objection by the relevant or affected government. Such geographic names are narrowly defined to include capital city names, sub-national place names, such as a county, province or state, and certain UNESCO and UN designated regions or sub-regions. However, geographic names which do not fall within these express designations or narrow definitions do not require documented support or non-objection by the relevant government. If there is any doubt, the Guidebook further suggests that the applicant consult with the relevant government and public authority to enlist support or non-objection prior to submission. (Guidebook, Article 2.2.1.4.2)

In the event that an application successfully completes these stages, the application transitions through the delegation process which includes certain testing and technical set up and the negotiation and execution of a registry agreement.

24. The Asia Green application for .PERSIANGULF engaged all of these objection procedures, save the need for obtaining prior government support from affected governments. In that regard, it cannot be disputed that .PERSIANGULF is not within the definition of designated geographic names under the Guidebook. Therefore, Asia Green was not required to obtain the written support from the Claimant or its member states. It is also undisputed that Asia Green did not in fact consult with the Claimant or its members, whether there was any obligation to do so or not. The evidence does show that the Claimant or its member states have consistently opposed the application for .PERSIANGULF and clearly would not have supported the application if consulted.

25. **GCC Letters of Opposition.** In October 2012, representatives of the governments of the UAE, Bahrain, Qatar and Oman sent separate but similar letters to the Chair of ICANN and to the Chair of the GAC objecting to the delegation of .PERSIANGULF as a new gTLD on two grounds. First, the proposed domain referred to a geographical place whose name was disputed in light of the historical naming dispute over the Gulf. Second, the use of the proposed name targeted countries and communities bordering the Gulf (including the six member states of the GCC) which were not consulted about and did not support the use of this proposed domain, thereby confirming the absence of any community consensus for its use (Claimant ER Request, Annexes 8,9,10 and 11). Therefore, on these basic grounds, the governments objected to the delegation of the proposed domain.
26. **GAC Early Warning.** On November 20, 2012, the governments of the UAE, Bahrain, Oman and Qatar issued a GAC Early Warning objecting to the delegation and recommending that Asia Green withdraw the application for the same reasons as had been set out in the October letters of objection (Claimant ER Request, Annex 12)
27. **Review by the Independent Objector.** In December 2012, the Independent Objector completed a review of the naming dispute and the public comments against the .PERSIANGULF gTLD, concluding that an objection on either the limited public interest ground or the community objection procedure was not warranted (ICANN Response, Annex R-ER-5). With respect to the limited public interest ground, the Independent Objector noted that there were no binding international legal norms to settle the issue. Resolutions of the United Nations Conference on the Standardization of Geographical Names urge countries sharing a geographical feature to agree on a name, failing which the separate names used by each country should be accepted. As for the Community Objection, while accepting that there was a clearly delineated community implicitly targeted by the application and that a significant portion of that community opposed the application, the Independent Objector considered it "most debateable" that the gTLD would "create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community", that is the Arab communities, which was the threshold requirement under the Guidebook for the launch of an independent objection (ICAAN Response, Exhibit R-ER-5). In the view of the Independent Objector, the new gTLD should neither solve nor exacerbate the naming dispute. Instead it was appropriate to adapt to the *status quo* by taking no

position. He noted the GCC could file its own objection and could apply for the gTLD .ARABIANGULF. Therefore, the Independent Objector considered it inadvisable to file an objection.

28. **GCC's Community Objection.** On 13 March 2013, the GCC filed a Community Objection to the .PERSIANGULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)

29. **GAC Advice under the Guidebook for Pending Applications and GCC Objections.** As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIANGULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.

30. At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIANGULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).

31. In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIANGULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

Ex. R-ER-6) which annexed to it a table referred to as a "Scorecard" (ICANN Response, Ex R-ER-7), recording the NGPC Response to each item raised by GAC in the Beijing Communique. With respect to .PERSIANGULD, the NGPC accepted the GAC advice and it was noted in the Scorecard that the advice would not toll or suspend the processing of any of the applications.

32. At the July 13-18 Durban GAC Meeting, the GAC gave further consideration to .PERSIANGULF application , among others. This GAC meeting has generated two documents which contain conflicting information on the deliberation over .PERSIANGULF. The Claimant has relied upon the GAC Meeting Minutes, (Claimant ER Request, Annex 14 in which the discussion was recorded as follows:

> "The GAC finalized its consideration of .persiangulf after hearing opposing views, the **GAC determined that it was clear that there would not be consensus on an objection regarding this string and *therefore the GAC does not provide advice against this string proceeding.*** The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. [emphasis added]

33. ICANN contrasts this language with the GAC Durban Communique which is received as the official document providing GAC Advice to the ICANN Board. This Communique (Claimant IRP Request, Annex 24) provides that "The GAC has finalized its consideration of the following strings, and ***does not object to them proceeding:*** ... ii. persiangulf (application number 1-2128-55439". This language suggests that there was in fact a consensus of the GAC members not to object to the application.

34. The Claimant's Reply Witness Adbulrahman Al Marzouqi attended the Durban meeting as the representative of the UAE and his evidence makes clear, at paragraphs 5, 6 and 7 of his Statement, that there was no consensus reached whatsoever, whether to support the application or to oppose it. The position taken by the Iranian representative and the opposing position taken Mr. Al Marzouqui for the UAE, apparently shared by others, prevented any consensus on any position regarding .PERSIANGULF. The general discord over geographic names was also reflected in the recommendation in the Durban Communique calling for further collaboration with GAC in refining the Applicant Guidebook for future rounds regarding the protection of terms with national, cultural, geographic and religious significance in accordance with the 2007 GAC Principles referenced above.

35. **ICANN Board Response and Notification September 2013.** The Durban Communique was relied upon by the NGPC of the ICANN Board as the formal statement of advice from the GAC to ICANN. Therefore, the NGPC noted and considered that GAC advice and responded to it by way of resolution and an attached "Scorecard" as follows:

> "**ICANN will continue to process the application** in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF." (emphasis added)

This NGPC resolution and the Scorecard were posted online on September 12, 2013 and the minutes and related materials were posted on 30 September 2013(the "NGPC Resolution and Scorecard"). It is this decision to "continue to process the application" which is said to be the action of the ICANN Board to approve the delegation of .PERSIANGULF and which therefore triggered the 30 period for filing a Request for an IRP. However, with the community objection still pending, the evidence is not clear as to the exact status of the application approval at that time. The ICANN Board and the NGPC did not and presumably would not unequivocally approve the delegation while the community objection was still pending.

36. **Community Objection and Expert Determination.** The Community Objection proceeded from March 2013 to October 30, 2013 when Judge Stephen Schwebel issued his Expert Determination, dismissing the Objection of the GCC. It must be noted that the necessary elements in support of a Community Objection are different from those required on an IRP. More importantly, they are significantly different from the threshold tests on an application for emergency measures in the context of an IRP. Judge Schwebel found that the GCC had met three of the four necessary elements for a successful Objection. He found that the GCC did have standing as an institution created by treaty having an ongoing relationship with a clearly delineated community, that is Arab inhabitants of the six member states of the GCC. It was plain and obvious that there was substantial opposition by the Arab inhabitants and the community to the application. It was also concluded that the Arab inhabitants would be implicitly targeted by the .PERSIANGULF gTLD. However, Judge Schwebel found that the GCC failed to meet the fourth element in that the GCC did not establish that the targeted community would "suffer the likelihood of material detriment to their rights or legitimate

interests", as required and defined under the Guidebook. Therefore, the objection was dismissed. He accepted that naming disputes such as that regarding the Gulf can be of high importance to States, "roiling international relations". However, in his view, the impact of the application .PERSIANGULF was difficult to discern and "it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute". Echoing the Independent Objector, he noted that the GCC was free to seek registration of the .ARABIANGULF. ICANN has repeated this argument in its Response although no such application for .ARABIANGULF has in fact been made by the GCC.

37. **October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review.** ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.

38. The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohanned Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

not been disputed that this letter was received by ICANN. No written response from Mr. Chehade or ICANN was adduced in evidence, either before or after the oral argument of this application. No written response is referenced by Mr. Al Marzouqi in his statement. Indeed, he suggests that the only response was a suggestion in September by his unnamed "ICANN counterpart" that the GCC *may* have to file a request for independent review.

39. By September 2014, the manner of dealing with certain geographic names remained a live issue. At that time, there was no evidence of a definitive statement from ICANN that a registry agreement was about to be signed for .PERSIANGULF. By contrast, Asia Green had apparently signed a registry agreement for .PARS by early September 2014, which agreement is posted by ICANN online. Some proposed changes to the Guidebook had also been tabled which would require the agreement of relevant governments to the delegation of geographic names as new domains. (Claimant IRP Request, Annex 1, "the protection of geographic names in the new gTLDs process, v.3 August 29, 2014). Although the Claimant attributed this proposal to ICANN (Claimant IRP Request at para. 1), it appears on review to be the work of a sub-working group of the GAC, and not of ICANN itself. The evidence is not clear on this point. In any event, it serves to illustrate that the use of geographic names remained a live issue within the ICANN community of committees while the delegation of .PERSIANGULF remained pending.

40. According to Mr. Al Marzouqi, the handling of geographic names was a topic of continued discussion in October 2014 at the ICANN meetings in Los Angeles, all without a resolution. Thereafter, he advised the GCC in November to proceed with the request for an IRP which it did on December 5, 2014. He also states that at no time during the resolution efforts from September 2013 to November 2014 was it suggested that the GCC would be time barred from proceeding with an IRP.

III. THE INDEPENDENT REVIEW PROCESS AND THE REQUEST FOR INTERIM MEASURES OF PROTECTION

41. ICANN attaches considerable importance to the principle of accountability and to that end has enshrined two important procedures in Article IV of its Bylaws to ensure accountability of decisions: *1.* Reconsideration of a Board action; and, *2.* Independent Review of a Board decision or action (ICANN Response, Exhibit R-ER-1). The first provides for a review or

reconsideration of any ICANN action by the Board itself for the benefit of any person or entity materially affected by that action. That procedure was not implemented by the GCC. The second is for an Independent Review by a third party of the Board decision or action alleged by an affected party to be inconsistent with the Articles or Bylaws. The Claimant chose to proceed with the Independent Review Process, rather than a Reconsideration, as it was entitled to do.

42. Bylaw Article IV, Section 3 sets out the detailed procedures for the IRP and the following requirements were urged as material to this application:

- **a.** A Request for IRP must be filed within 30 days of the posting of the Board meeting minutes said to demonstrate a violation of the Articles or Bylaws(Art. IV, Section 3.3);
- **b.** In comparing the contested action with the Articles or Bylaws, the IRP panel must apply a standard of review that is specifically and narrowly defined, to focus on the following three questions(Art. IV, Section 3.4):
  - **i.** Did the Board act without conflict of interest in taking its decision?
  - **ii.** Did the Board exercise due diligence and care in having a reasonable amount of facts in from of them?
  - **iii.** Did the Board members exercise independent judgement in taking the decision believed to be in the best interests of ICANN?
- **c.** There shall be a standing panel of IRP panel members from which a panel can be readily constituted and all proceedings shall be administered by an international dispute provider (Art. IV, Section 3.6).
- **d.** The IRP Panel has specific and limited remedial authority (Art. IV, Section 3.11) to order, *inter alia:*
  - **i.** Summary dismissal for frivolous or vexatious requests;
  - **ii.** A declaration whether an action or inaction is inconsistent with the Articles or Bylaws; or,
  - **iii.** A recommendation to the Board to stay any action or decision until such time as the Board reviews and acts upon the IRP opinion.

43. Prior to initiating a request for an IRP, a complainant is encouraged under the Bylaw to enter into a cooperative engagement process which is a voluntary ICANN process with the detailed

procedures being incorporated by reference into Bylaw Article IV, Section 3. These procedures include the tolling of the time for filing an IRP during each day of the cooperative engagement process up to fourteen days, unless a longer extension is mutually agreed in writing.

44. ICANN has also prepared the Supplementary Procedures for the IRP which confirmed the designation of the ICDR as the Independent Review Panel Provider. The ICDR Rules, together with the Supplementary Procedures and the Bylaws govern the IRP process. While the Supplementary Procedures expressly exclude the emergency measures of protection under the ICDR Rules (Paragraph 12, Supplementary Procedures), certain specified interim measures of protection may be recommended by an IRP Panel to the Board. These include a stay of any decision of the Board, such measure being consistent with those permitted under the Bylaw. As noted earlier, ICANN has agreed for the purposes only of this proceeding that an emergency arbitrator or panelist be appointed with the authority to issue an interim declaration to the ICANN Board as an emergency measure.

45. Claimant's Position on Emergency Interim Measures. The main submission put forward by the GCC in support of its request for emergency measures can be briefly summarized as follows:

- **a.** Article 6 of the ICDR Rules applies as no IRP panel has been appointed. Since ICANN is about to sign a registry agreement for .PERSIANGULF, the IRP Request will be rendered moot absent emergency interim relief (Claimant's ER Submission, para. 16);
- **b.** The four part test for establishing an entitlement to emergency interim relief have been met on the evidence, specifically:
  - **i.** *Urgency*. The GCC will be deprived of a meaningful independent review if ICANN signs the registry agreement.
  - **ii.** *Necessity*. There is no harm to either ICANN or to applicant, Asia Green, which outweighs the harm to the GCC absent any emergency interim measures. While Asia Green may be delayed in the processing of its pending application, such delay will cause no prejudice as Asia Green has the registry agreement for the .PARS gTLD which is intended to serve the

same market and constituency as it intends to target with .PERSIANGULF.

iii. *Protection of an Existing Right.* GCC has a right to a meaningful IRP in accordance with the ICANN Bylaws which will protected by the relief sought. That right will be useless without the emergency relief.

iv. *A Reasonable Possibility of Success on the Merits of the IRP.* The GCC emphasized that the standard of establishing a "reasonable possibility of success" is a lower standard than a "reasonable likelihood" of success for the purpose of showing that ICANN acted in a manner inconsistent with numerous "guidelines". In the Claimant IRP Request dated December 5, 2014, the GCC placed emphasis and reliance on the GAC Principles Regarding New gTLDs presented March 28, 2007 and certain other GAC advice arising from GAC meetings in 2013 which ICANN is said to have ignored (see also Claimant's ER Request, paragraphs 21 – 25).

46. Respondent's Position on Emergency Interim Measures. ICANN resists the application for interim measures essentially on the general ground that ICANN did everything it was required to do under the applicable Articles and Bylaws and that it properly followed the procedures contemplated in the Guidebook. ICANN also submitted three specific grounds for denying the requested relief which can be briefly summarized as follows:

a. The GCC is not reasonably likely to succeed on the merits of the IRP for two basic reasons. First, the IRP Request was filed long after the expiry of the 30 day filing period for doing so and is therefore time barred. Second, no ICANN Board action has been identified by the GCC said to violate the Articles or Bylaws.

b. The unreasonable delay of over one year by the GCC in bringing the Request in and of itself justifies the dismissal of the request and serves to underscore the lack of any urgency, necessity and harm to GCC.

c. The GCC has no demonstrable harm which outweighs the harm to others like Asia Green which has invested time, energy and money in its application. The integrity of the application process for which ICANN is responsible will also be harmed. The GCC will not be harmed as it can easily apply for .ARABIANGULF in order to serve its communities.

ICANN also reviewed in detail the procedures to be followed under the Guidebook and Bylaws and, based upon a detailed review of the chronology, submitted that ICANN did everything required of it to consider the concerns raised by the GCC members. In so doing, it took no steps inconsistent with the Articles or Bylaws.

47. **Reply of the Claimant.** In its Reply, the GCC addressed the key responding submissions of ICANN as follows:

   a. The ICANN decision and action in issue is well known and obvious – the decision to approve Asia Green's application for the new gTLD .PERSIANGULF (GCC Reply, para 11).

   b. The IRP Request is not time barred as ICANN has by its conduct from September 2013 to November 2014 effectively extended the time for filing as a result of ongoing discussions between the GCC and ICANN to resolve the issue, some of which involved the most senior executives of both organizations. Informal discussions continued through September and October and it was suggested to GCC by an unnamed ICANN representative that it may have to file an IRP request to reach a resolution. Therefore, there was no unreasonable delay as the GCC then proceeded to prepare and to file the Request dated December 5, 2014(GCC Reply, para, 6-9,17).

   c. The GCC also asserted that ICANN's action were inconsistent not only with the GAC advice previously identified, but also with certain specific core values of ICANN enshrined in Article 1, Section 1 of the Bylaws which are to guide decisions and actions of the Board, namely:

      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;
      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.

   d. As to the balancing of the relative harm, whether the interim measures are granted or not, the GCC asserted that the harm to it by a denial of relief would be irreparable as it would

lose the valuable right to an independent review. By contrast, ICANN has offered no evidence of harm to it, nor to Asia Green, which would outweigh the harm to the GCC.

48. The positions of both parties were further developed and clarified in oral argument on the application heard by way of telephone conference call on December 23, 2014 which was approximately one and one half hours in duration.

IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION

49. Is the GCC entitled to an interim declaration by way of an interim measure of protection that ICANN refrain from signing a registry agreement for .PERSIANGULF pending the hearing of the GCC Request for an IRP? Specifically, on the limited evidence available, has the GCC satisfied the following tests proposed by the parties for the grant of interim relief:

- **a.** urgency;
- **b.** necessity;
- **c.** protection of an existing right; and,
- **d.** a reasonable possibility of success on the merits of the IRP?

V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION

50. The parties in their written and oral submissions have analogized the independent review process and this request for interim emergency measures within this IRP to an international arbitral proceeding under the ICDR Rules and the Supplementary Procedures. It is generally accepted that interim or provisional measures are intended and designed to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner. Interim measures protect both the rights of a party and the integrity of the dispute process. While some measures may be aimed at preserving evidence critical to the disposition of the main dispute, other measures are intended to preserve a factual or legal status quo to safeguard a right, the recognition of which is sought before the tribunal hearing the substantive merits of the particular dispute (see Gary Born, International Commercial Arbitration, Kluwer, 2009, Vol. II at p. 1944). The necessary elements of proof will differ depending on the nature of the interim emergency relief sought, whether to preserve evidence or to preserve the status quo. Here, the requested interim emergency measure is in the nature of injunctive relief to restrain

an action, the execution of a registry agreement, in order to preserve the status quo pending the completion of the IRP.

51. The ICDR Rules expressly provide the power to grant interim measures, such as injunctive relief, including on an emergency basis under Article 6 prior to constitution of a panel. That article applies here by express agreement. Such extraordinary relief prior to the determination of the substantive merits is discretionary and largely fact driven. The ICDR Rules and the Supplementary Procedures are silent as to the necessary tests to guide the exercise of discretion to award such relief. The parties have referred to numerous authorities, some diverging, on the appropriate factors to consider, particularly with respect to the extent of an assessment and consideration of the substantive merits of a case. These authorities include not only U.S. domestic court cases and international arbitral institutional rules and awards, but also a prior decision of another ICANN IRP panel under the ICANN Bylaws. Given the divergence between the parties on the applicable test for considering the substantive merits, it is appropriate to clarify and confirm the tests emerging from the authorities to guide the exercise of discretion in awarding any interim emergency relief.

52. The Claimant has relied heavily on the decision of the ICANN IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13 (12 May 2014) in which an IRP Panel gave relief on an application for interim measures based on a four part test requiring proof of: (1) urgency; (2) necessity; (3) protection of an existing right; and, (4) a prima facie case or reasonable possibility of success on the merits (See Claimant ER Request, Annex 15, Decision at para. 37). ICANN has not put the first three criteria in issue, though each merits some elaboration. With respect to the fourth criterion, ICANN appeared to have accepted the applicability of that element, but then argued that the GCC has no reasonable *likelihood* of success for specific reasons.

53. The Claimant has also adopted the argument, which found success in the *DotConnectAfrica* IRP Panel decision, that interim relief was warranted as ICANN had failed to establish a standing panel of IRP panellists, as required under the Bylaws. In that case, the failure to establish a standing panel delayed the constitution of a panel for the specific case and significantly impaired the ability of the claimant to seek timely relief. There, the Panel found that the need for interim relief arose directly from the failure of ICANN to scrupulously honour its own procedural Bylaws. That argument does not carry the same weight or force in

this case as ICANN has designated the ICDR as the provider of panellists to serve on the IRP panel and the ICDR has acted promptly and efficiently in constituting a panel.

54. Here, the Request for an IRP was filed on December 5, 2014 and an IRP panellist was appointed on an emergency basis within four days, on December 9, 2014, with ICANN agreeing to the application of the ICDR Rules for emergency measures. A brief procedural hearing was held on the December 9 and the need for immediate emergency relief was then addressed but found unnecessary due to the undertaking of ICANN not to sign the registry agreement for .PERSIANGULF pending this application. The procedure for the appointment of the IRP panel or an Emergency Panel worked effectively and had no adverse impact whatsoever on the ability of the Claimant to seek effective interim relief. Interim emergency relief is not necessary or warranted based on this argument regarding the creation of the standing panel that found success in the *DotConnectAfrica* case. This case must be determined on the application of the generally accepted criteria for interim measures of protection.

a. Urgency or Irreparable Harm

55. The element of urgency imports the notion that the applicant will suffer imminent irreparable or serious harm if no interim relief is granted before the IRP hearing process is concluded at which time entitlement to relief for reparable or other harm may be finally addressed in the normal course (A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 4th ed. 2004, para. 7-29 and 7-30; Born, supra, page 1981 - 1982). Here, the GCC argues that its right to a fair and effective IRP process will be lost entirely if ICANN proceeds to sign a registry agreement for the disputed domain before the IRP proceeding can be held and completed. The relief sought by the GCC in its IRP Request expressly includes a declaration "requiring ICANN to refrain from signing the registry agreement [for .PERSIANGULF] with Asia Green or any other entity"(Claimant IRP Request, para. 75).

56. It is undisputed that ICANN intends to sign a registry agreement with Asia Green. ICANN'S undertaking to refrain from doing so is in place only pending the application for emergency measures and not until the final declaration in the IRP process. ICANN also intends to use its standard form registry agreement, a copy of which is available online. The registry agreement is for a term of ten years, subject to successive ten year renewals. As discussed

during oral argument, the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that the ICANN should not have signed that particular agreement. The execution of the registry agreement cannot be readily and lawfully undone.

57. While ICANN argues the absence of any harm to the GCC, irreparable or otherwise, by the delegation of the domain and the signing of a registry agreement, it does so principally in the context of two other elements for relief, namely necessity or the balancing of the harm and also the absence of any reasonable likelihood of success on the merits of the IRP. ICANN's position on these points is discussed in detail below under those particular elements.

58. ICANN also argues that any perceptions or adverse impact arising from the registration of .PERSIANGULF can be simply counteracted by registration of the gTLD .ARABIANGULF by the GCC. There are two difficulties with this argument for this application. First, it does not address the importance of the right to a fair and effective IRP process and the loss of that right. Second, it raises the issue of the existence and scope of any duty or obligation to mitigate on a party which may suffer irreparable harm by the actions of another. Should the GCC be required to undertake the effort, time and expense of applying for and operating a competing registry in an effort to counteract the impact of the disputed domain? In any event, would such a competing registry avoid or undo harm caused by the other? This issue the will be also discussed in connection with the primary arguments of ICANN on the consideration of the merits of the IRP. Suffice it to say at this point that the option of GCC applying for .ARABIANGULF does not avoid the harm to the GCC in respect of the IRP process, absent any interim relief nor does it negate the harm arising from the delegation of .PERSIANGULF.

59. For this application, this Panel accepts that the right to an independent review is a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process. If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant's right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant's IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a declaration

that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.

b. Necessity or the Balancing of Harm

60. The test of necessity imports an assessment of the relative proportionality of harm suffered, that is, a consideration and balancing of the harm to the Claimant if the interim relief is not granted with the harm caused to the Respondent if the relief is in fact ordered. The irreparable harm to the Claimant is already described above.

61. In terms of potential harm arising from or caused by the grant of the requested declaratory relief, ICANN relies on harm to itself and also to the Applicant Asia Green. ICANN is rightly concerned about maintaining the integrity of the gTLD application process and processing the application quickly and efficiently. Beyond that, counsel candidly admitted, when asked in oral argument, that there will be little harm to ICANN itself in the event that interim emergency relief is granted. It can also be said that the integrity of the ICANN independent review process, to ensure accountability and transparency in decision making, is also an integral part of ICANN's application process which merits promotion and protection. While some prejudice by delay to the gTLD application may arise from the granting of the requested interim relief, that is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process. Furthermore, the delay in the IRP is likely to be far shorter than the delay to date in the processing of the application. It is not clear what has caused the delay from October 2013 to November 2014 in the decision to sign the registry agreement, other than, as suggested by counsel for ICANN, the routine processing of the application and the negotiation of the agreement. In any event, any harm to ICANN by the grant of interim relief does not outweigh the harm to the GCC through the deprivation of a meaningful IRP process if no relief is granted and the registry agreement is signed.

62. Counsel for ICANN also pointed to and relied on the harm caused by the delay in the delegation to the applicant Asia Green which has invested time, effort and money into the pursuit of its application. That harm is said to be real and significant, with added continuing expense and delay in the conduct of business using the domain. It is said that this real harm stands in contrast to the vague allegations of harm to the GCC which may be caused by the

delegation of the disputed domain, particularly when the GCC could itself apply for and obtain .ARABIANGULF. It may be argued that the harm to Asia Green is not relevant to a consideration of relief on this application as Asia Green is not a party to this proceeding. However, in my view it is appropriate to consider such harm as it will also reflect upon and reinforce the potential reputational harm to ICANN with respect to the integrity of the application process.

63. In considering the harm to Asia Green, it must be remembered that Asia Green already has access to another delegated domain .PARS, for which a registry agreement is signed and is intended to target the same market as .PERSIANGULF. Asia Green will not be precluded from actively developing its business. Counsel for ICANN candidly admitted during oral submissions that he was not certain of the need for Asia Green to have two registries for essentially the same market, but noted that Asia Green had in any event spent considerable time and money for the disputed domain. Apart from the general impact of delay, there was no specific evidence of harm to Asia Green, such as a particular lost business opportunity.

64. In my view, the harm to the GCC absent any interim relief clearly outweighs any harm to Asia Green which may be caused by the grant of interim relief requiring ICANN to refrain from signing a registry agreement for .PERSIANGULF pending the IRP process. Any delay can be kept to a minimum by the prompt constitution of the IRP panel through the ICDR and a reasonable and efficient schedule for the conduct of the review. The application process has not in any event been proceeding in an overly expeditious manner, given that the application was made in July 2012. By September 2013, the NGPC Scorecard noted that ICANN will "continue to process the application" and it was only in November 2014 that the signing of a registry agreement appeared imminent. There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green.

65. In balancing the harm which may arise, whether interim relief is granted or not, it is clear on a balance of probabilities and not mere possibilities, that the harm to the GCC absent any relief is irreparable and that the loss of an effective meaningful IRP process outweighs any harm to either Asia Green or ICANN arising from delay in the signing of the registry agreement.

c. Protection of an Existing Right

66. This criterion was accepted and applied by the IRP Panel in the *DotConnectAfrica* Decision on Interim Measures of Protection, relied upon by the Claimant, although it is not entirely

clear where this requirement originates in the authorities and what is intended by it. This requirement is not normally separately identified either in case law or in authoritative texts as a specific criterion for the grant of interim injunctions or interim measures of protection. It is perhaps plain and obvious that the grant of an interim measure to preserve a factual or legal status quo is virtually always dependent on the assertion of an identified legal or equitable right. However, some interim measures not applicable here, such as an order to freeze assets to preserve rights of execution, may relate to only potential rights as opposed to existing rights. In any event, both the Claimant and the Respondent have proceeded on the basis of the existence and application of this third criterion.

67. The ICANN Bylaws, Article IV, Section 3.1 establishes "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." As stated in the Reply, it is this right which the Claimant seeks to protect, failing which the review will become meaningless after the execution of the registry agreement by ICANN. The protection of this right for the independent review of a Board decision to delegate the domain and enter into a registry agreement is an existing right which meets this pre-requisite for the grant of interim emergency relief.

d. A Reasonable Possibility that the Requesting Party will succeed on the Merits

68. The consideration and impact of the merits of the IRP is the main point of contention between the parties. They disagree not only on the basis of the available evidence, but more fundamentally on the definition and scope of this legal requirement. The Claimant maintains that it need show only a *reasonable possibility* of success on the merits of the IRP. The Respondent, while appearing to confirm the applicability of that test in its written submission (ICANN Response, para. 42), also submitted a more stringent standard that the Claimant must show a *reasonable likelihood* of success, which, ICANN submits, cannot be established on the evidence.

69. The Applicable Test. In the *DotConnectAfrica* Decision on Interim Measures, the IRP panel considered the competing tests of proof of a *prima facie* case and proof of a reasonable possibility of success and found that there was no meaningful difference between those two tests. They are essentially one and the same standard. That panel in *DotConnectAfrica* also

went on to state that interim relief should be available "on a standard of proof which is less than required for the merits under applicable law". This panel agrees with that finding. It should also be noted that in some fora, the requisite standard is couched in terms of whether a preliminary assessment reveals that there is a serious question to be tried or determined which is a standard the same or very similar to the standard of proof of *prima facie* case or proof of a reasonable possibility of success. The threshold is relatively low.

70. The standard of proof of a reasonable likelihood of success on the merits, as submitted by the Respondent, sets the bar too high for interim relief. That is essentially the same standard as balance of probabilities which is the normal civil standard to be applied at the hearing of the substantive merits of the IRP. The lesser standard of a *prima facie* case or a reasonable possibility of success is more appropriate for a number of reasons.

71. On an emergency interim application such as this, the submissions and the evidence are usually incomplete, largely due to the time constraints in developing the evidentiary record. That is the case here. More evidence and detailed submissions can be expected at a substantive hearing. Given the limited evidentiary record, the tribunal must refrain from prejudging the merits of the case on the interim relief application. If the higher standard of reasonable likelihood is applied, it is inevitable that the tribunal will be engaging in an early determination of the merits A prejudgement of the merits cannot be avoided if the same standard of proof is applied for emergency interim measures as for the substantive hearing. The lesser standard facilitates a provisional assessment without any binding or preclusive impact on the merits hearing. Once the threshold is met, the focus of the analysis will be on the test of irreparable harm and the balance of the respective harm pending the decision on the merits.

72. Where the grant of interim relief may in effect amount to a final determination and put an end to the entire dispute, a more extensive review of the merits may well be appropriate to weigh the likelihood of success along with the irreparability of harm and the balance of the respective harm. However, that is not this case. The grant of interim relief will not foreclose the completion of the IRP process. However, the refusal of interim relief likely will have that effect.

73. The standard of a *prima facie* case or reasonable possibility of success quite properly requires some consideration of the legal sufficiency and relative strength of the respective parties'

cases. Therefore, frivolous and weak cases can be identified and rejected to ensure that the interim measure of protection does not become an unjustified lever or windfall that can damage an innocent party (see Born, supra, at page 1992). In that regard, it cannot be said that the merits of the GCC's IRP Request is either frivolous or vexatious. It appears to raise serious questions about the decision making process of the ICANN Board under the Bylaws in connection with the approval of the application for .PERSIANGULF as a new gTLD.

74. **The Obligation of ICANN under the Bylaws.** The starting point for the discussion on whether the GCC has shown a reasonable possibility of success on the merits of the IRP is a clarification of the obligations of the ICANN Board under the Articles and Bylaws against which the actions and decision of the Board must be compared and measured. While the Claimant initially relied upon the various instances of GAC advice to the ICANN Board as the basis of its request for review, the Bylaws do not oblige the ICANN Board to accept any or all of the advice of the GAC or to take actions that are consistent only with the GAC advice. The Bylaws require the ICANN to take that advice into account and, where the advice is not followed, to provide reasons for so doing. (Exhibit R-ER-1, Bylaw Article XI, 2.1.j).

75. In its Reply, the GCC also expressly referred to and relied upon the core values set out in Bylaw Article I, Section 2.4, 2.8 and 2.11, quoted earlier at paragraph 47.c.1, and the obligation of the ICANN Board to be guided by those core values in making decisions. The Claimant identified these three of the eleven core values as the yardstick to measure and to assess the ICANN Board action to delegate the domain and to enter into a registry agreement with Asia Green. However, the last paragraph of Article I, Section 2 of the Bylaws makes it clear that the application of the individual or specific core values is necessarily qualified. Due to the breadth of the general language in the stated core values, the closing paragraph of Section 2 expressly provides that "situations will inevitably arise in which perfect fidelity to all eleven core values is not possible". The Board has latitude in its decision making and must of necessity exercise discretion in the balancing of all of the core values to arrive at any decision. Not all core values may be advanced to the same extent.

76. By the same token, the closing sentence of Article 1, Section 2 also sets out certain basic requirements with which the ICANN Board must comply in its decision making. According to the last sentence of Section 2, ICANN *shall*: (1) "*exercise its judgment*"; *(2) "to*

determine which core values are most relevant and how they apply to the specific circumstances of the case at hand"; and, (3) "*to determine, if necessary, an appropriate and defensible balance among competing values*". It is against these requirements that the relevant decision in issue of the ICANN Board must be assessed on the evidence. The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

77. This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement.

78. The Decision in Issue. The Respondent submitted, in part, that the Claimant had failed to identify any "action or decision" of the Board capable of review. The Respondent then also argued in the alternative that the only Board decision that could have injured the GCC is the September 2013 decision to "continue to process the application" in accordance with the Guidebook, following the GAC Durban Communique that the GAC did not object to the application (ICANN Response at para. 48). The Claimant submitted in Reply that the Board action in issue is well known and is simply the decision to proceed to delegate the domain .PERSIANGULF and to enter into a registry agreement. It is not disputed that ICANN is in fact about to enter a registry agreement with Asia Green for that domain.

79. The Emergency Panel accepts the Claimant's position that the Board decision and action in issue is the decision to proceed to delegate the domain .PERSIANGULF to Asia Green and to enter into a registry agreement, all pursuant to the Guidebook. If not for that decision, this Emergency Request would not have been brought. That decision is capable of review.

80. The only available documentary evidence of that Board decision adduced by the parties is the posting of the NGPC Resolution and Scorecard on September 12, 2013 to "continue to process the application", followed by the posting on September 30, 2013 of the Minutes and Briefing Materials related to that decision. There are no other Board resolutions or memoranda after September 2013 which otherwise address or confirm the Board deliberation or decision to make the delegation. It is in relation to the posting of the Resolution, Scorecard and Minutes that the Respondent has based its main arguments against any emergency interim relief, namely that the request for the IRP was time-barred or was in any event unreasonably and fatally delayed. It is appropriate to now address these two main related arguments asserted by ICANN regarding the September decision.

81. The Issues of Time-Bar and of Delay. ICANN has relied on the requirement under Article IV, Section 3.3 of the Bylaws that the request for an IRP "must be filed within 30 days of the posting of the Board meeting (and the accompanying Board Briefing Materials, if available)." It is said that the 30 day time limit is mandatory and, in this case, commenced on September 30, 2013. Therefore the filing period expired on October 30, 2013. As a result, the December 5, 2014 filing of the IRP Request is, according the ICANN, patently out of time. In addition, ICANN asserts that this lengthy delay from October 2013 to December 2014 was unreasonable and was left unexplained in the Claimant's initial submission. Accordingly it is submitted that such delay, in and of itself, further justifies the denial of extraordinary discretionary relief.

82. The GCC responded to the time-bar and delay arguments in its Reply. The GCC relied on the Witness Statement of Mr. Al Marzouqu which outlined the ongoing contact between him, as the GCC representative, and ICANN over the disputed domain, including the high level meeting in June 2014 to attempt to resolve the issue. Therefore, the GCC asserted that any time limit for filing the IRP Request was extended by ICANN's conduct.

83. In the view of the Emergency Panel, the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable. The evidence of Mr. Al Marzouqi, while vague in some of the detail, provides a number of reasonable examples of such conduct. First, as of September 30, 2013, the Expert

Determination was still pending and was not released until October 30, 2013. The alleged discussion with an unidentified ICANN representative to await the delivery of the Expert Determination before attempting any resolution is reasonable under the circumstances. Otherwise, the 30 day time limit would have expired by the time the Expert Determination was delivered. Second, and most importantly, it is beyond dispute that the President of ICANN met with the representatives of the GCC in early June 2014 with a follow up letter being delivered by the GCC representative to the ICANN President confirming a request not to proceed with the delegation of the disputed domain. The circumstances of the meeting and the unanswered follow up letter, while not expressly referring to the deadline for filing an IRP, are also suggestive of an extension of that filing period. Indeed, the tenor of the evidence with such a high level meeting in June 2014 reasonably suggests that the issue of the delegation was still under active consideration with no final decision having in fact been made. Third, Mr. Al Marzouqi also states that another ICANN representative, again unnamed, suggested in September 2014 that the GCC may have to file a request for IRP. The available evidence and reasonable inferences from that evidence support the defence that the time limit was extended for commencing the IRP, and there is a reasonable possibility that the GCC will succeed on this issue. It is recognized that the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself. After a full review of the evidence on the IRP and the application of the appropriate standard of proof, the IRP panel may well find that the time limit for filing was mandatory and that it expired on October 30, 2013 without any extension. However, at this stage, it is sufficient to find that there is a reasonable possibility that the time has been extended under the circumstances.

84. Counsel for ICANN also argued that the time limit for the IRP filing could be tolled or delayed, but only through the formal invocation of the Cooperative Engagement Process prior to the commencement of the IRP as provided for in the Bylaws Article IV, Section 3, para. 14. This is a voluntary process encouraged by ICANN to try to resolve issues or at least narrow the issues for a reference to the Board. A conciliation process following the commencement of an IRP is also encouraged. According to the copy provided by ICANN, the Cooperative Engagement procedure has an even shorter time limit for commencement, being only 15 days of the posting of the Minutes of the Board. While it is undisputed that the formal Cooperative Engagement Process was never started, it is also undisputed that an

analogous informal engagement process was in fact undertaken involving the most senior officers of both ICANN and the GCC with the apparent purpose of resolving the issues. The availability of the Cooperative Engagement Process is not the sole method for extending time for filing the IRP and is not determinative of this issue whether ICANN has extended the time the time for the commencement of an IRP by reason of its conduct in connection with the undisputed efforts at resolution undertaken in 2014, especially the June 2014 meeting with the senior representatives of the organizations and the July 9 letter.

85. Based on the limited evidence available at this stage, there is a reasonable possibility that, by reason of ICANN's conduct, any time limitation for filing an IRP was extended or otherwise would not be enforced. The Reply evidence of the GCC also provides a reasonable basis for a possible explanation of the delay of over one year, an explanation which may neutralize the defence of delay or laches to the grant of discretionary interim emergency relief.

86. During the IRP process, these issues can be more fully ventilated with additional evidence from both parties about the meeting and contacts. As ICANN did not file any evidence on this Emergency Request of the involvement and conduct of its representatives throughout 2014, it will have the opportunity to do so for the IRP hearing. This evidence will also further assist the determination of whether the 30 day time limit for filing the IRP under the Bylaws is mandatory or directory only or was extended or waived. The IRP Panel will therefore have a fresh opportunity on a complete evidentiary record to further consider the defences of the time bar and the delay.

87. Comparison of the Bylaws with the Board's Decision and Decision Making Process. The merits of the IRP will involve a determination of whether the action and decision of the Board with respect to the delegation and registry agreement for .PERSIANGULF was made in a manner consistent with the requirements under the Articles and Bylaws. The IRP Panel will make this comparative determination on the basis of a standard of balance of probabilities. At this stage, only a preliminary assessment can and should be made on these issues. It is sufficient to identify the presence of serious issues or serious questions and determine if there is a reasonable possibility of success on the available evidence. It is also essential to avoid any prejudgement or findings on the merits of these issues and to avoid influencing the IRP Panel in its eventual task.

88. The Respondent asserts that it has acted consistently with the Bylaws throughout. Based on a careful review of the Bylaws and the evidence, there are in my view a number of serious questions about the process of the Board's decision making and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process. A series of more focussed questions about the decision making process emerge from the analysis of the evidence, including the following:

a. Did the ICANN Board or the NGPC acting for the Board exercise its own independent judgment in deciding to proceed to delegate .PERISANGULF and to enter into a registry agreement or did it simply adopt the GAC advice in the GAC Durban Communique that the GAC did not object, without doing its own independent assessment?

b. Did the NGPC identify, consider and take guidance from the core values as set out in Article I, Section 2 of the Bylaws, including values 4, 8, and 11 relied upon by the Claimant? Did the NGPC determine which of the core values were most relevant to the issue of the delegation of .PERSIANGULF in light of the history of the opposition and if so what is the evidence of that?

c. Did the NGPC determine a balance of the competing values identified in Article I, Section 2 of the Bylaws with respect to the applied for gTLD and the objections to it? If so, what was it and on what was it based? Is that balance defensible, how, and where is that determination recorded? What is the evidence to confirm that a defensible balance of the competing values has been made?

d. Did the NGPC exercise due diligence to consider a reasonable amount of facts in making its decision to proceed with the delegation under the circumstances? Apart from taking a position consistent with the GAC advice set out in the Durban Communique, what other facts were relied upon by the NGPC? Did the NGPC consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or alternatively was the NGPC entitled or obliged to disregard that opposition due to the wording of the Durban Communique? Given the delay from the September 2013 resolution to November 2014 when the registry agreement was about to be signed, was the NGPC obliged to consider and did it consider, in exercising due diligence, the facts of the

continued opposition of the GCC and the events occurring during that period, such as the June 2014 meeting between ICANN representatives, including President Chehade, and representatives of the GCC, as well as the July follow-up letter? Where is the evidence of that consideration in its decision making? Should the Board consider and weigh the August 29, 2014 policy statement setting out the concerns of the Sub-working group that geographic names generally should be avoided in absence of agreement of relevant affected governments?

e. When did the ICANN Board in fact decide to delegate the domain? Is it in fact on September 10, 2013 with the adoption of the Scorecard in response to the GAC Durban Communique or was the decision made at a later date, such as after the June 2014 meeting of the ICANN President and the GCC representatives in Kuwait City, in which case how was that decision made?

89. The September 2013 Board decision, as taken, was simply to "continue to process the application in accordance with the established procedures in the AGB". That decision does not reflect any assessment or application of the competing core values or a consideration of the three stated values relied upon by the GCC. Nor does it provide a statement of a defensible balance of the competing values. It is clear that the ICANN Board was aware of the objections of the GCC and its constituent governments to the application, both before and after the September resolution to continue to proceed. The evidence does not establish that this governmental opposition was taken into account at all in the Board decision to proceed with the delegation of the .PERSIANGULF domain to Asia Green, given the apparent reliance on the wording of the Durban communique. It is certainly not clear under the Bylaws that the evidence of the objections by the GCC and its member states, raised after the September 10 resolution and before the signing of the registry agreement, should **not** be taken into account. To the contrary, core value in Article I, Section 2.11 suggests that recommendations of governments are to be duly taken into account. That is a significant and serious issue for consideration on the IRP in respect of which the parties will be entitled to adduce additional evidence. On the basis of the available evidence, the Claimant has a reasonable possibility of success on the merits of the IRP.

90. ICANN has also asserted that "ICANN did precisely what it was supposed to do pursuant to the Guidebook" and that there "is no Article [of Incorporation], Bylaws provision or

'guideline' that requires the ICANN Board to do anything more than follow the processes that it has followed" (ICANN Response, para. 54). That argument itself raises a serious and fundamental question to be considered and determined by the IRP Panel about the inter-relationship of the obligations on ICANN under the Guidebook and the Bylaws. Does compliance with the Guidebook procedures for the processing of a domain application satisfy the obligations on the ICANN Board under Bylaws Article 1, Section 2 in terms of the consideration of competing relevant values and the determination of an appropriate and defensible balance of those competing values? That is not at all obvious and the circumstances suggest an answer in the negative. Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values.

91. In its Response, ICANN also relied on the position expressed in the Comments of the Independent Objector (Exhibit R-ER-5) and on the findings of the Expert Determination (Claimant ER Request, Annex 2) to justify the propriety of the delegation. These specific recommendations are certainly material to the Board consideration, but they are not a substitute for the exercise by the Board of its own judgement in balancing the competing values as expressly required under Article 1, Section 2 of the Bylaws. Therefore, at this stage and based on the available evidence, the Claimant appears to have a reasonable possibility of success on the merits of the IRP.

92. Both the Independent Objector and the Expert also noted that the GCC could itself apply for .ARABIANGULF and thereby neutralize any objection with the delegation of .PERSIANGULF. ICANN in its Response has also relied on this argument. The Independent Objector stated that it is not the mission of the gTLD strings to solve or exacerbate such naming disputes, but they should adapt to the *status quo*. This directly raises the type of policy issue which should be addressed by the Board in a discussion and balancing of the core values of ICANN in Article 1, Section 2 and which calls out for a reasoned

discussion and defensible balance to be reached by the Board. There is no question about ICANN solving the naming dispute – it cannot. There is a serious question as to whether, in the context of a geographic naming dispute, the registration of one domain name and the encouragement to register the other will elevate the deeper dispute between the parties to a new level and introduce that dispute to the Internet and to the internet domain name system. As noted in the Expert Determination, denomination disputes can be of high importance, roiling international relations, particularly when it is a flashpoint for deeper disputes as appears to be the case here. While the suggestion of the Independent Objector is for the gTLD strings to adapt to the *status quo*, one of the objectives on an application for interim measures is to preserve the *status quo.* The context assists in determining what may be regarded as the *status quo*. According to the Independent Objector, since both disputed names are in fact used in practice in the different states, it is suggested that both be used. Absent agreement on a common name, that would be consistent with general rules for international cartography. However, in terms of the domain naming system and top level domains for the Internet, neither term is currently used – that is the *status quo* for top level domain names. It is that *status quo* which should be preserved pending the completion of the IRP. The GCC is not asking to use the domain .ARABIANGULF and at this point does not want to use that domain. It is simply seeking to maintain the status quo that neither name be used as a gTLD.

93. This Emergency Panel therefore finds that the GCC has a reasonable possibility of success on the IRP for the purposes of granting interim measures in the nature of injunctive relief. However, nothing in this Interim Declaration should be taken as a finding on the merits binding on the IRP panel or as a suggestion of any decision which the ICANN Board should or should not make in respect of the merits of the domain application in dispute. The IRP Panel will have an opportunity on a full evidentiary record to make the determination required of it pursuant to the ICANN Bylaws, Article IV, Section 3 whether the Board in making its decision has acted consistently with the provision of the Articles and Bylaws. That is not a review *de novo* of the merits of the decision of the ICANN Board, but a review of the decision-making process of the Board in light of requirements under the Bylaws.

e. Other Considerations for Interim Measures

94. Based on the foregoing analysis, the Claimant has established an entitlement to an order that ICANN refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF until the IRP is completed, or until such other order of the IRP panel. Of course in the event that the parties are able to amicably resolve the issues to their mutual satisfaction, the interim order and the proceedings can be brought to an end upon their consent. It is a common term or condition for the grant of such interim measures in the nature of injunctive relief to require the applicant to post security for any potential monetary damages or costs which may be caused by the grant of such measures in the event that the order is subsequently set aside or terminated. No request has been made at this time for security and the parties were not asked to brief the point. Therefore no order for such security shall be made at this time. However, the order made herein is without prejudice to any request which may be made in due to the IRP Panel which shall be free to consider that issue afresh.

95. Neither the Claimant nor the Respondent has sought costs of this Request for Interim Measures. The issue of costs was simply not addressed in the written or oral submissions. No order as to costs will be made at this time, but the issue of costs of this Request for Interim Measures shall be reserved to IPR panel.

VI. Conclusion and Interim Declaration`

96. Based on the forgoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:

- **a.** ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;
- **b.** This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;
- **c.** This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and,
- **d.** The costs of this Request for Interim Measures shall be reserved to the IRP panel.

97. After the completion of the foregoing reasons for this emergency interim declaration and immediately before its release, the Tribunal received an email from the Claimant dated 11

February 2015, attaching a letter from ICANN dated 2 February 2015 which was apparently in response to the letter dated 9 July 2014 from Mr. Al Ghanim referred to in these reasons. In the February 2 letter, ICANN advised that the processing of the .PERSIANGULF application had been placed "On Hold". Apparently, Asia Green invoked the Cooperative Engagement Process in respect of some decision of the ICANN Board. As noted earlier, that process must be commenced within 15 days of the posting of the minutes of the Board which are said to violate the Articles or Bylaws. As a result of the application being placed "On Hold", the GCC took the position that their Emergency Request for Interim Measures had been rendered moot and asked for a declaration to be issued to that effect, but with an express reservation that the matter proceed in the event that ICANN does take further steps to sign an agreement with Asia Green.

98. As for ICANN's position, the letter of February 11 also set out ICANN's position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also delivered a response opposing the GCC request. ICANN asserted that the GCC should either withdraw the Request for Emergency Relief or allow the decision with respect to that Request to be released if the "GCC wishes to ensure that the .PERSIANGULF application remains on hold". Clearly, ICANN did not agree that the Request was moot. ICANN asserted those accountability mechanisms under the Bylaws should proceed to completion, including this Request for Emergency Relief or, alternatively, that the GCC withdraw the Request for Emergency Relief.

99. On 12 February 2015 at 9:29 pm EST, the GCC replied to the ICANN position. The GCC did not withdraw its Request. The GCC maintained its position that the letter of February 2 from ICANN rendered the Request moot.

100. The parties are not in agreement on a consent disposition to this application. GCC has not withdrawn the Request for Emergency Relief. The Request remains extant. As a result, it is appropriate that this Declaration be released forthwith.

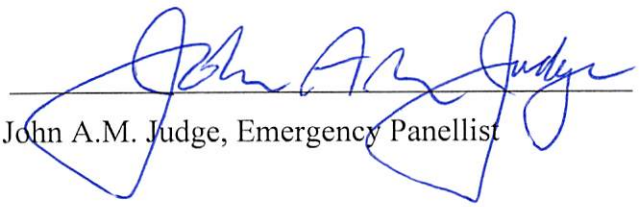
101. Having reviewed the letter of 2 February 2015 and the further submissions of the parties in the email of counsel of February 11 and 12, 2015, this Tribunal finds and confirms that the reasoning and result remains as set out above. The result is not altered or changed by these late submissions. Indeed, these materials reinforce the finding that the Declaration as set out

above should now be issued and released. Most importantly, the position taken by ICANN clearly indicates that, but for an order on this Request for Emergency Relief, the application will not remain on hold, suggesting that the registry agreement will be signed. The fact of the commencement of the Cooperative Engagement Process by Asia Green raises further questions as to what is the decision of ICANN Board in respect of the disputed application. For the purposes of the recently commenced Cooperative Engagement Process it may simply be the decision to put the application on hold pending the completion of the emergency request. The ICANN letter of 2 February 2015 is not an admission or commitment by ICANN that it will place the application on hold pending the completion of the GCC's IRP request. The request by Asia Green for the Cooperative Engagement Process raises many other questions as to the role if any of the GCC in that process and also the impact, if any at all, on the GCC request for the IRP. ICANN is rightly concerned that the accountability processes including the IRP should proceed as intended under the Bylaws. Therefore, for these reasons, the request of the GCC for a declaration that this Request is now moot is denied.

102. To be clear, and having taken into account the submissions of parties received on 11 and 12 February 2015, the interim declaratory relief as set out in paragraph 96 is hereby granted.

Signed in Toronto, Ontario, Canada for delivery to the Parties in Los Angeles, California, USA and Riyadh, Saudi Arabia.

Dated 12 February 2015.



John A.M. Judge, Emergency Panellist

Legal Authority CA-7

International Centre for Settlement of Investment Disputes

Burlington Resources Inc. and others
CLAIMANTS

v.

Republic of Ecuador

and

Empresa Estatal Petróleos del Ecuador (PetroEcuador)
RESPONDENTS

ICSID Case No. ARB/08/5

PROCEDURAL ORDER No. 1
on Burlington Oriente's Request for Provisional Measures

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Date: June 29, 2009

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I. FACTUAL AND PROCEDURAL BACKGROUND

A. Subject matter of this Order

1. The present order deals with a request for provisional measures, by which Burlington Resources Oriente Limited ("Burlington Oriente"; to the exclusion of the other Claimants in this arbitration) seeks the following relief from the Arbitral Tribunal:

   (i) that Ecuador and PetroEcuador and/or their agencies or entities refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42;

   (ii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from making or implementing any measure, decision or resolution which directly or indirectly affects the legal situation of or is intended to terminate the Block 7 and 21 PSCs; and

   (iii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the *status quo*, including commencing any action or adopting any resolution or decision that directly or indirectly affects the legal or physical integrity of Burlington Oriente's representatives.

B. Origin of the dispute

2. The present dispute originates from two production sharing contracts ("PSCs") for the exploration and exploitation of oil fields in the Amazon Region. The first contract relates to Block 7. It was concluded on 23 March 2000 between Kerr McGee Ecuador Energy Corporation, Preussag Energie GMBH, Sociedad Internacional Petrolera S.A., Compañía Latinoamericana Petrolera Número Dos S.A., on the one hand and the Republic of Ecuador ("Ecuador") by the intermediary of Empresa Estatal Petróleos del Ecuador ("PetroEcuador"), on the other hand (the "Block 7 PSC"). The second contract relates to Block 21. It was concluded on 20 March 1999 between Oryx Ecuador Energy Company, Santa Fe Minerales del Ecuador S.A., Sociedad Internacional Petrolera S.A., and Compañía

Latinoamericana Petrolera S.A., on the one hand, and Ecuador by the intermediary of PetroEcuador, on the other hand (the "Block 21 PSC"). Burlington Resources Oriente Limited ("Burlington Oriente") alleges that it now holds a 42.5% interest in the Block 7 PSC and a 46.25% interest in the Block 21 PSC, an allegation that remained unchallenged. Perenco Ecuador Limited ("Perenco") is the operator of Blocks 7 and 21.

3. Both PSCs contain tax stabilization clauses, a choice of Ecuadorian law, and an ICSID arbitration clause.

4. According to its Article 6(2), the Block 7 PSC will expire on 16 August 2010. By contrast, pursuant to Articles 6(2)(5) and 6(3) of the Block 21 PSC, the period of exploitation for such PSC is twenty (20) years from the date of authorization of PetroEcuador, *i.e.* allegedly until 2021, being specified that by letter of 24 December 2008 (Exhibit C49) the Ministry of Energy and Mines invited Perenco to appoint a negotiating team for the early termination of Block 21 PSC (as confirmed by the Ministry's letter of 26 January 2009 – Exhibit E3).

5. Burlington Oriente and Perenco formed a Consortium, which is responsible for the tax obligations derived from the PSCs.

6. On 19 April 2006, Ecuador enacted Law No. 2006-42 ("Law 42"), which amended the Hydrocarbons Law of Ecuador as follows:

> "**[c]ontracting companies** having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference** […]." (Exhibit C7, Article 2; emphasis added)

7. Decrees Nos. 1583 (29 June 2006) and 1672 (13 July 2006) spelled out the method of calculation of such 50% participation. From the record, it appears that the "*reference price*" (that is "*the monthly average selling*

price in force at the date of subscription of the agreement expressed at constant rates for the month of payment") is USD 25 per barrel for Block 7 (Transcript, p.163) and USD 15 per barrel for Block 21 (Exhibit C41). In other words, if "*the actual monthly average selling price for the FOB sale of Ecuadorian crude oil*" amounted for instance to USD 40, Ecuador's participation would be 50% of USD 15, *i.e.* USD 7.5, for Block 7 and 50% of USD 25, *i.e.* USD 12.5, for Block 21.

8. On 18 October 2007, Ecuador published Decree No. 662 ("Decree 662"; from here, any reference to Law 42 includes Decree 662 unless otherwise specified), which amended Decree No. 1672 and increased the participation on "*extraordinary revenues*" pursuant to Law 42 from 50 percent to 99 percent. Using the same example as in the preceding paragraph, Ecuador's participation would be 99% of USD 15, *i.e.* USD 14.85, for Block 7 and 99% of USD 25, *i.e.* 24.75, for Block 21 crude.

9. From the enactment of Law 42 until June 2008, *i.e.* during eighteen months after the adoption of Law 42 and eight months after Decree 662, the Consortium made the payments due under these texts to the State (hereinbelow, the expression "Law 42 payments" will include payments under Decree 662, unless otherwise specified). Specifically, by June 2008, the Consortium alleges that it "*had made Law No. 2006-42 payments for Block 7 and 21 to Ecuador in excess of US$396.5 million*" (Request for provisional measures, para.25).

10. Thereafter, the Consortium ceased to make such payments to the Respondent. Instead, it deposited the monies owed under Law 42 (and Decree 662) in an alleged total amount of USD 327.4 million (USD 171.7 million for Block 7 and USD 155.7 million for Block 21) into two segregated accounts, over which it keeps control.

11. Following the decision of Burlington Oriente to reject Ecuador's proposal to amend the Block 7 and 21 PSCs, Ecuador allegedly threatened to seize assets of the Consortium in order to collect unpaid amounts relating to Law 42 and to terminate the Block 7 and Block 21 PSCs. Notices were

served by PetroEcuador on Perenco (Exhibit C55), in order to collect monies in the amount of USD 327,467,447.00 million (for the entire Consortium).

12. On 19 February 2009, Ecuador and PetroEcuador (through the Executory Tribunal of PetroEcuador) instituted so-called *coactiva* proceedings to enforce the payment of USD 327,467,447.00, corresponding to the Consortium's allegedly unpaid amounts under Law 42.

13. On 25 February 2009, PetroEcuador proceeded to serve its third notice of the *coactiva* process on Perenco, which filed an action before the Civil Judge of Pichincha against any further actions that could be taken within the *coactiva* process[1].

14. On 3 March 2009, the *coactiva* administrative tribunal ordered the immediate seizure of all Block 7 and 21 crude production and cargos produced by Perenco**,** which decision was confirmed by the Civil Judge of Pichincha on 9 March 2009 (Exhibit C60).

15. At the hearing, Burlington Oriente asserted that the "[coactiva judge] *elected to treat it* [the debt for payments under Law 42] *as if it was res judicata, and then went ahead, seized the assets, and auctioned off – and auctioned them off for payment*." (Transcript, pp.27-8). The Respondents did not rebut such statement. They had actually stated in a letter of 3 March 2009 that "*steps have been, or will imminently be, taken by the 'coactivas judge' to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente's Request for Provisional Measures*". Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington. By contrast, it has not been shown that other assets such as production equipment have been seized.

1 It is unclear whether Perenco alone, or the whole Consortium (as stated by the Respondents, see para.40 of the Rejoinder) filed an action before the Ecuadorian courts.

C. Request for arbitration

16. On 21 April 2008, Burlington Resources Inc., Burlington Oriente, Burlington Resources Andean Limited and Burlington Resources Ecuador Limited filed a Request for arbitration with ICSID. They asked for the following relief:

> "(a) DECLARE that Ecuador has breached:
>
> (i) Article III of the Treaty [between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment] by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington's investments in Ecuador;
>
> (ii) Article II of the Treaty by failing to treat Burlington's investments in Ecuador on a basis no less favorable than that accorded nationals; by failing to accord Burlington's investments fair and equitable treatment, full protection and security and treatment no less than that required by international law; by implementing arbitrary and discriminatory measures against Burlington's investments; and
>
> (iii) Each of the PSCs;
>
> (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
>
> (c) AWARD such other relief as the Tribunal considers appropriate; and
>
> (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration, including Burlington's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs".

D. Procedural history

17. On 20 February 2009, Burlington Oriente filed a Request for provisional measures (the "Request").

18. The Request was accompanied by a number of exhibits, including a witness statement from Mr. Alex Martinez. It included a request for a temporary restraining order with immediate effect.

19. On 23 February 2009, the First Respondent (Ecuador) filed a response to the Claimant's request for a temporary restraining order. It in particular undertook "*to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it takes any measure that seeks to enforce the debts claimed in exhibit C-55 to the request for Provisional Measures".* On the basis of this undertaking, the Tribunal considered that it could dispense with reviewing whether a temporary order with immediate effect was justified pending determination of the application for provisional measures.

20. Burlington Oriente renewed its request for a temporary restraining order on 25 February 2009 alleging that the third *coactiva* notice had been given and that three days thereafter the Respondents could start seizing assets. The First Respondent replied on 26 February 2009 and reiterated its undertaking.

21. On 27 February 2009, the Arbitral Tribunal again resolved that there was no need to rule on Burlington Oriente's request in view of Ecuador's repeated assurances.

22. On 3 March 2009, Burlington Oriente again repeated its request for a temporary restraining order, owing to the alleged imminence of the seizures of Burlington Oriente's assets pursuant to two orders issued by the *coactiva* tribunal on 3 March 2009.

23. On 4 March 2009, the First Respondent filed a preliminary reply to Burlington Oriente's Request for provisional measures (the "Preliminary Reply").

24. On 6 March 2009, in light of the information received three days earlier, the Arbitral Tribunal recommended "*that the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties*

and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first." In issuing such recommendation, the Arbitral Tribunal considered that the requirements of urgency and of necessity were met. It in particular considered that Burlington Oriente's right to have its interests effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances.

25. The First Respondent filed its Reply to Burlington Oriente's Request for provisional measures (the "Reply"), together with a Request for reconsideration of the Tribunal's recommendation of 6 March 2009, on 17 March 2009. On 25 March 2009, the Claimant filed a Reply to the First Respondent's request for reconsideration of the Tribunal's recommendation on 25 March 2009. The Arbitral Tribunal denied the First Respondent's request for reconsideration on 3 April 2009 on the ground that no changed circumstances called for reconsideration and that the hearing on provisional measures was to take place shortly thereafter.

26. The Claimants filed their Response to Ecuador's Replies to the Request for provisional measures on 27 March 2009 (the "Response") and the Respondent filed their Rejoinder to Burlington Oriente's Request for provisional measures on 6 April 2009 (the "Rejoinder").

27. The hearing on provisional measures took place on 17 April 2009 in Washington, D.C. It was attended by the following persons:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Francisco Orrego Vicuña, Arbitrator

ICSID Secretariat

Mr. Marco T. Montañés-Rumayor, Secretary of the Tribunal

Representing the Claimants

Ms. Aditi Dravid, ConocoPhilips Company

Mr. Alex Martinez, Burlington Resources Oriente Limited

Mr. Alexander Yanos, Freshfields Bruckhaus Deringer US LLP

Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP

Mr. Viren Mascarenhas, Freshfields Bruckhaus Deringer US LLP

Mr. Javier Robalino-Orellana, Pérez Bustamante & Ponce Abogados Cía Ltda.

Representing the First Respondent Republic of Ecuador

Mr. Alvaro Galindo Cardona, Director de Patrocinio Internacional Procuraduría General del Estado

Mr. Juan Francisco Martínez, Procuraduría General del Estado

Mr. Felipe Aguilar, Procuraduría General del Estado

Mr. Eduardo Silva Romero, Dechert LLP

Mr. George K. Foster, Dechert LLP

Mr. José Manuel García Represa, Dechert LLP

Representing the Second Respondent PetroEcuador

Dr. José Murillo Venegas, Empresa Estatal Petróleos del Ecuador

Dr. Wilson Narváez, Empresa Estatal Petróleos del Ecuador

At the hearing, the Tribunal heard the Parties' oral arguments as well as the testimony of Mr. Martinez. A transcript was made in English and Spanish and distributed to the Parties.

II. PARTIES' POSITIONS

A. Claimant's position

28. The Claimant argues that the test to be applied to provisional measures is twofold: urgency and necessity to spare significant harm to a Party's rights.

29. It understands the first requirement of urgency in a broad fashion that includes situations in which protection cannot wait until the award. In the

present case, it submits that urgency arises out of the Respondents' plan to enforce all amounts due under Law 42.

30. With respect to necessity, the Claimant stresses that the distinction between "significant" and "irreparable" harm does not entail consequences in the present case. According to the Claimant, irreparable harm is not required under the ICSID Convention or international law, and a broad meaning has been given to the phrase by a number of international tribunals (*Paushok v. Mongolia*, *City Oriente v. Ecuador*, *Saipem v. Bangladesh*). It further submits that ICSID arbitral tribunals have interpreted "*necessity*" for provisional measures not so much as a need to prevent "*irreparable*" harm but as a need to spare "*significant harm*". According to the Claimant, ICSID tribunals have also given careful consideration to the proportionality of the measures when considering if they are necessary.

31. The Claimant argues that necessity exists here in three respects:

    (i) Provisional measures are necessary to preserve the Claimant's rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules pursuant to which "[…] *once the parties have consented to ICSID arbitration, they cannot resort to other forums in respect to the subject matter of the dispute before the ICSID Tribunal*." (Response, para.32). The Claimant contends that through the *coactiva* proceedings, the Respondents seek provisional relief against it in contravention to the said rights.

    (ii) Provisional measures are necessary to protect Burlington Oriente's independent right to specific performance of the Block 7 and 21 PSCs. The right to specific performance exists under Ecuadorian law, as provided by Article 1505 of the Ecuadorian Civil Code and confirmed by the Supreme Court of Ecuador in the case of *Tecco v. IEOS*. The Claimant also argues that Burlington Oriente's right to specific performance would not survive termination of the PSCs and that it is a property right that deserves protection to prevent its dissipation or destruction. The Claimant substantially argues that the Respondents' measures will irreversibly end Burlington Oriente's actual right to seek specific performance of the PSCs by effectively terminating them.

    (iii) Provisional measures are necessary to protect Burlington Oriente's self-standing rights to the preservation of the *status quo*, non-

> aggravation of the dispute, and preservation of the award. These rights are in danger of being irreparably harmed by the actions of the Respondents. In particular, according to the Claimant, the enforcement of Law 42 would alter the *status quo* and aggravate the dispute, as well as frustrate the effectiveness of the award, particularly of an award of specific performance.

32. The Claimant adds that its request for provisional measures not only responds to the necessity criterion, but also fulfills the proportionality requirement. They point out that "[s]*ince Ecuador has not enforced Law No. 2006-42 since June 2008, when the* Consortium *began depositing it into a segregated account, no additional burden would be imposed upon Ecuador if the Tribunal authorized the Consortium or Burlington Oriente to continue paying such amounts into a segregated account or into an official escrow account*." (Request, para.74).

33. The Arbitral Tribunal further notes the statement made by Mr. Alex Martinez, a member of the Board of Directors for Burlington Oriente and Latin America Partnership Operations and Peru Opportunity Manager for ConocoPhillips Corporation, according to whom "[i]*f Ecuador indeed seizes the production assets of the Perenco-Burlington Oriente Consortium and/or the oil produced by the consortium, Burlington Oriente will be forced to exit Blocks 7 and 21 as it will be forced in this context to spend money to produce oil for the sole benefit of PetroEcuador*" (Witness Statement of Alex Martinez, para.10).

B. Respondents' position

34. In its Preliminary Reply, Reply and Rejoinder, the First Respondent (Ecuador) set out its arguments against the Claimant's Request. The Second Respondent (PetroEcuador) stated in its letters of 31 March, 2 and 6 April 2009 that it opposed the Claimant's Request and agreed with the position of the Republic of Ecuador, as expressed in the submissions just referred to. Therefore, the Arbitral Tribunal will thereafter refer to the position expressed in the First Respondent's submissions as that of both Respondents (on the admissibility of PetroEcuador's opposition to the Request, see para.43).

35. The Respondents state at the outset of their submissions that the Claimant's acts against the enforcement of a valid Ecuadorian law constitute an interference with the sovereignty of Ecuador. They further contend that a presumption of validity exist in favor of legislative measures adopted by a State, that any loss might be compensated by an award of damages and interest, and that the Claimant admits that it could meet its obligations to pay the disputed amounts, since it stated to have set aside the relevant amounts in U.S. accounts. The Respondents also state that the Claimant's Request is neither urgent nor necessary.

36. The Respondents stress that the applicable test for granting provisional measures is the existence of an urgent need to avoid irreparable prejudice, in accordance with ICJ practice. In particular, they stress that no ICSID tribunal has ever rejected the criterion of "*irreparable*" harm to the benefit of "*significant*" harm. They further state that Burlington Oriente's reliance on *Paushok v. Mongolia* and *City Oriente v. Ecuador* is misplaced, as in the latter case, irreparable harm was met on the facts and, in the former, the arbitral tribunal recognized that it went against the weight of authorities.

37. Furthermore, the Respondents understand urgency as follows: "[…] *action prejudicial to the rights of Burlington Oriente is likely to be taken before the Tribunal can finally decide on the merits of the dispute submitted to it*." (Preliminary Reply, para. 8). The Respondents also state that "*Burlington Oriente's reliance on a so-called 'proportionality test' confuses the issue*" (Preliminary Reply, para.52).

38. The Respondents do not see the need for protection against the termination of the PSCs as urgent, since Ecuador confirmed on 23 February 2009 to the Arbitral Tribunal that none of the Respondents had taken steps to this effect.

39. The Respondents further opposed the Claimant's arguments asserting that Burlington Oriente has not identified any substantive right requiring preservation through provisional measures:

(i) The *coactiva* process does not threaten the Claimants' rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules. Such process is an administrative not a judicial proceeding. Consequently, it does not involve the determination of any of the matters at issue in this arbitration. The only judicial proceedings before the Ecuadorian courts (namely the proceedings in front of the Civil Court of Pichincha) were initiated by the Claimants, and not by any of the Respondents.

(ii) Burlington Oriente has no right to specific performance of the PSCs, let alone one that would be irreparably harmed absent provisional relief. It has not established that Ecuador actually intended to terminate the PSCs. To the contrary, the government "***expressly disavowed*** *any such intention*." (Rejoinder, para.21, with emphasis). Even if Ecuador had such intent, Burlington Oriente would still have no right to specific performance under international law. As for Ecuadorian law, it does not recognize a right to specific performance when the subject matter of the obligation is contrary to the law, which would be the case here because the enforcement of the PSCs would breach Law 42. Moreover, there is no more basis for a tribunal to restrain a sovereign State from terminating a contract than to order a State to reinstate a contract after termination.

(iii) The preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the effectiveness of the award are not free standing rights in international law, independent from contractual or treaty rights. The preservation of the *status quo* is one of the purposes to be served by preserving rights under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules by way of provisional measures. Even if it had a right to the preservation of the *status quo*, Burlington Oriente is the one who altered this *status quo* by ceasing to pay the amounts due to Ecuador. Finally, there is no risk that the enforcement of Law 42 aggravates the dispute or renders any future award ineffective, since the dispute can easily be resolved through a monetary award.

40. The Respondents further argue that the Claimant's allegations about a threat to the physical and legal integrity of Burlington's representatives is unparticularised and should therefore be rejected.

III. DISCUSSION

41. The Tribunal will first deal with some preliminary matters (A). Thereafter, it will address the standards applicable to provisional measures in general (B), before reviewing each such standards, *i.e*. the existence of right (C),

urgency (D), and necessity or the need to avoid harm (E). It will finally deal with the issue of the escrow account (F) before setting forth its decision (IV).

A. PRELIMINARY MATTERS

42. The Arbitral Tribunal will first deal with a few procedural issues which arose during the hearing of 17 April and in the course of previous written exchanges, namely the timeliness of PetroEcuador's opposition to the Request; Burlington Oriente's use of an alleged statement by President Correa; and the request for relief regarding the alleged threat to the legal and physical integrity of the Claimant's representatives.

43. Burlington Oriente argues that PetroEcuador's endorsement of Ecuador's position on 31 March 2009 (confirmed on 1 and 6 April 2009 and repeated at the hearing, Transcript, p.9) was untimely and should thus not be considered. PetroEcuador attended the hearing without presenting oral argument of its own in accordance with the Tribuna''s understanding set out in the latter's letter of 8 April 2009. Since PetroEcuador made no written or oral submissions of its own, but for its adhesion to Ecuador's case, the fact that such adhesion did not respect the briefing schedule did not affect the Claimant's due process rights. The Tribunal would thus find it excessively formalistic to disregard PetroEcuador's endorsement of the First Respondent's position.

44. As a second preliminary matter, the Respondents object to Burlington Oriente's reliance at the hearing on a statement by President Correa in 2008 (Transcript, p.21). Since evidence of such a statement was not in the record then, the Arbitral Tribunal will not consider it for purpose of this decision.

45. As a third preliminary matter, the Respondents submit that Burlington Oriente's request for relief based on the threat to the legal and physical integrity of its representatives has been abandoned (Transcript, pp.90-91). The Arbitral Tribunal indeed notes that Burlington Oriente has not opposed such submission at the hearing. Be this as it may, the allegation of threats

is in any event unsubstantiated Hence, the Tribunal will not further entertain it. [2]

46. As a final observation within these preliminary matters, the Tribunal notes that this order is made on the basis of its understanding of the record as it stands now. Nothing herein shall preempt any later finding of fact or conclusion of law.

B. APPLICABLE STANDARDS

1. Legal framework

47. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal.

48. Article 47 of the ICSID Convention provides that

> "[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party."

49. Rule 39 of the ICSID Arbitration Rules reads as follows:

> (1) "At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

[2] *See,* for a similar approach, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para. 89: "In other words, Claimants are asking a provisional measure in order to avoid a behaviour, which they are not even sure to be intended. This is not the purpose of a provisional measure. Provisional measures are not deemed to protect against any potential and hypothetical harm susceptible to result from uncertain measures, they are deemed to protect the requesting party from an imminent harm."

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[…]"

It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is a *prima facie* basis for jurisdiction.

50. The provisional measures were requested by Burlington Oriente, *i.e.* one of the so-called "*Burlington subsidiaries*" (Request for Arbitration, para.1). The "*Burlington subsidiaries*" (that is Burlington Oriente, Burlington Resources Ecuador Limited and Burlington Resources Andean Limited) seek compensation for the Respondents' breach of the PSCs (Request for Arbitration, para.3). As far as Burlington's subsidiaries are concerned, the Claimants assert that ICSID has jurisdiction on the basis of the arbitration clauses embodied in Section 20.3 of the Block 7 PSC and Section 20.2.19 of the Block 21 PSC:

"By the express language of the PSCs for Blocks 7, 21 and 23, the parties consented to ICSID jurisdiction from the moment the ICSID Convention was ratified by Ecuador. Ecuador ratified the ICSID Convention on February 7, 2001. Thus, since February 7, 2001, all parties to the PSCs for Blocks 7, 21 and 23 have consented to ICSID arbitration to resolve the dispute set forth herein." (Request for Arbitration, para.131).

Hence, the Tribunal considers that it has *prima facie* jurisdiction for purposes of rendering this order.

2. Requirements for provisional measures

51. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties differ on the nature of such harm. The Claimant argues that significant harm is sufficient, while the Respondents insist on

irreparable harm. The Parties further disagree on the type and existence of the rights to be protected. The Tribunal will now review the different requirements for provisional measures just set out and the Parties' divergent positions in this respect.

C. EXISTENCE OF RIGHTS

52. Burlington Oriente asserts that three types of rights need protection by way of provisional measures, namely the right to exclusive recourse to ICSID under Article 26 of the ICSID Convention (1); the rights to the preservation of the *status quo*, the non-aggravation of the dispute and the effectiveness of the arbitral award (2); and the right to specific performance of the PSCs (3).

53. At the outset, one notes the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard (Transcript, p.169, 179-80, 199). It cannot require actual proof, but must be satisfied that the rights exist *prima facie*.

1. Right to exclusivity under Article 26 of the ICSID Convention

54. In the first place, Burlington Oriente substantially argues that provisional measures are necessary to preserve the exclusivity of ICSID proceedings under Article 26 of the ICSID Convention, which in essential part provides that *"*[c]*onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."*

55. The Claimant submits that matters at issue in the present case are being adjudicated in the *coactiva* process. The Respondents reply that the *coactiva* proceeding is an administrative not a judicial process, that it carries no *res judicata*, and does not preempt the determination of the dispute by this Tribunal.

56. In the Tribunal's view, two questions arise here. First, does a right to the exclusive jurisdiction of ICSID exist as a right that can be protected through provisional measures? If the answer is positive, the second question that arises is whether that right is at risk under the circumstances if no provisional measures are granted.

57. The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures, or in the words of the *Tokios Tokelés v. Ukraine* tribunal:

> "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative."[3]

58. The existence of such a right being accepted, is the continuation of the *coactiva* process susceptible of putting this right at risk? There is conflicting argumentation on record about the true legal nature and the subject matter of the *coactiva* process (Transcript, pp. 26-7, 49-63, 116-30). The Tribunal is thus unable to come to a conclusion on this issue in the context of this Order. Hence, for purposes of the present limited review, it cannot but hold that Burlington Oriente has not established a *prima facie* case of breach of Article 26 of the ICSID Convention.

2. Right to the preservation of the *status quo* and non-aggravation of the dispute

59. Second, Burlington Oriente asserts rights to the preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the award. The Respondents object that these are neither rights under Article 47 of the ICSID Convention nor free standing rights under international law and that the Claimant can only seek measures that protect the substantive rights in dispute.

60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or

[3] *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 3 of 18 January 2005, para. 7, citation omitted.

substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

61. The Tribunal will now review the right to the preservation of the *status quo* and the non-aggravation of the dispute. Such rights focus on the situation at the time of the measures. By contrast, the right to the protection of the effectiveness of the award looks into the future. As such, under the circumstances of this case, it is closely linked with the right to specific performance. The discussion on such latter right, to which the Tribunal refers later in this Order, thus equally disposes of the issue of the protection of the award.

62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the case of the *Electricity Company of Sofia and Bulgaria*[4]. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need "*to preserve the status quo between the parties pending* [the] *final decision on the merits*" and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention "*is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award*"[5].

63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*[6] and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged "*the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do*

[4] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, para. 103, ICJ Reports 2001, p.466.

[5] 1 ICSID Reports 99.

[6] *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, "The First 'World Bank'" Arbitration (Holiday Inns v. Morocco) – Some Legal Problems", BYIL, 1980.

anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult"[7].

64. The principle was re-affirmed in *Plama v. Bulgaria*[8] (although with a somewhat more limited approach), *Occidental v. Ecuador*[9], and *City Oriente v. Ecuador*[10].

65. There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs are in force and, subject to the controversy about the Law 42 payments, appear to be performed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.

66. In making this finding, the Tribunal understands Ecuador's arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.

67. The Tribunal is also mindful of the Respondents' argument that Burlington Oriente is the one who altered the *status quo* by ceasing to pay the amounts due to Ecuador. It cannot, however, follow this argument. Indeed, the *status quo* at issue, the one that needs protection – provided the other requirements are met – consists in the continuation of the cooperation between the Parties in the framework of the PSCs.

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[7] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p.412.

[8] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/04), Order of 6 September 2005, para.40.

[9] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.96.

[10] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on provisional measures of 19 November 2007, para.55.

68. In conclusion, the Tribunal holds that Burlington Oriente has shown the existence of a right to preservation of the *status quo* and the non-aggravation of the dispute.

3. Right to specific performance (and to the preservation of the effectiveness of the award)

69. Third, the Claimant asserts a right to specific performance of the PSCs and to the protection of the effectiveness of an award that may sanction such right. It is disputed whether specific performance is admissible under Ecuadorian and international law.

70. With respect to international law, Article 35 of the ILC Articles on State responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate[11]. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. In the instant case, the PSCs are in force which makes it unnecessary to consider that view. As far as Ecuadorian law is concerned, it appears to provide for the remedy of specific performance pursuant to Article 1505 of the Civil Code.

71. Accordingly, at first sight at least, a right to specific performance appears to exist. Some other factual and legal elements seem to support the possibility of specific performance: (i) Burlington Oriente's claim for specific performance is a contract, not a treaty claim; (ii) the PSCs are still being perfomed, and (iii) they contain a choice of Ecuadorian law and a tax stabilization clause. Thus, at least *prima facie*, a right to specific performance could exist in the present situation. Under the circumstances, the same can be said of the right to the protection of the effectiveness of a possible future award.

[11] See also e.g. *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.400: "Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."

D. URGENCY

72. The Parties agree that there is urgency when it is impossible to wait until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute. They disagree, however, on whether the present facts meet the urgency requirement. The Respondents in particular submit that the threat of termination of the PSCs does not create an urgent situation as Ecuador has confirmed to the Tribunal on 23 February 2009 that the Respondents had taken no steps to this effect.

73. The Arbitral Tribunal agrees that the criterion of urgency is satisfied when, as Schreuer puts it, "*a question cannot await the outcome of the award on the merits*"[12]. This is in line with ICJ practice[13]. The same definition has also been given in *Biwater Gauff v. Tanzania*:

> "In the Arbitral Tribunal's view, the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award."[14]

74. The Tribunal shares the Respondents' opinion that no urgency arises from the alleged threat of termination of the PSCs. The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers. Indeed, when the

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[12] Christoph SCHREUER, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751 (para.17).

[13] In the words of the ICJ, "[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, para.23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para.22 *; Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, para.32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists", Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Order of 15 October 2008, para.129.

[14] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition[15].

E. NECESSITY OR NEED TO AVOID HARM

75. The Parties concur that the measures must be necessary or in other words that they must be required to avoid harm or prejudice being inflicted upon the applicant. They differ, however, on the required intensity of the harm: "*irreparable*", *i.e*. not compensable by money, for the Respondents, as opposed to "*significant*" for the Claimant.

76. The Respondents substantially argue that the harm invoked by Burlington Oriente cannot be deemed "*irreparable*" because (i) no production assets were seized and (ii) such harm can easily be made good by a monetary award. They rely in particular on *Occidental Petroleum and other v. Ecuador* to argue that "*a mere increase in damages is not a justification for provisional measures*" (Rejoinder, para.55).

77. The Claimant does not dispute that no production assets were seized, but insists that its operational capacity is severely threatened by the seizures, that the imposition of the Law 42 payments led to a loss on investment in 2008 and prevented a sale of the latter (Testimony of Mr. Martinez, Transcript, pp.117-118 and 114). It also argues that it may have no other choice than to "walk away" from its investment.

78. The words "necessity" or "harm" do not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by balancing the degree of harm the applicant would suffer but for the measure.

79. The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages. The *Occidental* tribunal found that there was no irreparable harm since the Claimants' harm, if any, could be

[15] Of the same opinion, in particular, City Oriente, Decision on Provisional Measures, para.69.

compensated by a monetary award[16]. In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages[17], but did not discuss the matter further. Similarly, the tribunal in *Metalclad v. Mexico* denied the request and underlined that the measures must be required to protect the applican''s rights from "*an injury that cannot be made good by subsequent payment of damages*"[18].

80. By contrast, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought was damages, while *City Oriente* was seeking contract performance[19]. In its decision not to revoke the measures, the tribunal stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 "*require that provisional measures be ordered only as means to prevent irreparable harm*"[20]. In the UNCITRAL investment case of *Paushok v. Mongolia*, the tribunal distinguished *Plama*, *Occidental* and *City Oriente* and concluded that "*irreparable harm*" in international law has a "*flexible meaning*". It also referred to Article 17A of the UNCITRAL Model Law which only requires that "*harm not adequately reparable by an award of damages is likely to result if the measures are not ordered*"[21].

81. However defined, the harm to be considered does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of both parties. Specifically, it stated that "*provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State*".[22] In the same spirit, the *City Oriente* tribunal stressed the

[16] Occidental, para.92.
[17] Plama, para.46.
[18] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information, October 27, 1997, para.8.
[19] City Oriente, Decision on Revocation, para.86.
[20] Ibid., para.70.
[21] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia* (UNCITRAL Case), Order on Interim Measures of September 2, 2008, paras.62, 68-69.
[22] Occidental, para.93.

need to weigh the interests at stake against each other. Referring to Article 17A(1) of the UNCITRAL Model Law, it emphasized the balance of interests that needs to be struck as follows:

> "It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby."[23]

82. In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of "*harm not adequately reparable by an award of damages*" to use the words of the UNCITRAL Model Law. It will also weigh the interests of both sides in assessing necessity.

83. Unlike *Occidental*, this case is not one of only "*more damages*" caused by the passage of time[24]. It is a case of avoidance of a different damage. The risk here is the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be granted against the investor's own act of "walking away", the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.

84. In reaching this conclusion, the Tribunal has paid due attention to the Respondents' argument that the effect of the seizures was economically neutral for the Claimant. Every time oil is seized for a given amount, past due Law 42 debts are extinguished, which would allow the Claimant to

[23] City Oriente, Decision on Revocation, para.72.
[24] Occidental, para.99.

withdraw the equivalent amount from the segregated account. Although the Claimant replies that it will not touch the monies on the segregated account, the objection is mathematically speaking correct. Yet, it misses the point. Indeed, the risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist. This is especially, but not exclusively so if the investor is liable to settle both the alleged past due Law 42 payments and the newly accruing ones (Transcript, p.195). The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.

85. This last observation shows that provisional measures are in the interest of both sides if they are adequately structured, a matter discussed in the next section.

F. ESCROW ACCOUNT

86. As an alternative to its main request for relief, Burlington Oriente confirmed at the hearing that it could envisage an escrow account "*where all the funds that are the subject of this dispute could be held pending its resolution*" (Transcript, pp.23-24, esp. lines 16-18). The Arbitral Tribunal notes the Respondents' argument that such account would be "*unmanageable and inadequate*" (Transcript, p.211, line 12), since it would exclusively cover the Parties in this arbitration, notwithstanding the joint liability of the Consortium and also because an offshore escrow account would be "*inimical to Ecuador's sovereignty*" (Transcript, p.212, lines 4-5).

87. The Arbitral Tribunal is of the view that the establishment of an escrow account would provide a balanced solution likely to preserve each Party's rights. The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would

reasonably expect both Parties to continue the performance of the PSCs under their terms.

88. The terms and conditions of the escrow account, and other practicalities call for a number of specifications:

(i) The escrow account shall contain all future and past payments due under Law 42 and Decree 662. Past payments shall include all payments owed by the Claimant and payed into their segregated account. It appears that past payments (in the amount of USD 327.4 million) were made by the Consortium into two segregated U.S. accounts (one for each of the members of the Consortium, see Request, para.25). Therefore, even if the Consortium were jointly liable for its debts as the Respondents allege, the Claimant will be able to separate the payments owed by it from the payments owed by Perenco.

(ii) The amounts deposited on the escrow account shall only be released in accordance with a final award, or a settlement agreement duly entered into by the Parties, or with other specific instructions issued by this Tribunal.

(iii) The escrow agent shall be an internationally recognized financial institution. For reasons of neutrality, it shall not be an Ecuadorian, North American or Bermudan institution.

(iv) Interest earned on the escrow account should be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal.

(v) The costs incurred by the escrow account shall be borne equally by both Parties but can be made part of the claim for compensation by each Party.

IV. ORDER

On this basis, the Arbitral Tribunal makes the following order:

1. The Parties shall confer and make their best efforts to agree on the opening of an escrow account at an internationally recognized financial institution incorporated outside of Ecuador, the United States of America and Bermuda;

2. Burlington Oriente shall pay into the escrow account all future and past payments allegedly due under Law 42 and Decree 662, including all payments made by the Claimants into their segregated account;

3. The funds in the escrow account shall only be released in accordance with a final award or a settlement agreement duly entered into by the Parties or with other specific instructions from this Tribunal;

4. The costs of the escrow account shall be borne equally by both Parties and can be made part of the claim for compensation by each Party;

5. The interest accrued on the escrow account shall be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal;

6. If the Parties cannot agree on the opening of an escrow account within 60 days from notification of this Order, they shall report to the Arbitral Tribunal setting forth the status of their negotiations and the content of and reasons for their disagreements, after which the Arbitral Tribunal will rule on the outstanding issues;

7. The Respondents shall discontinue the proceedings pending against the Claimant under the *coactiva* process and shall not initiate new *coactiva* actions;

8. The Parties shall refrain from any conduct that may lead to an aggravation of the dispute until the Award or the reconsideration of this order. In particular, Burlington Oriente shall refrain from making good on its threat to abandon the project and Ecuador shall refrain from any action that may induce Burlington Oriente to do so;

9. The Order issued by this Tribunal on 6 March 2009 is terminated;

10. Costs are reserved for a later decision or award.

[*signed*]
Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

[*signed*]
Professor Francisco Orrego Vicuña
Arbitrator

[*signed*]
Professor Brigitte Stern
Arbitrator

Legal Authority CA-8

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 8 MARCH 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 8 MARS 2011

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ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

YEAR 2011

2011
8 March
General List
No. 150

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CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; *Judges* ad hoc Guillaume, Dugard; *Registrar* Couvreur.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. Whereas by an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (herein-

after "Nicaragua") on the basis of an alleged "incursion into, occupation of and use by Nicaragua's army of Costa Rican territory" as well as alleged breaches of Nicaragua's obligations towards Costa Rica under:

"*(a)* the Charter of the United Nations and the Charter of the Organization of American States;
(b) the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 . . ., in particular Articles I, II, V and IX;
(c) the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 . . .;
(d) the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 . . .;
(e) the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat . . .;

(f) the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*; and
(g) other applicable rules and principles of international law";

2. Whereas Costa Rica states in its Application that

"[b]y sending contingents of its armed forces to Costa Rican territory and establishing military camps therein, Nicaragua is not only acting in outright breach of the established boundary regime between the two States, but also of the core founding principles of the United Nations, namely the principles of territorial integrity and the prohibition of the threat or use of force against any State in accordance with Article 2, paragraph 4, of the Charter; also endorsed as between the parties in Articles 1, 19 and 29 of the Charter of the Organization of American States";

3. Whereas Costa Rica contends in the said Application that

"Nicaragua has, in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory from the San Juan River to Laguna los Portillos (also known as Harbor Head Lagoon), and certain related works of dredging on the San Juan River";

whereas it states that during the first incursion, which occurred on or about 18 October 2010, Nicaragua was reported "felling trees and depositing sediment from the dredging works on Costa Rican territory"; whereas it adds that, "[a]fter a brief withdrawal, on or about 1 Novem-

ber 2010 a second contingent of Nicaraguan troops entered Costa Rican territory and established a camp";

4. Whereas Costa Rica maintains that "[t]his second incursion has resulted in the continuing occupation by armed Nicaraguan military forces of an initial area of around 3 square kilometres of Costa Rican territory, located at the north-east Caribbean tip of Costa Rica", but that "evidence shows that Nicaraguan military forces have also ventured further inside Costa Rican territory, to the south of that area"; whereas it contends that Nicaragua has "also seriously damaged that part of Costa Rican territory under its occupation";

5. Whereas Costa Rica also asserts in the said Application that "[t]he ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region";

6. Whereas, relying on statements made by the Nicaraguan head of the dredging operations and the President of Nicaragua, Costa Rica asserts that Nicaragua is seeking to divert the flow of the San Juan River to what that State erroneously describes as its "historic channel" by cutting a canal which would join the seaward course of the river to the Laguna los Portillos; whereas, in so doing, Nicaragua would cause harm to an area of territory which Costa Rica maintains, for the reasons set out at length in its Application, falls under its sovereignty;

7. Whereas Costa Rica contends in particular that the border line, which it claims Nicaragua is violating by its military and dredging operations, has for the last 113 years "consistently been respected and depicted, in all official maps of both countries, as constituting the international boundary line between Costa Rica and Nicaragua";

8. Whereas in its Application, as a basis for the jurisdiction of the Court, Costa Rica refers to Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá") and to the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929 (as amended on 23 October 2001);

9. Whereas, at the end of its Application, Costa Rica presents the following submissions:

> "For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican

territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.

In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

(a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;

(b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;

(c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;

(d) the obligation not to damage Costa Rican territory;

(e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;

(f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;

(g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

(h) the obligations under the Ramsar Convention on Wetlands;

(i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law";

10. Whereas Costa Rica also requests the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above" (para. 9);

11. Whereas on 18 November 2010, having filed its Application, Costa Rica also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court;

12. Whereas, in its Request for the indication of provisional measures, Costa Rica refers to the same bases of jurisdiction of the Court relied on in its Application (see paragraph 8 above) and to the facts set out therein;

13. Whereas, in support of the said Request, Costa Rica states that

> "Nicaragua is currently destroying an area of primary rainforests and fragile wetlands on Costa Rican territory (listed as such under the Ramsar Convention's List of Wetlands of International Importance) for the purpose of facilitating the construction of a canal through Costa Rican territory, intended to deviate the waters of the San Juan River from its natural historical course into Laguna los Portillos (the Harbor Head Lagoon)";

whereas it observes that "Nicaraguan officials have indicated that the intention of Nicaragua is to deviate some 1,700 cubic metres per second . . . of the water that currently is carried by the Costa Rican Colorado River";

14. Whereas Costa Rica contends that it has regularly protested to Nicaragua and called on it not to dredge the San Juan River "until it can be established that the dredging operation will not damage the Colorado River or other Costa Rican territory", but that Nicaragua has nevertheless continued with its dredging activities on the San Juan River and that it "even announced on 8 November 2010 that it would deploy two additional dredges to the San Juan River", one of which is reportedly still under construction;

15. Whereas Costa Rica asserts that Nicaragua's statements demonstrate "the likelihood of damage to Costa Rica's Colorado River, and to Costa Rica's lagoons, rivers, herbaceous swamps and woodlands", the dredging operation posing more specifically "a threat to wildlife refuges in Laguna Maquenque, Barra del Colorado, Corredor Fronterizo and the Tortuguero National Park";

16. Whereas Costa Rica refers to the adoption on 12 November 2010 of a resolution of the Permanent Council of the Organization of American States (CP/RES.978 (1777/10)), welcoming and endorsing the recommendations made by the Secretary-General of that Organization in his report of 9 November 2010 (CP/doc.4521/10); and whereas it states that the Permanent Council called on the Parties to comply with those recommendations, in particular that requesting "the avoidance of the presence of military or security forces in the area where their existence might rouse tension";

17. Whereas Costa Rica asserts that Nicaragua's "immediate response to the Resolution of the Permanent Council of the OAS was to state [its] intention not to comply with [it]" and that Nicaragua has "consistently refused all requests to remove its armed forces from the Costa Rican territory in Isla Portillos";

18. Whereas Costa Rica affirms that its rights to sovereignty and territorial integrity form the subject of its Request for the indication of provisional measures submitted to the Court; whereas it maintains that Nicaragua's obligation "not to dredge the San Juan if this affects or dam-

ages Costa Rica's lands, its environmentally protected areas and the integrity and flow of the Colorado River" corresponds to these rights;

19. Whereas, at the end of its Request for the indication of provisional measures, Costa Rica asks the Court

> "as a matter of urgency to order the following provisional measures so as to rectify the presently ongoing breach of Costa Rica's territorial integrity and to prevent further irreparable harm to Costa Rica's territory, pending its determination of this case on the merits:
>
> (1) the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories;
> (2) the immediate cessation of the construction of a canal across Costa Rican territory;
> (3) the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests;
> (4) the immediate cessation of the dumping of sediment in Costa Rican territory;
> (5) the suspension of Nicaragua's ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of this dispute;
>
> (6) that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court";

20. Whereas on 18 November 2010, the date on which the Application and the Request for the indication of provisional measures were filed in the Registry, the Registrar informed the Nicaraguan Government of the filing of these documents and transmitted certified copies of them to it forthwith, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of this filing;

21. Whereas on 19 November 2010 the Registrar informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 11, 12 and 13 January 2011 as the dates for the oral proceedings on the Request for the indication of provisional measures;

22. Whereas, pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission of the printed bilingual text of the Application to the Members of the

United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the Request for the indication of provisional measures;

23. Whereas, on the instructions of the Court and in accordance with Article 43 of the Rules of Court, the Registrar addressed to all the States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute; and whereas the Registrar also addressed to the Secretary-General of the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute;

24. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of them proceeded, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; whereas, for this purpose, Costa Rica chose Mr. John Dugard, and Nicaragua chose Mr. Gilbert Guillaume;

25. Whereas on 4 January 2011 Costa Rica transmitted to the Court certain documents relating to the Request for the indication of provisional measures, to which it intended to refer during the oral proceedings; whereas these documents were communicated forthwith to the other Party;

26. Whereas, on the same day and to the same end, Nicaragua in turn transmitted certain documents to the Court, which were communicated forthwith to the other Party; whereas on the same occasion Nicaragua filed in the Registry electronic copies of documents, including video material which it intended to present to the Court during the oral proceedings; whereas Costa Rica informed the Registrar that it had no objection to such a presentation; and whereas the Court authorized the presentation of the video material at the hearings;

27. Whereas, on 4 January 2011, Nicaragua also asked the Court, in the exercise of its power under Article 62, paragraph 1, of the Rules of Court, to call upon Costa Rica to produce, before the opening of the oral proceedings, studies it had carried out with regard to the impact of the dredging of the San Juan River on the flow of the Colorado River; whereas, following this request, Costa Rica produced such a study on its own initiative on 6 January 2011;

28. Whereas on 10 January 2011 Costa Rica also transmitted to the Court electronic versions of a Nicaraguan atlas from which it intended to produce certain maps during the oral proceedings; whereas this document was communicated forthwith to Nicaragua;

29. Whereas at the public hearings held on 11, 12 and 13 January 2011, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the Request for the indication of provisional measures were presented the following representatives of the Parties:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Arnoldo Brenes,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Marcelo Kohen,
Mr. James Crawford;

On behalf of Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Stephen C. McCaffrey,
Mr. Paul S. Reichler,
Mr. Alain Pellet;

and whereas, during the hearings, questions were put by certain Members of the Court to Nicaragua, to which replies were given in writing by the latter; whereas, in accordance with Article 72 of the Rules of Court, Costa Rica then commented upon Nicaragua's written replies;

* * *

30. Whereas, in its first round of oral observations, Costa Rica reiterated the arguments developed in its Application and its Request for the indication of provisional measures, and argued that the conditions necessary for the Court to indicate the requested measures had been fulfilled;

31. Whereas Costa Rica reaffirmed that, without its consent, Nicaragua has constructed an artificial canal across an area of Costa Rican territory unlawfully occupied by Nicaraguan armed forces; whereas, to this end, Nicaragua is said to have illegally deforested areas of internationally protected primary forests; and whereas, according to Costa Rica, Nicaragua's actions have caused serious damage to a fragile ecosystem and are aimed at establishing a fait accompli, modifying unilaterally the boundary between the two Parties, by attempting to deviate the course of the San Juan River, in spite of the Respondent's "constant, unambiguous [and] incontestable" recognition of the Applicant's sovereignty over Isla Portillos, which the said canal would henceforth intersect;

32. Whereas Costa Rica declared that it is not opposed to Nicaragua carrying out works to clean the San Juan River, provided that these works do not affect Costa Rica's territory, including the Colorado River, or its navigation rights on the San Juan River, or its rights in the Bay of San Juan del Norte; whereas Costa Rica asserted that the dredging works carried out by Nicaragua on the San Juan River did not comply with these conditions, firstly because Nicaragua has deposited large amounts of sediment from the river in the Costa Rican territory it is occupying and has proceeded to deforest certain areas; secondly, because these works, and those relating to the cutting of the disputed canal, have as a consequence the significant deviation of the waters of the Colorado River, which is situated entirely in Costa Rican territory; and, thirdly, because these dredging works will spoil portions of Costa Rica's northern coast on the Caribbean Sea;

33. Whereas Costa Rica asserted that the part of its territory affected by Nicaragua's activities is protected under the Convention on Wetlands

of International Importance especially as Waterfowl Habitat, done at Ramsar on 2 February 1971 (*United Nations Treaty Series (UNTS)*, Vol. 996, No. I-14583, p. 245, hereinafter the "Ramsar Convention"), and that on 17 December 2010, further to a mission, a report by the Ramsar Secretariat (hereinafter the "Ramsar Report") stated that the work undertaken by Nicaragua had inflicted serious damage on the protected wetlands; whereas Costa Rica also referred to a report of 4 January 2011 drawn up by the Operational Satellite Applications Programme of the United Nations Institute for Training and Research (hereinafter the "UNITAR/UNOSAT report") relating to the geomorphological and environmental changes likely to be caused by Nicaragua's activities in the border region;

34. Whereas, according to Costa Rica, the Court is not seised of a boundary dispute arising from a divergence of interpretation, between the Parties, of a treaty or an arbitral award, because, until the unexpected emergence of the present dispute, Nicaragua had always recognized Isla Portillos as falling in its entirety under Costa Rican sovereignty; whereas, to this end, Costa Rica recalled the history and substance of the territorial demarcation between the Parties through the 1858 Treaty of Limits, the 1888 Cleveland Award, the 1896 Pacheco-Matus Convention and the five arbitral awards of General Alexander; whereas, in support of its assertions, it produced a number of maps, including some drawn up at the time of the above-mentioned awards and, more recently, by Nicaragua itself or by third States; and whereas Costa Rica maintained that Nicaragua is attempting, in a new and artificial way, to portray these proceedings as a territorial dispute, even though it is indisputably established that, from the point on the coast originally identified as Punta Castilla, the boundary runs all around the Harbor Head Lagoon and along the sea coast of Isla Portillos before joining the mouth of the San Juan River, in such a way that the canal cut by Nicaragua across Isla Portillos is on Costa Rican territory;

35. Whereas Costa Rica also asserted that its title to territory was confirmed by *effectivités*, namely the exercise of elements of governmental authority in the disputed territory, including the deeds of possession inscribed in the Costa Rican cadastre;

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36. Whereas, in its first round of oral observations, Nicaragua stated that the activities it is accused of by Costa Rica took place on Nicaraguan territory and that they did not cause, nor do they risk causing, irreparable harm to the other Party;

37. Whereas, referring to the first Alexander Award dated 30 September 1897 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, pp. 215-222), Nicaragua maintained that, from the point

on the coast originally identified as Punta Castilla, the boundary follows the eastern edge of the Harbor Head Lagoon before joining the San Juan River by the first natural channel in a south-westerly and then a southerly direction; that this boundary line in the area in dispute derives from the very terms of the Alexander Award and is more rational than the line claimed by Costa Rica, since it links, by the said channel, the bed of the San Juan River to the Harbor Head Lagoon, over which Nicaragua is indisputably sovereign; and that the exercise in various forms and over several years of sovereign prerogatives in the region in question by the Nicaraguan public authorities is confirmation of Nicaragua's title to territory;

38. Whereas Nicaragua asserted that since the said natural channel had become obstructed over the years, it had undertaken to make it once more navigable for small vessels; whereas the works condemned by Costa Rica were not therefore aimed at the cutting of an artificial canal; and whereas the cleaning and clearing of the channel had been carried out manually in Nicaraguan territory, the right bank of the said channel constituting the boundary between the two Parties;

39. Whereas Nicaragua also asserted that the number of trees felled was limited and that it has undertaken to replant the affected areas, all located on the left bank of the said channel, with ten trees for every one felled; whereas it stated that the works to clean the channel are over and finished;

40. Whereas Nicaragua indicated that the dredging operations on the San Juan River were made necessary by the progressive sedimentation of its bed and that it has not only a sovereign right to dredge the river, but also an international obligation to do so; whereas it stated that these operations, aimed at improving the navigability of the river, had only been authorized after an environmental impact assessment had been duly completed; whereas it added that, as in the case of the cleaning and clearing of the channel, any debris from the dredging of the river had been set on Nicaragua's side of the border, at various clearly identified sites;

41. Whereas Nicaragua contended that Costa Rica did not suffer, nor was it likely to suffer, any harm on account of these disputed activities; whereas it contested the scientific value of the Ramsar Report on the grounds that it was drawn up on the basis of information supplied solely by Costa Rica; whereas, according to Nicaragua, the impact of the dredging works on the San Juan River on the flow of the Colorado River is and will remain negligible, as recognized by a Costa Rican study; and whereas Nicaragua referred to a report by Dutch experts confirming the validity of the environmental impact assessment carried out by the Nicaraguan administration and the non-injurious character of the dredging works undertaken;

42. Whereas Nicaragua disputed that elements of its armed forces had occupied an area of Costa Rican territory; whereas it stated that it had assigned some of its troops to the protection of staff engaged in the cleaning of the channel and the dredging of the river, but clarified that these

troops had remained in Nicaraguan territory and that they were no longer present in the border region where those activities took place;

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43. Whereas, in its second round of oral observations, Costa Rica repudiated the existence of a natural channel joining the San Juan River to the Harbor Head Lagoon and maintained that the narrow waterway in question had been artificially constructed by Nicaragua in Costa Rican territory; whereas, according to Costa Rica, Nicaragua's territorial claim to the area in dispute is not "plausible" and derives from a dangerous challenge to the principle of the stability of borders; whereas Costa Rica contended that the *effectivités* invoked by Nicaragua are supported only by affidavits gathered from Nicaraguan State officials after the introduction of the present proceedings;

44. Whereas Costa Rica indicated that, in spite of its requests, it had not received, before the present proceedings, a copy of the environmental impact assessment conducted by Nicaragua; whereas it observed that this study concerned only the dredging operation on the San Juan River and not the activities relating to the canal cut by Nicaragua and considered by the latter to be a natural channel (hereinafter the "*caño*", the Spanish designation adopted by both Parties as from the second round of oral argument); and whereas Costa Rica called into question the probative value of the report of the Dutch experts submitted by Nicaragua and maintained that it has suffered environmental harm which has the potential to be aggravated, thereby rendering necessary the indication of provisional measures by the Court;

45. Whereas, at the end of its second round of oral observations, Costa Rica presented the following submissions:

"Costa Rica requests the Court to order the following provisional measures:

A. Pending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan River and between the banks of the Laguna los Portillos (also known as Harbor Head Lagoon) and the Taura River ('the relevant area'):

(1) station any of its troops or other personnel;
(2) engage in the construction or enlargement of a canal;
(3) fell trees or remove vegetation or soil;

(4) dump sediment.

B. Pending the determination of this case on the merits, Nicaragua shall suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area.

C. Pending the determination of this case on the merits, Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court";

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46. Whereas, in its second round of oral observations, Nicaragua contended that, contrary to Costa Rica's affirmations, the *caño* existed before it was the subject of the clean-up operation; that this fact was evidenced by various maps, satellite photographs, the environmental impact assessment conducted by Nicaragua and affidavits, all of which pre-date the disputed works; and that the boundary between the Parties in the contested area does indeed follow this *caño*, in view of the specific hydrological characteristics of the region;

47. Whereas Nicaragua reaffirmed that it has the right to dredge the San Juan River without having to obtain Costa Rica's permission to do so; whereas it confirmed that this limited operation, like that relating to the cleaning and clearing of the *caño*, had not caused any damage to Costa Rica and did not risk causing any, since, according to Nicaragua, there is no evidence to substantiate the Applicant's claims; and whereas it concluded that there was nothing to justify the indication by the Court of the provisional measures sought by Costa Rica;

48. Whereas, at the end of its second round of oral observations, Nicaragua presented the following submissions:

"In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for provisional measures filed by the Republic of Costa Rica";

* * *

PRIMA FACIE JURISDICTION

49. Whereas, the Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded; whereas the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards

the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40);

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50. Whereas Costa Rica is seeking to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá and on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute; whereas it also refers to a communication sent by the Nicaraguan Minister for Foreign Affairs to his Costa Rican counterpart dated 30 November 2010, in which the Court is presented as "the judicial organ of the United Nations competent to discern over" the questions raised by the present dispute;

51. Whereas Nicaragua, in the present proceedings, did not contest the jurisdiction of the Court to entertain the dispute;

52. Whereas, in view of the foregoing, the Court considers that the instruments invoked by Costa Rica appear, prima facie, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require; whereas, at this stage of the proceedings, the Court is not obliged to determine with greater precision which instrument or instruments invoked by Costa Rica afford a basis for its jurisdiction to entertain the various claims submitted to it (see *ibid.*, p. 151, para. 54);

* * *

Plausible Character of the Rights Whose Protection Is Being Sought and Link between These Rights and the Measures Requested

53. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending its decision; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party; whereas, therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible (*ibid.*, p. 151, paras. 56-57);

54. Whereas, moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (see, for example, *ibid.*, p. 151, para. 56);

Plausible Character of the Rights Whose Protection Is Being Sought

55. Whereas the rights claimed by Costa Rica and forming the subject of the case on the merits are, on the one hand, its right to assert sovereignty over the entirety of Isla Portillos and over the Colorado River and, on the other hand, its right to protect the environment in those areas over which it is sovereign; whereas, however, Nicaragua contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon (hereinafter the "disputed territory"), and whereas Nicaragua argues that its dredging of the San Juan River, over which it has sovereignty, has only a negligible impact on the flow of the Colorado River, over which Costa Rica has sovereignty;

56. Whereas, therefore, apart from any question linked to the dredging of the San Juan River and the flow of the Colorado River, the rights at issue in these proceedings derive from the sovereignty claimed by the Parties over the same territory (cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 39); and whereas the part of Isla Portillos in which the activities complained of by Costa Rica took place is *ex hypothesi* an area which, at the present stage of the proceedings, is to be considered by the Court as in dispute (cf. *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 10, para. 28);

57. Whereas, at this stage of the proceedings, the Court cannot settle the Parties' claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, for the purposes of considering the Request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible;

58. Whereas it appears to the Court, after a careful examination of the evidence and arguments presented by the Parties, that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible; whereas the Court is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua; whereas the provisional measures it may indicate would not prejudge any title; and whereas the Parties' conflicting claims cannot hinder the exercise of the Court's power under its Statute to indicate such measures;

59. Whereas paragraph 6 of the third clause of the Cleveland Award of 22 March 1888 reads as follows:

> "The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement." (*RIAA*, Vol. XXVIII, p. 210.);

whereas Costa Rica contends that it has the right to request the suspension of the dredging operations on the San Juan River if they threaten seriously to impair navigation on the Colorado River or to damage Costa Rican territory; whereas, relying on the second sentence of paragraph 6 of the third clause of that Award, quoted above, Nicaragua argues that, if any damage results from the works to maintain and improve the San Juan River, Costa Rica can only seek indemnification, and therefore that Costa Rica, in the event of risk of harm, cannot obtain by means of provisional measures a remedy which the Award would exclude on the merits; whereas Costa Rica responds that indemnification is not the only remedy available to it; whereas at this stage of the proceedings, the Court finds that the rights claimed by Costa Rica are plausible;

Link between the Rights Whose Protection Is Being Sought and the Measures Requested

60. Whereas the first provisional measure requested by Costa Rica is aimed at ensuring that Nicaragua will refrain from any activity "in the area comprising the entirety of Isla Portillos"; whereas the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica; whereas, therefore, a link exists between these rights and the provisional measure being sought;

61. Whereas the second provisional measure requested by Costa Rica concerns the suspension of Nicaragua's "dredging programme in the River San Juan adjacent to the relevant area"; whereas there is a risk that the rights which might be adjudged on the merits to belong to Costa Rica would be affected if it were established that the continuation of the Nicaraguan dredging operations on the San Juan River threatened seriously to impair navigation on the Colorado River (see paragraph 59 above) or to cause damage to Costa Rica's territory; whereas, therefore, there exists a link between these rights and the provisional measure being sought;

62. Whereas the final provisional measure sought by Costa Rica is aimed at ensuring that Nicaragua refrains "from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court" pending the "determination of this case on the merits"; whereas on a number of occasions the Court has already indicated provisional measures ordering one or other of the parties, or even both, to refrain from any action which would aggravate or extend the dispute or make it more difficult to resolve (see, for example, *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 21, para. 47, point B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 24, para. 52, point B; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 49, point 1); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 129, para. 47, point (1)); whereas "in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 16, para. 49); whereas the final provisional measure sought by Costa Rica, being very broadly worded, is linked to the rights which form the subject of the case before the Court on the merits, in so far as it is a measure complementing more specific measures protecting those same rights;

* * *

Risk of Irreparable Prejudice and Urgency

63. Whereas the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

64. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision (see, for example,

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. *Senegal), Provisional Measures*, *Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62); and whereas the Court must therefore consider whether such a risk exists in these proceedings;

* *

65. Whereas, in its Request for the indication of provisional measures, Costa Rica states that "Nicaraguan armed forces continue to be present on Isla Portillos in breach of Costa Rica's sovereign rights" and that Nicaragua "is continuing to damage the territory of Costa Rica, posing a serious threat to its internationally protected wetlands and forests"; whereas it contends, moreover, that

> "Nicaragua[, which] is attempting to unilaterally adjust, to its own benefit, a River the right bank of which forms a valid, lawful and agreed border . . . cannot be permitted to continue to deviate the San Juan River through Costa Rica's territory in this manner, so as to impose on Costa Rica and the Court a fait accompli";

66. Whereas, during the course of the oral proceedings, Costa Rica stated that it wished the *status quo ante* to be restored, pending the Court's judgment on the merits, and indicated that the following rights, which it considers itself to possess, are under threat of irreparable prejudice as a result of Nicaragua's activities:

"1. the right to sovereignty and territorial integrity;
2. the right not to have its territory occupied;
3. the right not to have its trees chopped down by a foreign force;
4. the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal; and
5. the several rights corresponding to Nicaragua's obligation not to dredge the San Juan if this affects or damages Costa Rica's land, environment or the integrity and flow of the Colorado River";

67. Whereas Costa Rica maintained that it "does not, at the present stage, need to establish that its rights have actually been harmed irremediably" nor to "prove actual harm", and that it is sufficient to establish "that there is a risk of irreparable prejudice [being caused] to the rights in dispute, and that the risk of such harm is sufficiently serious and imminent that provisional measures are required to protect the rights";

68. Whereas Costa Rica asserted that the works undertaken by Nicaragua at the site of the *caño*, in particular the felling of trees, the clearing of vegetation, the removal of soil and the diversion of the waters of the San Juan River, not only entail a violation of Costa Rica's territorial

integrity, but will have the effect of causing flooding and damage to Costa Rican territory, as well as geomorphological changes; whereas, according to Costa Rica, the dredging of the San Juan River carried out by Nicaragua will result in similar effects, as well as significantly reducing the flow of the Colorado River; and whereas it contended that the harm caused will not merely be irreparable as such, but that it is Nicaragua's intention for it to be irreparable, because it is not doing this for temporary purposes;

69. Whereas, moreover, Costa Rica affirms in its Request for the indication of provisional measures that the request "is of . . . real urgency", because of "the continued damage being inflicted on [its] territory" by Nicaragua's activities, in particular its repeated dredging of the San Juan River; whereas, according to Costa Rica, "[t]here is a real risk that . . . action prejudicial to the rights of Costa Rica will continue and may significantly alter the factual situation on the ground before the Court has the opportunity to render its final decision on the questions for determination set out in the Application"; whereas it adds that "[t]he ongoing presence of Nicaraguan armed forces on Costa Rica's territory is contributing to a political situation of extreme hostility and tension" and that "[a] provisional measure ordering the withdrawal of Nicaraguan forces from Costa Rican territory is . . . justified so as to prevent the aggravation and/or extension of the dispute"; and whereas, in the oral proceedings, Costa Rica reaffirmed the urgent nature of its request;

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70. Whereas, during the oral proceedings, Nicaragua contended that it acted within its own territory and caused no harm to Costa Rica; whereas it maintained that its activities, the environmental impact of which had been duly assessed beforehand, were not likely to cause or aggravate the damage feared by Costa Rica and that, in any case, the risk of harm was not imminent;

71. Whereas Nicaragua asserted at the hearings that the cleaning and clearing operations in respect of the *caño* were over and finished, and that none of its armed forces were presently stationed on Isla Portillos; whereas, in a written reply to questions put by a Member of the Court at the end of the hearings, Nicaragua confirmed these assertions, adding that it did "not intend to send any troops or other personnel to the region" contested by the Parties nor to "[establish] a military post there in the future", while the issue of the felling of trees and the dumping of sediment in certain areas along the *caño* "no longer arises", since the operation to clean the latter is "over and finished";

72. Whereas Nicaragua stated in its written replies that it does not "intend to have any personnel stationed in [the disputed] area"; whereas it nevertheless added that "[t]he only operation currently being carried out there is the replanting of trees" and that "[t]he Ministry of the Environment of Nicaragua (MARENA) will send inspectors to the site periodi-

cally in order to monitor the reforestation process and any changes which might occur in the region, including the Harbor Head Lagoon"; whereas Nicaragua also observed that "[t]he *caño* is no longer obstructed" and further stated that "[i]t is possible to patrol the area on the river, as has always been the case, for the purposes of enforcing the law, combating drug trafficking and organized crime, and protecting the environment";

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73. Whereas it is in the light of this information that the first provisional measure requested by Costa Rica in its submissions presented at the end of its second round of oral observations should be considered, namely, that

> "[p]ending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan River and between the banks of the Laguna los Portillos (also known as Harbor Head Lagoon) and the Taura River ('the relevant area'):
>
> (1) station any of its troops or other personnel;
> (2) engage in the construction or enlargement of a canal;
> (3) fell trees or remove vegetation or soil;
>
> (4) dump sediment";

74. Whereas Nicaragua's written responses set out above (see paragraph 71) indicate that the work in the area of the *caño* has come to an end; whereas the Court takes note of that; whereas the Court therefore concludes that, in the circumstances of the case as they now stand, there is no need to indicate the measures numbered (2), (3) and (4) as set out in paragraph 73 above;

75. Whereas those written responses nevertheless also show that Nicaragua, while stating that "[t]here are no Nicaraguan troops currently stationed in the area in question" and that "Nicaragua does not intend to send any troops or other personnel to the region" (see paragraph 71 above), does intend to carry out certain activities, if only occasionally, in the disputed territory, including on the *caño* (see paragraph 72 above); whereas the Court recalls that there are competing claims over the disputed territory; whereas this situation creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom; whereas this situation moreover gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death;

76. Whereas the Court concludes under these circumstances that provisional measures should be indicated; whereas it points out that it has the

power under its Statute to indicate provisional measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, as Article 75, paragraph 2, of the Rules of Court expressly states (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 46);

77. Whereas, given the nature of the disputed territory, the Court considers that, subject to the provisions in paragraph 80 below, each Party must refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security, until such time as the Court has decided the dispute on the merits or the Parties have come to an agreement on this subject;

78. Whereas, in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces of either Party, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, i.e., in Costa Rica's case, the part of Isla Portillos lying east of the right bank of the *caño*, excluding the *caño*; and, in Nicaragua's case, the San Juan River and Harbor Head Lagoon, excluding the *caño*; and whereas it shall be for the Parties' police or security forces to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory;

79. Whereas the Court observes that there are two wetlands of international importance, within the meaning of the Ramsar Convention, in the boundary area in question; whereas, acting pursuant to Article 2 of that Convention, Costa Rica has "designate[d]" the "Humedal Caribe Noreste" wetland "for inclusion in [the] List of Wetlands of International Importance . . . maintained by the [continuing] bureau" established by the Convention, and whereas Nicaragua has done likewise in respect of the "Refugio de Vida Silvestre Río San Juan" wetland, of which Harbor Head Lagoon is part; whereas the Court reminds the Parties that, under Article 5 of the Ramsar Convention:

> "[t]he Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna";

80. Whereas the disputed territory is moreover situated in the "Humedal Caribe Noreste" wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention; whereas the Court considers that, pending delivery of the Judgment on the merits, Costa Rica must be

in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated; whereas for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused; and whereas Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

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81. Whereas the second provisional measure requested by Costa Rica in its submissions presented at the conclusion of the hearings is an order requiring Nicaragua to "suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area"; whereas in support of this request Costa Rica asserts that the programme creates an imminent risk of irreparable prejudice to its environment, in particular to the flow, and hence navigability, of the Colorado River, as well as to the hydrodynamic balance of the area's waterways, which Nicaragua disputes;

82. Whereas it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan River is creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado River; whereas nor has it been shown that, even if there were such a risk of prejudice to rights Costa Rica claims in the present case, the risk would be imminent; and whereas the Court concludes from the foregoing that in the circumstances of the case as they now stand the second provisional measure requested by Costa Rica should not be indicated;

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83. Whereas, in the light of what the Court has already said on the subject of the final provisional measure requested by Costa Rica (see paragraph 62 above) and of the Court's conclusions above on the subject of the specific provisional measures to be indicated, it is in addition appropriate in the circumstances to indicate complementary measures, calling on both Parties to refrain from any act which may aggravate or extend the dispute or render it more difficult of solution;

* * *

84. Whereas the Court's "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United*

States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109) and thus create international legal obligations which both Parties are required to comply with (see, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263));

* * *

85. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions;

* * *

86. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;

(2) By thirteen votes to four,

Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; *Judge* ad hoc Dugard;

AGAINST: *Judges* Sepúlveda-Amor, Skotnikov, Xue; *Judge* ad hoc Guillaume;

(3) Unanimously,

Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(4) Unanimously,

Each Party shall inform the Court as to its compliance with the above provisional measures.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of March, two thousand and eleven, 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 Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA and SEPÚLVEDA-AMOR append separate opinions to the Order of the Court; Judges SKOTNIKOV, GREENWOOD and XUE append declarations to the Order of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Order of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Order of the Court.

(Initialled) H.O.
(Initialled) Ph.C.

Legal Authority CA-9

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

Emilio Agustín Maffezini
Claimant

v.

Kingdom of Spain
Respondent

ICSID Case No. ARB/97/7

PROCEDURAL ORDER Nº 2

1. The Kingdom of Spain, the Respondent in this arbitration proceeding, by document dated 3 July 1998, has filed an application for provisional measures. The Claimant by document dated 6 August 1999, requests the Tribunal to dismiss such application.

2. Specifically, the Respondent has requested the Tribunal to require the Claimant to post a guaranty, bond or similar instrument in the amount of the costs expected to be incurred by the Respondent in defending against this action.

3. The Respondent alleges that the claim is worthless and the Claimant's accusations groundless. Accordingly, the Respondent argues, the Claimant will lose this action and should, therefore, be required to reimburse the Respondent for all its costs and expenses incurred in defending against this claim.

4. Provisional measures have been ordered by previous ICSID tribunals [See for example, *Holiday Inns et al.* v. *Morocco* (ICSID Case No. ARB/72/1), and *MINE* v. *Guinea* (ICSID Case No. ARB/84/4).] However, the Tribunal has not found any ICSID case where provisional measures were ordered requiring the posting of a guaranty or bond to cover the costs and expenses to be incurred in the future by one of the parties.

5. Of course, the lack of precedent is not necessarily determinative of our competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances.

6. The issue of provisional measures is covered by both the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* and the *Rules of Procedure for Arbitration Proceedings* [Arbitration Rules.]

7. Article 47 of the Convention states;

> Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party.

While Rule 39(1) states that

> At any time during the proceedings a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

8. Thus, it is clear that an arbitral tribunal has the authority to recommend provisional measures.[1]

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[1] The Tribunal notes that the parties did not reserve the right to access national judicial or other authorities for the imposition of provisional remedies as required under Rule 39(5). Accordingly, they have relinquished this right.

9. While there is a semantic difference between the word 'recommend' as used in Rule 39 and the word 'order' as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word "dictación". The Tribunal does not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word 'recommend' to be of equivalent value as the word 'order.'

10. The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application.

11. We now turn to the Arbitration Rules and the language of the Convention to determine whether the provisional measures sought by the Respondent are capable of being ordered by the Tribunal.

12. Rule 39(1) specifies that a party may request

> '. . . provisional measures for the preservation of its rights. . . .'

13. The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.

14. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property.

15. However, in the instant case, we are unable to see what present rights are intended to be preserved. The Respondent alleges that it may be difficult or impossible for it to obtain reimbursement of its legal costs and expenses, *if the Claimant does not prevail and if the Tribunal orders the payment of additional costs and expenses to be paid by the Claimant*.

16. This claim contains several hypothetical situations.

17. One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses it will incur.

18. Obviously, at this point in the proceedings the Tribunal is unable to answer either of these two questions. These must remain, at least for the time being, as hypothetical issues concerning future events. While hypothetical issues are stimulating and academically challenging, they are beyond the ken of an arbitral tribunal determining real issues of fact and law.

19. Respondent alleges that the Claimant's claim is totally without merit, forcing the Respondent to spend unnecessary money on the costs and expenses incurred in defending against the Claimant's claim.

20. Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.

21. A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature.

22. We now turn to the final question before the Tribunal on this issue of provisional measures.

23. Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.

24. In this case, the subject matter in dispute relates to an investment in Spain by an Argentine investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case.

25. It is clear that these are two separate issues. The issue of provisional measures is unrelated to the facts of the dispute before the Tribunal.

26. In this case, after review of the Respondent's and Claimant's briefs, the oral arguments, as well as our review of the applicable law, we find that the Respondent has failed to demonstrate that the imposition of an order for provisional measures is warranted.

27. Accordingly, the Arbitral Tribunal hereby ORDERS the Respondent's application for provisional measures DISMISSED.

_____
Francisco Orrego Vicuña
President of the Tribunal

Date: October 28, 1999.

Legal Authority CA-10

598 F.3d 30
United States Court of Appeals,
Second Circuit.

CITIGROUP GLOBAL MARKETS, INC., Plaintiff–Appellee,
v.
VCG SPECIAL OPPORTUNITIES MASTER FUND LIMITED, f/k/a CDO Plus Master Fund Limited, Defendant–Appellant.

Docket No. 08–6090–cv.
|
Argued: Nov. 24, 2009.
|
Decided: March 10, 2010.

Synopsis

Background: Broker that entered into prime brokerage services agreement with hedge fund brought action to enjoin arbitration before the Financial Industry Regulatory Authority (FINRA) of fund's claims arising from alleged violation of credit default swap agreement by broker's affiliate. The United States District Court for the Southern District of New York, Barbara S. Jones, J., granted broker's motion for preliminary injunction, and fund appealed.

Holdings: The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that:

[1] the "serious questions" standard for assessing a movant's likelihood of success on the merits remains valid when ruling on a motion for preliminary injunction, and

[2] district court did not abuse its discretion when it preliminarily enjoined FINRA arbitration.

Affirmed.

West Headnotes (6)

[1] **Federal Courts**
Preliminary injunction;temporary restraining order

Court of Appeals reviews the grant of a preliminary injunction for abuse of discretion.

36 Cases that cite this headnote

[2] **Federal Courts**
Abuse of discretion in general

A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law.

3 Cases that cite this headnote

[3] **Injunction**
Serious or substantial question on merits

The "serious questions standard" permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.

144 Cases that cite this headnote

[4] **Injunction**
Serious or substantial question on merits

The "serious questions" standard for assessing a movant's likelihood of success on the merits remains valid when ruling on a motion for preliminary injunction.

220 Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Performance, breach, enforcement, and contest of agreement

District court could apply the "serious questions" standard in ruling on broker's

motion to preliminarily enjoin arbitration of dispute with hedge fund before the Financial Industry Regulatory Authority (FINRA) regarding alleged violation of terms of credit default swap agreement.

15 Cases that cite this headnote

[6] **Alternative Dispute Resolution**

Performance, breach, enforcement, and contest of agreement

District court did not abuse its discretion when it preliminarily enjoined Financial Industry Regulatory Authority (FINRA) arbitration of hedge fund's dispute with broker regarding alleged violation of terms of credit default swap agreement between fund and broker's affiliate; whether fund was a "customer" of broker under FINRA rules for purposes of credit default swap transactions was a serious question going to the merits of the broker's claims, and balance of hardships favored the broker.

58 Cases that cite this headnote

Attorneys and Law Firms

***31** Steven G. Mintz (Terence W. McCormick and Joshua H. Epstein, on the brief), Mintz & Gold LLP, New York, NY, for Defendant–Appellant.

Allan J. Arffa (Karen R. King, on the brief), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, for Plaintiff–Appellee.

Before: FEINBERG, WALKER, KATZMANN, Circuit Judges.

Opinion

***32** JOHN M. WALKER, JR., Circuit Judge:

VCG Special Opportunities Master Fund Limited ("VCG") appeals from the November 12, 2008 order of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) granting the plaintiff-appellee Citigroup Global Markets, Inc.'s ("CGMI") motion for a preliminary injunction and enjoining VCG from proceeding with an arbitration initiated against CGMI before the Financial Industry Regulatory Authority ("FINRA"). VCG also appeals from the district court's May 29, 2009 order denying its motion for reconsideration of the preliminary injunction. Because we conclude that the "serious questions" standard for assessing a movant's likelihood of success on the merits remains valid in the wake of recent Supreme Court cases, and because neither the district court's assessment of the facts nor its application of the law supports a finding of abuse of discretion, we AFFIRM as to both orders.

BACKGROUND

On July 17, 2006, VCG, a hedge fund based on the Isle of Jersey, entered into a brokerage services agreement with CGMI. Under the agreement, CGMI was obligated to provide prime brokerage services by clearing and settling trades in fixed income securities for VCG. VCG then entered into a credit default swap agreement with Citibank, N.A. (Citibank) (a sister-affiliate of appellee CGMI under the corporate umbrella of Citigroup, Inc.). VCG alleges that it was a "customer" of CGMI, which allegedly acted as the middleman with respect to the series of transactions culminating in the credit default swap agreement with Citibank. After entering into the swap, Citibank eventually declared a writedown of the assets covered in its credit default swap agreement with VCG, triggering VCG's obligation to pay Citibank a total of $10,000,000.

VCG sued Citibank, seeking a declaration that, by declaring the writedown, Citibank had violated the terms of the parties' credit default swap agreement. The district court found in Citibank's favor and also found that VCG was in breach of the agreement by failing to fulfill its payment obligation. *VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, 594 F.Supp.2d 334 (S.D.N.Y.2008), *aff'd*, No. 08–5707, 2009 WL 4576542 (2d Cir. Dec. 8, 2009).

In addition to litigating its claims against Citibank, VCG began arbitration proceedings against CGMI before the FINRA pursuant to FINRA Rule 12200.[1] In response, CGMI filed a complaint in the district court to permanently enjoin the arbitration and for a declaration that CGMI had no obligation to arbitrate

with VCG regarding the claims submitted to the FINRA arbitrators. On June 20, 2008, CGMI moved for a temporary restraining order and preliminary injunction against the FINRA arbitration pending a final resolution of CGMI's claims. CGMI asserted that it was not a party to, and did not broker, the VCGCitibank credit default swap. Compl. ¶ 3. Specifically, CGMI argued that VCG was not a "customer" of CGMI for purposes of those transactions and, therefore, CGMI was under no obligation to arbitrate VCG's claims under the FINRA rules.

***33** In opposition to the preliminary injunction motion, VCG submitted a declaration stating that "CGMI recommended and set the terms for" the credit default swap and that VCG's employees had "dealt with several CGMI representatives in connection with the transaction, but most often with Jeff Gapusan, Donald Qu[i]ntin, and Jaime Aldama." Wong Decl. ¶ 7. [2] The declaration further stated that "[t]he terms of the contract were negotiated directly with [a] CGMI employee, Jeff Gapusan, who acted as liaison for the trading desk at CGMI." *Id.* at ¶ 19; *see also* Gruber Decl., Ex. B (FINRA records listing the three men identified by Wong as the go-betweens on the Citibank deal as employees of CGMI).

In arguing that it had not acted as a middleman for the VCGCitibank credit default swap and that VCG was not its "customer," CGMI contended that the people identified by VCG as its CGMI contacts were acting as agents of Citibank rather than CGMI, though they were formally employed by CGMI at the time of the VCG–Citibank negotiations. Vogeli Decl. ¶ 6. CGMI also submitted a copy of VCG's initial disclosures, from VCG's action against Citibank, in which VCG had listed Jeff Gapusan and Donald Quintin as trading personnel employed by Citibank, not CGMI. Arffa Decl., Ex. 6. [3]

On November 12, 2008, the district court granted CGMI's motion for a preliminary injunction. In granting the injunction, the district court applied this circuit's long-established standard for the entry of a preliminary injunction, under which the movant is required to show " 'irreparable harm absent injunctive relief, and either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in plaintiff's favor.' " *Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund Ltd.*, No. 08–cv–5520, 2008 WL 4891229, at *2 (S.D.N.Y. Nov. 12, 2008) (quoting *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir.2008)). The district court held that CGMI had demonstrated a likelihood of irreparable harm, but had failed to make a showing of "probable success" on the merits based on its claim that there was no customer relationship between CGMI and VCG with respect to the credit default swap transactions. *Id.* at *2, *4. The district court found, however, that CGMI had provided evidence that raised "serious questions" as to whether VCG was in fact a customer of ***34** CGMI with respect to the swap transaction and granted the preliminary injunction on that basis. *Id.* at *5–*6.

The district court further noted that, while some prior cases have required arbitration under the FINRA rules for claims involving non-securities, those cases "dealt in large part with individual brokers' fraudulent conveyances or investments, where there is a strong policy argument favoring arbitration." *Id.* The district court concluded that, "in light of the undefined scope of Rule [12200's 'business activities' prerequisite and its application to cases not involving securities transactions,] and the unique set of facts before the Court," CGMI had presented legal and factual issues that made its assertions a "fair ground for litigation." *Id.* at *6. Finally, the district court found that the balance of hardships tipped decidedly in CGMI's favor given that an injunction would simply freeze the arbitration without destroying VCG's ability to continue that arbitration in the event that the district court determined that the dispute fell within the scope of the FINRA rules. *Id.*

On May 29, 2009, the district court denied VCG's motion for reconsideration, rejecting VCG's argument that *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), had eliminated the "serious questions" prong of this circuit's preliminary injunction standard.

This appeal followed.

DISCUSSION

[1] **[2]** This Court reviews the grant of a preliminary injunction for abuse of discretion. *See* *Almontaser*, 519 F.3d at 508; *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir.2007). "A district court abuses its

discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *Almontaser,* 519 F.3d at 508.

VCG first contends that the district court abused its discretion by applying the wrong legal standard to CGMI's request for a preliminary injunction. VCG argues that three recent decisions of the Supreme Court—*Munaf v. Geren,* 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008); *Winter,* 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249; and *Nken v. Holder,* 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)—have eliminated this circuit's "serious questions" standard for the entry of a preliminary injunction, and that, in light of the district court's finding that CGMI failed to demonstrate its likelihood of success on the merits, the entry of a preliminary injunction in this case must be reversed. In the alternative, VCG argues that even if this circuit's standard for a preliminary injunction remains intact, the district court committed several legal errors in determining that CGMI had presented "serious questions" as to the arbitrability of VCG's claims.

Winter articulates the following standard for issuing a preliminary injunction:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter, 129 S.Ct. at 374; *see also Munaf,* 128 S.Ct. at 2219; *Nken,* 129 S.Ct. at 1761. Although not stated explicitly in its briefs, we take VCG's position to be that the standard articulated by these three Supreme Court cases requires a preliminary injunction movant to demonstrate that it is more likely than not to succeed on its underlying claims, or in other words, that a movant must show a greater than fifty ***35** percent probability of success on the merits. Thus, according to VCG, a showing of "serious questions" that are a fair ground for litigation will not suffice. *See* VCG Br. 23–25 (describing the required showing as a "probability" of success, as opposed to a "possibility").

I. The Continued Viability of the "Serious Questions" Standard

[3] For the last five decades, this circuit has required a party seeking a preliminary injunction to show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979); *accord Almontaser,* 519 F.3d at 508; *Checker Motors Corp. v. Chrysler Corp.,* 405 F.2d 319, 323 (2d Cir.1969); *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir.1953).[4] The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction. *See, e.g., F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.,* 597 F.2d 814, 815–19 (2d Cir.1979). Because the moving party must not only show that there are "serious questions" going to the merits, but must additionally establish that "the balance of hardships tips *decidedly* " in its favor, *Jackson Dairy,* 596 F.2d at 72 (emphasis added), its overall burden is no lighter than the one it bears under the "likelihood of success" standard.

The value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation. Preliminary injunctions should not be mechanically confined to cases that are simple or easy. Requiring in every case a showing that ultimate success on the merits is more likely than not "is unacceptable as a general rule. The very purpose of an injunction ... is to give temporary relief based on a preliminary estimate of the strength of plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case. ***36** Limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (2d ed.2009); *see also Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir.1981) (en banc) ("The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test.... The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each

case. Thus, an effort to apply the probability language to all cases with mathematical precision is misplaced."). [5]

Indeed, the Supreme Court, prior to the trilogy of cases cited by VCG, has counseled in favor of a preliminary injunction standard that permits the entry of an injunction in cases where a factual dispute renders a fully reliable assessment of the merits impossible. In *Ohio Oil Co. v. Conway,* 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 (1929), the Court dealt with a factual dispute, relating to the effect on the plaintiff of a state tax on oil revenues, which had to "be resolved before the constitutional validity of [a] statute [could] be determined." *Id.* at 814, 49 S.Ct. 256. Faced with this situation, the Court instructed that "[w]here the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party [in the absence of such an injunction] will be certain and irreparable ... the injunction usually will be granted." *Id.; see also Mazurek v. Armstrong,* ***37** 520 U.S. 968, 975–76, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (reversing the Ninth Circuit's finding that movants had shown a "fair chance of success on the merits," while recognizing the "fair chance" standard and its potential application in future cases).

The Supreme Court's recent opinions in *Munaf, Winter*, and *Nken* have not undermined its approval of the more flexible approach signaled in *Ohio Oil.* None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict "likelihood" requirement in cases that warrant it. *Munaf* involved a preliminary injunction barring the transfer to Iraqi custody of an individual captured in Iraq by the Multinational Force–Iraq. *Munaf,* 128 S.Ct. at 2214–15. That injunction was premised on "jurisdictional issues ... so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Id.* at 2219 (emphasis and internal quotation marks omitted). The Supreme Court vacated that injunction on the grounds that a "likelihood of jurisdiction" was irrelevant to the preliminary injunction consideration and could not substitute for a consideration of the merits. The Court in *Munaf* simply stated that a question as to a court's jurisdiction over a claim "says nothing about the 'likelihood of success on the merits,' " *id.,* but provided nothing in the way of a definition of the phrase "a likelihood of success." *See id.*

Nor does *Winter* address the requisite probability of success of the movant's underlying claims. While *Winter* rejected the Ninth Circuit's conceptually separate "possibility of irreparable harm" standard, 129 S.Ct. at 375–76, it expressly withheld any consideration of the merits of the parties' underlying claims, *id.* at 376, 381. Rather, the Court decided the case upon the balance of the equities and the public interest. 129 S.Ct. at 375–76, 381. [6]

Finally, *Nken* likewise did not address the issue of a moving party's likelihood of success on the merits. *Nken* provides a four factor standard for granting a stay pending appeal, which the Court recognized as overlapping substantially with the preliminary injunction standard. 129 S.Ct. at 1761. Although the Court repeated the "likely to succeed on the merits" phrasing, it did not suggest that this factor requires a showing that the movant is "more likely than not" to succeed on the merits. [7]

***38** **[4]** **[5]** If the Supreme Court had meant for *Munaf, Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself. [8] We have recognized this flexible standard since at least 1953, *see Hamilton Watch,* 206 F.2d at 740, and our standard has survived earlier instances in which the Supreme Court described the merits prerequisite to a preliminary injunction as a "likelihood of success" without specifically addressing the content of such a "likelihood," *see, e.g., Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) ("The other inquiry relevant to preliminary relief is whether respondents made a sufficient showing of the likelihood of ultimate success on the merits."). We have found no command from the Supreme Court that would foreclose the application of our established "serious questions" standard as a means of assessing a movant's likelihood of success on the merits. Our standard accommodates the needs of the district courts in confronting motions for preliminary injunctions in factual situations that vary widely in difficulty and complexity. Thus, we hold that our venerable standard for assessing a movant's probability of success on the merits remains valid and that the district court did not err in applying the "serious questions" standard to CGMI's motion. [9]

II. The District Court's Analysis

[6] Having determined that the district court did not err by applying the "serious questions" standard to CGMI's motion for a preliminary injunction, we turn to VCG's contentions that the district court misapplied that standard. VCG argues that the district court erred in assessing the issue of arbitrability when it (1) failed to construe the FINRA arbitration rules in favor of arbitration absent "positive assurance" that VCG's claims in fact fell outside the scope of the arbitration agreement; (2) failed to recognize that VCG was a "customer" of CGMI as a matter of law; (3) found "serious questions" regarding whether a party requesting FINRA arbitration over a non-securities transaction must provide a strong policy argument in favor of arbitration; and (4) inappropriately weighed the balance of hardships. [10]

***39 A. "Positive Assurance" as to Non–Arbitrability and the Definition of "Customer"**

VCG contends that our decision in *John Hancock Life Insurance v. Wilson,* 254 F.3d 48 (2d Cir.2001), requires the district court to order the parties to arbitrate, even in the face of doubts as to the scope of the arbitration provision, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 58. VCG misapplies the holding of *John Hancock* in attacking the district court's decision.

John Hancock required a "positive assurance" of non-arbitrability in the face of an ambiguity in the scope of the arbitration provision of the NASD rules. *Id.* at 59–60 (finding that the term "customer" in the NASD rules includes the clients of an "associated person" of the firm against whom arbitration is sought). In this case, however, there is no ambiguity as to the scope of the FINRA rules defining the term "customer"; the only unresolved question is whether, as a factual matter, VCG was CGMI's "customer" under any definition of that term. If VCG's credit default swap arrangements were never handled by an agent of CGMI, acting for that purpose, then VCG was not the "customer" of CGMI under any reasonable construction of that term. VCG's argument based on *John Hancock* is inapposite given the nature of the dispute. Because the relevant question, in light of the contradictions in the record, is whether VCG was a "customer" of CGMI in even the broadest sense of the word, and because this issue is in sharp dispute, the district court committed no error of law or fact in holding that this uncertainty poses a serious question going to the merits of CGMI's claims.

B. Arbitrability of Disputes Involving Non–Securities

VCG next argues that the preliminary injunction was based in part on too narrow a view of the types of disputes that are arbitrable under FINRA Rule 12200. The district court held that FINRA arbitration was not limited solely to disputes involving "business activities" related to securities, but stated that nonsecurities cases "have dealt in large part with individual brokers' fraudulent conveyances or investments, where there is a strong policy argument favoring arbitration." *Citigroup Global Mkts., Inc.,* 2008 WL 4891229, at *6. The district court continued by stating, "[i]n light of the undefined scope of Rule 12200 and the unique set of facts before the Court, the Court concludes that CGMI has presented legal and factual issues that make its assertions a fair ground for litigation." *Id.*

Were the application of the FINRA rules to non-securities cases the sole ground on which the district court granted CGMI's motion for preliminary relief, we would be forced to confront the district court's suggested limitation of the definition of the term "business activities" in non-securities cases. However, because the district court correctly ruled that VCG's customer status was a serious question going to the merits, we affirm the entry of the preliminary injunction even assuming an error of law as to the district court's understanding of the term "business activity."

***40 C. Weighing the Balance of Hardships**

VCG next argues that the district court failed to consider that VCG would be "deprived of its right to a speedy resolution of its grievance with a broker-dealer" and would have "to incur the cost and expend the energy involved in litigating the threshold arbitrability question." VCG Br. 45. The district court did not neglect these concerns: it expressly considered the impact of delay on VCG and weighed that hardship against those that would be imposed on CGMI in the absence of a preliminary injunction. The district court's balancing of those hardships did not constitute an abuse of discretion.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's orders granting CGMI's motion for a preliminary injunction and denying VCG's motion for reconsideration.

All Citations

598 F.3d 30

Footnotes

1 In relevant part, FINRA Rule 12200 requires members of the FINRA to arbitrate the disputes pursuant to the FINRA Code of Arbitration Procedure if arbitration is "requested by [a] customer," "[t]he dispute is between a customer and a member or associated person of a member," and "[t]he dispute arises in connection with the business activities of the member."

2 The declaration stated that "the fee to be paid to CGMI was 5.5% per annum, calculated on the 'notional amount' of $10,000,000 of the collateralized debt obligation, Millstone.... In return, VCG agreed to pay CGMI only upon the occurrence of a credit event." Wong Decl. ¶ 19. The declaration misstates the parties to, and obligations provided in, the credit default swap agreement. As each of the documents underlying the swap agreement demonstrates, and contrary to the statements in Wong's declaration, Citibank, *not* CGMI, was the party with whom VCG contracted, and VCG, *not* CGMI, was to be paid 5.5% per annum. *See* Arffa Decl., Exs. 1–5.

3 Following oral argument on CGMI's motion for a preliminary injunction, VCG filed a supplemental initial disclosure in its case against Citibank and submitted the new disclosure to the district court in this case. The supplemental disclosure lists Gapusan and Quintin as employees of CGMI. VCG Sur–Reply in Opp'n to Mot. for Prelim. Inj., Ex. A. The district court noted that the original disclosures were "not judicial admissions demonstrating that VCG knew that it was dealing with Citibank [and not CGMI]," but also that the disclosures gave the court reason to pause when considering VCG's understanding of the three relevant employees' roles at the time VCG interacted with them. *Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund Ltd.*, No. 08–cv–5520, 2008 WL 4891229, at *5 (S.D.N.Y. Nov. 12, 2008).

4 We have recognized three limited exceptions to this general standard, none of which is relevant here. First,

> [W]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous ["serious questions"] standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.

Able v. United States, 44 F.3d 128, 131 (2d Cir.1995) (first alteration in original) (quoting *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir.1989)).

Second, "[a] heightened 'substantial likelihood' standard may also be required when the requested injunction (1) would provide the plaintiff with 'all the relief that is sought' and (2) could not be undone by a judgment favorable to defendants on the merits at trial." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir.2006) (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34–35 (2d Cir.1995)).

Third, a "mandatory" preliminary injunction that "alter[s] the status quo by commanding some positive act," as opposed to a "prohibitory" injunction seeking only to maintain the status quo, "should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.' " *Tom Doherty Assocs.*, 60 F.3d at 34 (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir.1985)).

5 We note that, prior to *Winter*, seven of the twelve regional Courts of Appeals, including this circuit and the Eighth Circuit in *Dataphase*, applied a preliminary injunction standard that permitted flexibility when confronting some probability of success on the merits that falls short of a strict fifty-one percent. *See* *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir.2007), *overruled in part by* *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 & n. 10 (9th Cir.2009) (recognizing that the Ninth Circuit's previous standard as articulated in *Lands Council* was overruled at least with respect to the formerly permissible showing of a "possibility" of irreparable harm); *Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1112–13 (10th Cir.2006); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir.2001); *Davenport v. Int'l Broth. of Teamsters, AFL–CIO*, 166 F.3d 356, 361 (D.C.Cir.1999); *Duct–O–Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir.1994); *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 624–25 (8th Cir.1987); *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir.1977), *overruled by* *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47 (4th Cir.2009).

On the other hand, three of our sister circuits have traditionally limited their preliminary injunction standards to the four factors cited in *Winter*, without reference to the possibility of obtaining an injunction based on a showing of serious questions going to the merits. *See* *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 483 n. 3 (11th

Cir.1990) (noting that the "serious questions" standard had not been recognized in the Eleventh Circuit); *Concerned Women for Am., Inc. v. Lafayette County,* 883 F.2d 32, 34 (5th Cir.1989); *In re Arthur Treacher's Franchisee Litig.,* 689 F.2d 1137, 1147 n. 14 (3d Cir.1982) (rejecting the Second Circuit's "serious questions" standard as articulated in *Hamilton Watch*). The First Circuit does not generally provide for the possibility of a flexible showing as to the merits, *see Weaver v. Henderson,* 984 F.2d 11, 12 (1st Cir.1993) ("In the ordinary course, plaintiffs who are unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief."), but has in the past recognized a potentially more flexible approach, *see Tuxworth v. Froehlke,* 449 F.2d 763, 764 (1st Cir.1971) ("No preliminary injunction should be granted in any case unless there appears to be a reasonable possibility of success on the merits. Granted that the necessary degree of likelihood of success depends upon various considerations, we must perceive at least some substantial possibility." (internal citation omitted)).

6 To this extent, *Winter* reiterates the majority position of the circuits, including this one, that a showing of irreparable harm is fundamental to any grant of injunctive relief. *See, e.g., Almontaser,* 519 F.3d at 508 ("A party seeking a preliminary injunction *must* show irreparable harm absent injunctive relief ...." (internal quotation marks omitted and emphasis added)); *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 360 (4th Cir.1991) ("The 'balance of hardship' test does not negate the requirement that the [plaintiff] show some irreparable harm."), *overruled on other grounds by Real Truth About Obama,* 575 F.3d 342; *Friendship Materials, Inc. v. Mich. Brick, Inc.,* 679 F.2d 100, 105 (6th Cir.1982) ("Thus, the alternate test does not remove the irreparable harm requirement."); *Dataphase Sys., Inc.,* 640 F.2d at 114 n. 9 ("This court previously noted that under any test the movant is required to show the threat of irreparable harm."); *Canal Auth. of Fla. v. Callaway,* 489 F.2d 567, 574 (5th Cir.1974) ("[W]here no irreparable injury is alleged and proved, denial of a preliminary injunction is appropriate.").

7 The Supreme Court implies just the opposite in *Nken,* which contrasts a showing of a likelihood of success with a chance of success that is only "better than negligible." 129 S.Ct. at 1761. Because a "serious questions" showing necessarily requires more than that the chances for success are only "better than negligible," this circuit's "serious questions" standard does not conflict with the Supreme Court's decision in *Nken.*

8 As the Supreme Court noted in *Nken,* "[t]here is substantial overlap between [the factors governing a motion to stay] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." 129 S.Ct. at 1761 (internal citation omitted). In that light, we note that the Supreme Court followed a flexible approach when, in recently addressing the standard for issuing a stay pending the disposition of a petition for a writ of certiorari, it stated that the grant of such a motion required a likelihood of irreparable harm, but required only a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and a "fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry,* 558 U.S. 183, 130 S.Ct. 705, 710, 175 L.Ed.2d 657 (2010) (per curiam). Acknowledging the use of a sliding scale in certain situations, the Court further stated that "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

9 We note that two of our sister circuits have retreated from a flexible approach in assessing the merits of a movant's case in light of *Winter. See Real Truth About Obama,* 575 F.3d at 346–47; *Am. Trucking Ass'ns,* 559 F.3d at 1052. We think the Fourth and Ninth Circuits have misread *Winter*'s import.

10 Neither party contests that arbitrability itself was an issue for the district court to decide. *See Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the *question of arbitrability,* is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." (internal quotation marks omitted) (alteration in original)).