crowell moring

Reference Material 10.

Internet Corporation for Assigned Names and Numbers

Approved Board Resolutions | Singapore

2

Español (/es/groups/board/documents/resolutions-20jun11-es.htm) | Français (/fr/groups/boa ments/resolutions-20jun11-fr.htm)
Русский (/ru/groups/board/documents/resolutions-20jun11-ru.htm) | (/zh/groups/b uments/resolutions-20jun11-zh.htm)
العربية (/ar/groups/board/documents/resolutions-20jun11-ar.htm)

20 June 2011

1. Approval of the New gTLD (generic Top Level Domain) Program

   Whereas, on 28 November 2005, the GNSO (Generic Names Supporting O ation) Council voted imously to initiate a policy development process on the introduction of new gTLDs.

   Whereas, the GNSO (Generic Names Supporting Organization) Committee Introduction of New addressed a range of difficult technical, operational, legal, economic, and p estions, and facilitat despread participation and public comment throughout the policy development proces

   Whereas, on 6 September 2007, the GNSO (Generic Names Supporting O ation) Council approv a supermajority vote a motion supporting the 19 recommendations, as a whol et out in the Final Re of the ICANN (Internet Corporation for Assigned Names and Numbers) Generic Names S ing Organisation on troduction of New Generic Top-Level Domains going forward to the ICANN (Internet Cor n for Assigned Nam Board <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 ttp://gnso.icann.org/issues/new-gtlds /pdp-dec05-fr-parta-08aug07.htm)>.

   Whereas, the Board instructed staff to review the GNSO (Generic Names S orting Orga) recommendations and determine whether they were capable of implementation, and staff engaged internatio cal, operational and legal expertise to support the implementation of the policy recommendations and develo lementation plans for the GNSO (Generic Names Supporting Organization)'s policy recomm ndations.

   Whereas, on 26 June 2008, the Board adopted the GNSO (Generic mes Supporting Organiza policy recommendations for the introduction of new gTLDs and directed staff t rther develop and co s detailed implementation plan, continue communication with the community on such , and provide the d with a final versi of the implementation proposals for the board and community to approve bef e launchi he new gTLD (generic Top Level Domain) application process <http://www.icann.org/en/minutes/resolution (/en/minutes/resolutions-26jun08.htm#_Toc76113171)>.

   Whereas, staff has made implementation details publicly available in the form of dr he gTLD (generic Top Level Domain) Applicant Guidebook and supporting materials for public discussion and co t.

   Whereas, the first draft of the Applicant Guidebook was published on 23 October 2008 <http://www.icann.org/en/topics /new-gtlds/comments-en.htm (/en/topics/new-gtlds/comments-en.htm)>, and the Guidebook has undergone continued substantial revisions based on stakeholder input on multiple drafts.

   Whereas, the Board has conducted intensive consultations with the Governmental Advisory Committee (including in Brussels in February 2011, in San Francisco in March 2011, by telephone in May 2011, and in Singapore on 19 June 2011), resulting in substantial agreement on a wide range of issues noted by the GAC (Governmental Advisory Committee), and the Board has directed revisions to the Applicant Guidebook to reflect such agreement.

   Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) received letters from the United States Department of Commerce and the European Commission addressing the issue of registry-registrar cross-ownership, and the Board considered the concerns expressed therein. The Board agrees that the potential abuse of significant

market power is a serious concern, and discussions with competition authorities will continue.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has consulted with the GAC (Governmental Advisory Committee) to find mutually acceptable solutions on areas where the implementation of policy is not consistent with GAC (Governmental Advisory Committee) advice, and where necessary has identified its reasons for not incorporating the advice in particular areas, as required by the Bylaws; see <http://www.icann.ord/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf (/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf)> [PDF, 103 KB].

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) community has dedicated countless hours to the review and consideration of numerous implementation issues, by the submission of public comments, participation in working groups, and other consultations.

Whereas, the Board has listened to the input that has been provided by the community, including the supporting organizations and advisory committees, throughout the implementation process.

Whereas, careful analysis of the obligations under the Affirmation of Commitments and the steps taken throughout the implementation process indicates that ICANN (Internet Corporation for Assigned Names and Numbers) has fulfilled the commitments detailed in the Affirmation <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm (/en/documents/affirmation-of-commitments-30sep09-en.htm)>.

Whereas, the Applicant Guidebook posted on 30 May 2011 <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm (/en/topics/new-gtlds/comments-7-en.htm)> includes updates resulting from public comment and from recent GAC (Governmental Advisory Committee) advice.

Whereas, the draft New gTLDs Communications Plan <http://www.icann.org/en/topics/new-gtlds/new-gtlds-communications-plan-30may11-en.pdf (/en/topics/new-gtlds/new-gtlds-communications-plan-30may11-en.pdf)> [PDF, 486 KB] forms the basis of the global outreach and education activities that will be conducted leading up to and during the execution of the program in each of the ICANN (Internet Corporation for Assigned Names and Numbers) geographic regions.

Whereas, the Draft FY12 Operating Plan and Budget <http://www.icann.org/en/announcements/announcement-17may11-en.htm (/en/announcements/announcement-17may11-en.htm)> includes a New gTLD (generic Top Level Domain) Program Launch Scenario, and the Board is prepared to approve the expenditures included in Section 7 of the Draft FY12 Operating Plan and Budget.

Whereas, the Board considers an applicant support program important to ensuring an inclusive and diverse program, and will direct work to implement a model for providing support to potential applicants from developing countries.

Whereas, the Board's Risk Committee has reviewed a comprehensive risk assessment associated with implementing the New gTLD (generic Top Level Domain) Program, has reviewed the defined strategies for mitigating the identified risks, and will review contingencies as the program moves toward launch.

Whereas, the Board has reviewed the current status and plans for operational readiness and program management within ICANN (Internet Corporation for Assigned Names and Numbers).

Resolved (2011.06.20.01), the Board authorizes the President and CEO to implement the new gTLD (generic Top Level Domain) program which includes the following elements:

1. the 30 May 2011 version of the Applicant Guidebook <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm (/en/topics/new-gtlds/comments-7-en.htm)>, subject to the revisions agreed to with the GAC (Governmental Advisory Committee) on 19 June 2011, including: (a) deletion of text in Module 3 concerning GAC (Governmental Advisory Committee) advice to remove references indicating that future Early Warnings or Advice must contain particular information or take specified forms; (b) incorporation of text concerning protection for specific requested Red Cross and IOC names for the top level only during the initial application round, until the GNSO (Generic Names Supporting Organization) and GAC (Governmental Advisory Committee) develop policy advice based on the global public interest, and (c) modification of the "loser pays" provision in the URS to apply to complaints involving 15 (instead of 26) or more domain names with the same registrant; the Board authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes;
2. the Draft New gTLDs Communications Plan as posted at <http://www.icann.org/en/topics/new-gtlds/new-gtlds-communications-plan-30may11-en.pdf (/en/topics/new-gtlds/new-gtlds-communications-plan-30may11-en.pdf)> [PDF, 486 KB], as may be revised and elaborated as necessary and appropriate;

3. operational readiness activities to enable the opening of the application process;
4. a program to ensure support for applicants from developing countries, with a form, structure and processes to be determined by the Board in consultation with stakeholders including: (a) consideration of the GAC (Governmental Advisory Committee) recommendation for a fee waiver corresponding to 76 percent of the $185,000 USD evaluation fee, (b) consideration of recommendations of the ALAC (At-Large Advisory Committee) and GNSO (Generic Names Supporting Organization) as chartering organizations of the Joint Applicant Support (JAS) Working Group, (c) designation of a budget of up to $2 million USD for seed funding, and creating opportunities for other parties to provide matching funds, and (d) the review of additional community feedback, advice from ALAC (At-Large Advisory Committee), and recommendations from the GNSO (Generic Names Supporting Organization) following their receipt of a Final Report from the JAS Working Group (requested in time to allow staff to develop an implementation plan for the Board's consideration at its October 2011 meeting in Dakar, Senegal), with the goal of having a sustainable applicant support system in place before the opening of the application window;
5. a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the new gTLD (generic Top Level Domain) program, based on the "Process for Handling Requests for Removal of Cross-Ownership Restrictions for Existing gTLDs" <http://www.icann.org /en/announcements/announcement-02may11-en.htm (/en/announcements/announcement-02may11-en.htm)>, as modified in response to comments <http://www.icann.org/en/tlds/process-cross-ownership-gtlds-en.htm (/en/tlds /process-cross-ownership-gtlds-en.htm)> (a redline of the Process to the earlier proposal is provided at <http://www.icann.org/en/minutes/process-cross-ownership-restrictions-gtlds-20jun11-en.pdf (/en/minutes/process-cross-ownership-restrictions-gtlds-20jun11-en.pdf)> [PDF, 97 KB]); consideration of modification of existing agreements to allow cross-ownership with respect to the operation of existing gTLDs is deferred pending further discussions including with competition authorities;
6. the expenditures related to the New gTLD (generic Top Level Domain) Program as detailed in section 7 of the Draft FY12 Operating Plan and Budget <http://www.icann.org/en/announcements/announcement-17may11-en.htm (/en/announcements/announcement-17may11-en.htm)>; and
7. the timetable as set forth in the attached graphic <http://www.icann.org/en/minutes/timeline-new-gtld-program-20jun11.pdf (/en/minutes/timeline-new-gtld-program-20jun11.pdf)> [PDF, 167 KB], elements of which include the New gTLD (generic Top Level Domain) application window opening on 12 January 2012 and closing on 12 April 2012, with the New gTLD (generic Top Level Domain) Communications Plan beginning immediately.

Resolved (2011.06.20.02), the Board and the GAC (Governmental Advisory Committee) have completed good faith consultations in a timely and efficient manner under the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.j. As the Board and the GAC (Governmental Advisory Committee) were not able to reach a mutually acceptable solution on a few remaining issues, pursuant to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.k, the Board incorporates and adopts as set forth in the document describing the remaining areas of difference between ICANN (Internet Corporation for Assigned Names and Numbers)'s Board and the GAC (Governmental Advisory Committee) <http://www.icann.ord/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf (/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf)> [PDF, 103 KB] the reasons why the GAC (Governmental Advisory Committee) advice was not followed. The Board's statement is without prejudice to the rights or obligations of GAC (Governmental Advisory Committee) members with regard to public policy issues falling within their responsibilities.

Resolved (2011.06.20.03), the Board wishes to express its deep appreciation to the ICANN (Internet Corporation for Assigned Names and Numbers) community, including the members of the GAC (Governmental Advisory Committee), for the extraordinary work it has invested in crafting the New gTLD (generic Top Level Domain) Program in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and core values, and counts on the community's ongoing support in executing and reviewing the program.

Rationale for Resolutions 2011.06.20.01-2011.06.20.03

* Note: The Rationale is not final until approved with the minutes of the Board meeting.

Rationale for Approval of the Launch of the New gTLD (generic Top Level Domain) Program (/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf) [PDF, 624 KB]

Board (/en/groups/board)

Meetings (/en/groups/board/meetings)

Documents (/en/groups/board/documents)

Board & Chair Self-Appraisal (/en/groups/board/documents/appraisals)

Board Compensation Election (/en/groups/board/documents/ce)

Procedure Manual (/en/groups/board/documents/draft-procedure-manual-09oct12-en)

Resolutions Wiki (https://community.icann.org/display/tap/ICANN+Board+Resolutions)

Statements of Interest (/en/groups/board/documents/sois)

Audit Committee (/en/groups/board/audit)

Board Governance Committee (/en/groups/board/governance)

Compensation Committee (/en/groups/board/compensation)

Executive Committee (/en/groups/board/executive)

Finance Committee (/en/groups/board/finance)

New gTLD Program Committee (/en/groups/board/new-gtld)

Risk Committee (/en/groups/board/risk)

Structural Improvements Committee (/en/groups/board/improvements)

ALAC (http://www.atlarge.icann.org)

ASO (http://aso.icann.org)

ccNSO (http://ccnso.icann.org)

GAC (http://gac.icann.org)

GNSO (http://gnso.icann.org)

IETF (/en/groups/ietf)

NRO (http://www.nro.net)

NomCom (/en/groups/nomcom)

RSSAC (/en/groups/rssac)

SSAC (/en/groups/ssac)

Technical Liaison Group (/en/groups/tlg)

Other Groups (/en/groups/other)

Past Groups (/en/groups/past)

Organizational Reviews (/en/groups/reviews)

Stay Connected

Newsletter: HTML Plain Text
Compliance Newsletter: HTML Plain Text
Policy Update: HTML Plain Text

Subscribe

Follow us @icann (https://twitter.com/#!/icann/)
Videos (http://www.youtube.com/icannnews)
Photos on Flickr (http://www.flickr.com/photos/icann/)
Facebook (http://www.facebook.com/icannorg)

ICANN Blog (http://blog.icann.org/)
Community Wiki (https://community.icann.org/)
Planet ICANN (/en/groups/planet-icann)
RSS Feeds (/en/news/rss)

ICANN Network
myICANN (http://www.myicann.org/)
ASO (http://aso.icann.org)
ALAC (http://www.atlarge.icann.org)
ccNSO (http://ccnso.icann.org)
GAC (http://gac.icann.org)
GNSO (http://gnso.icann.org)
RSSAC (/en/groups/rssac)
SSAC (/en/groups/ssac)
Community Wiki (http://community.icann.org)
Meetings (http://meetings.icann.org)
New gTLDs (http://newgtlds.icann.org)
WHOIS (http://whois.icann.org)
Help

(/en/help)
Acronym Helper

crowell moring

Reference Material 11.

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program

*Note: The Rationales are not final until approved with the minutes of the Board meeting.

Table of Contents

ICANN Board Rationales

1. Program Launch……..4
2. Evaluation Process……8
3. Fees……16
4. Geographic Names……..30
5. Mitigating Malicious Conduct……..46
6. Objection Process……64
7. Root Zone Scaling……79
8. String Similarity and String Contention……93
9. Trademark Protection……107

1. ICANN Board Rationale for the Approval of the Launch of the New gTLD Program

1. ICANN Board Rationale for the Approval of the Launch of the New gTLD Program

I. WHY NEW gTLDs ARE BEING INTRODUCED

New gTLDs are being introduced because the community has asked for them. The launch of the new generic top-level domain (gTLD) program will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 22 gTLDs. In a world with over 2 billion Internet users – and growing – diversity, choice and competition are key to the continued success and reach of the global network. New gTLDs will bring new protections to consumers (as well as brand holders and others) that do not exist today in the Domain Name System (DNS). Within this safer environment, community and cultural groups are already anticipating how they can bring their groups together in new and innovative ways. Companies and consumers that do not use the Latin alphabet will be brought online in their own scripts and languages. Industries and companies will have the opportunity to explore new ways to reach customers. The years of community work in planning have produced a robust implementation plan, and it is time to see that plan through to fruition.

II. FOLLOWING ICANN'S MISSION AND COMMUNITY DEVELOPED PROCESSES

A. Introduction of new TLDs is a core part of ICANN's Mission

When ICANN was formed in 1998 as a not for profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, a purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new generic top-level domains while ensuring internet security and stability. The introduction of new top-level domains into the DNS has thus been a fundamental part of ICANN's mission from its inception, and was specified in ICANN's Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.[1]

ICANN initially created significant competition at the registrar level, which has resulted in enormous benefits for consumers. ICANN's community and Board has now turned its attention to fostering competition in the registry market. ICANN began this process with the "proof of concept" round for the addition of a limited number of new generic Top Level Domains ("gTLDs") in 2000, and then permitted a limited number of additional "sponsored" TLDs in 2004-2005. These additions to the root demonstrated that TLDs could be added without adversely affecting the security and stability of the domain name system. Follow on economic studies indicated that, while benefits accruing from innovation are difficult to predict, that the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users. The

[1] ICANN's Bylaws articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. *See* ICANN Bylaws, Article 1, Section 2.6.

studies also stated that taking steps to mitigate the possibility of rights infringement and other forms of malicious conduct would result in maximum net social benefits.

B. The Community Created a Policy Relating to the Introduction of new gTLDs

After an intensive policy development process, in August 2007, the Generic Names Supporting Organization issued a lengthy report in which it recommended that ICANN expand the number of gTLDs. *See* http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm. Contributing to this policy work were ICANN's Governmental Advisory Committee ("GAC"), At-Large Advisory Committee ("ALAC"), County Code Names Supporting Organization ("ccNSO") and Security and Stability Advisory Committee ("SSAC"). The policy development process culminated with Board approval in June 2008. *See* http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171.

III. COMMUNITY INVOLEMENT WAS KEY IN IMPLEMENTATION PLANNING

Since the June 2008 decision, the community has been hard at work creating, commenting on, and refining the implementation of this policy.

Seven versions of the Applicant Guidebook have been published. Fifty-eight explanatory memoranda have been produced. There have been nearly 50 new gTLD-related public comment sessions, over these documents as well as a variety of excerpts and working group reports. Over 2,400 comments were received through those public comment fora, which have been summarized and analyzed, and considered in revisions to the new gTLD program. Over 1,350 pages of summary and analysis have been produced. The community has also participated in numerous workshops and sessions and open microphone public forums at ICANN meetings, providing additional suggestions for the improvement of the new gTLD program. ICANN has listened to all of these community comments in refining the program that is being approved today.

Nearly every ICANN Supporting Organization and Advisory Committee was represented in targeted community-based working groups or expert teams formed to address implementation issues. The GNSO and its component stakeholder groups and constituencies participated in all aspects of the implementation work arising out of its policy recommendations. The ccNSO was particularly active on issues relating to internationalized domain names (IDNs) and the treatment of geographical names in the new gTLD program.

ICANN's technical Advisory Committees provided direct input into the implementation work. For example, RSSAC and SSAC provided expert analysis that there is no expected significant impact of new gTLDs on the stability and scalability of the root server system.

ALAC members served on nearly every working group and team, and actively participated in all public comment fora, giving the world's Internet users a voice in implementation discussions.

IV. CONSULTATION WITH THE GAC LEAD TO IMPROVEMENTS

Under the ICANN Bylaws, the GAC has an assurance that the Board will take GAC advice into account. The Board, through an extensive and productive consultation process with the GAC, has considered the GAC's advice on the new gTLD program and resolved nearly all of the areas where there were likely differences between the GAC advice and the Board's positions.

The ICANN Board and the GAC held a landmark face-to-face consultation on 28 February – 1 March 2011 and subsequently exchanged written comments on various aspects of the new gTLD Program. On 15 April 2011, ICANN published a revised Applicant Guidebook, taking into account many compromises with the GAC as well as additional community comment. On 20 May 2011, the GAC and the ICANN Board convened another meeting by telephone, and continued working through the remaining differences between the Board and GAC positions. *See* http://www.icann.org/en/announcements/announcement-22may11-en.htm. On 26 May 2011, the GAC provided its comments on the 15 April 2011 Applicant Guidebook, and the GAC comments were taken into consideration in the production of the 30 May 2011 Applicant Guidebook.

On 19 June 2011, the ICANN Board and GAC engaged in a further consultation over the remaining areas where the Board's approval of the launch of the new gTLD program may not be consistent with GAC advice. At the beginning of the GAC consultation process, there were 12 issues under review by the GAC and the Board, with 80 separate sub-issues. The GAC and the Board have identified mutually acceptable solutions for nearly all of these sub-issues. Despite this great progress and the good faith participation of the GAC and the Board in the consultation process, a few areas remain where the GAC and the Board were not able to reach full agreement. The reasons why these items of GAC advice were not followed are set forth in responses to the GAC such as Board responses to item of GAC Advice.

V. MAJOR IMPLEMENTATION ISSUES HAVE BEEN THOROUGHLY CONSIDERED

The launch of the new gTLDs has involved the careful consideration of many complex issues. Four overarching issues, along with several other major substantive topics have been addressed through the new gTLD implementation work. Detailed rationale papers discussing the approval of the launch of the program as it relates to nine of those topics are included here. These nine topics are:

- Evaluation Process
- Fees
- Geographic Names
- Mitigating Malicious Conduct
- Objection Process
- Root Zone Scaling
- String Similarity and String Contention
- Trademark Protection.

Detailed rationales have already been produced and approved by the Board in support of its decisions relating to two other topics, Cross Ownership, at http://www.icann.org/en/minutes/rationale-cross-ownership-21mar11-en.pdf and Economic Studies, at http://www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf, each approved on 25 January 2011.

VI. CONCLUSION

The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS. After the ICANN community created a policy recommendation on the expansion of the number of gTLDs, the community and ICANN have worked tirelessly to form an implementation plan. The program approved for launch today is robust and will provide new protections and opportunities within the DNS.

The launch of the new gTLD program does not signal the end of ICANN's or the community's work. Rather, the launch represents the beginning of new opportunities to better shape the further introduction of new gTLDs, based upon experience. After the launch of the first round of new gTLDs, a second application window will only be opened after ICANN completes a series of assessments and refinements – again with the input of the community. The Board looks forward to the continual community input on the further evolution of this program.

The Board relied on all members of the ICANN community for the years of competent and thorough work leading up to the launch of the new gTLD program. Within the implementation phase alone, the community has devoted tens of thousands of hours to this process, and has created a program that reflects the best thought of the community. This decision represents ICANN's continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.

2. ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program

2. ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, one of the areas that required significant focus is a process that allows for the evaluation of applications for new gTLDs. The Board determined that the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

Following the policy advice of the GNSO, the key goal for the evaluation process was to establish criteria that are as objective and measurable as possible. ICANN worked through the challenge of creating criteria that are measurable, meaningful (i.e., indicative of the applicant's capability and not easily manipulated), and also flexible enough to facilitate a diverse applicant pool. In the end, ICANN has implemented a global, robust, consistent and efficient process that will allow any public or private sector organization to apply to create and operate a new gTLD.

II. Brief History of ICANN's Analysis of the Evaluation Process Associated with the gTLD Program

This section sets forth a brief history of the significant actions on the subject of the evaluation process associated with the gTLD program.

- In December 2005, the GNSO commenced a policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to stimulate competition further and for numerous other reasons.

- In August of 2007, the GNSO issued its final report regarding the introduction of new gTLDs. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO's policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880

- Starting with the November 2007 Board meeting, the Board began to consider issues related to the selection procedure for new gTLDs, including the need for the process to respect the principles of fairness, transparency and non-discrimination.

- On 20 November 2007, the Board discussed the need for a detailed and robust evaluation process, to allow applicants to understand what is expected of them in the process and to provide a roadmap. The process should include discussion of technical criteria, business and financial criteria, and other specifications. ICANN proceeded to work on the first draft of the anticipated request for proposals. http://www.icann.org/en/minutes/minutes-18dec07.htm

- On 23 October 2008, ICANN posted the Draft Applicant Guidebook, including an outline of the evaluation procedures (incorporating both reviews of the applied-for gTLD string and of the applicant), as well as the intended application questions and scoring criteria. These were continually revised, updated, and posted for comment through successive drafts of the Guidebook. http://www.icann.org/en/topics/new-gtlds/comments-en.htm

- Between June and September 2009, KPMG conducted a benchmarking study on ICANN's behalf, with the objective of identifying benchmarks based on registry financial and operational data. The KPMG report on Benchmarking of Registry Operations ("KPMG Benchmarking Report") was designed to be used as a reference point during the review of new gTLD applications.

- In February 2010, ICANN published an overview of the KPMG Benchmarking Report. This overview stated that ICANN commissioned the study to gather industry data on registry operations as part of the ongoing implementation of the evaluation criteria and procedures for the new gTLD program. http://icann.org/en/topics/new-gtlds/benchmarking-report-15feb10-en.pdf Rationale-all -final-20110609.doc

- On 30 May 2011, ICANN posted the Applicant Guidebook for consideration by the Board. This lays out in full the proposed approach to the evaluation of gTLD applications.

III. Analysis and Consideration of the Evaluation Process

A. Policy Development Guidance

The GNSO's advice included the following:

- The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

- All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.

- Applicants must be able to demonstrate their financial and organisational operational capability.

- There must be a clear and pre-published application process using objective and measurable criteria.

B. Implementation of Policy Principles

Publication of the Applicant Guidebook has included a process flowchart which maps out the different phases an application must go through, or may encounter, during the evaluation process. There are six major components to the process: (1) Application Submission/Background Screening; (2) Initial Evaluation; (3) Extended Evaluation; (4) Dispute Resolution; (5) String Contention and (6) Transition to Delegation. All applications must pass the Initial Evaluation to be eligible for approval.

The criteria and evaluation processes used in Initial Evaluation are designed to be as objective as possible. With that goal in mind, an important objective of the new TLD process is to diversify the namespace, with different registry business models and target audiences. In some cases, criteria that are objective, but that ignore the differences in business models and target audiences of new registries, will tend to make the process exclusionary. The Board determined that the process must provide for an objective evaluation framework, but also allow for adaptation according to the differing models applicants will present.

The Board set out to create an evaluation process that strikes a correct balance between establishing the business and technical competence of the applicant to operate a registry, while not asking for the detailed sort of information that a venture capitalist may request. ICANN is not seeking to certify business success but instead seeks to encourage innovation while providing certain safeguards for registrants.

Furthermore, new registries must be added in a way that maintains DNS stability and security. Therefore, ICANN has created an evaluation process that

asks several questions so that the applicant can demonstrate an understanding of the technical requirements to operate a registry.

After a gTLD application passes the financial and technical evaluations, the applicant will then be required to successfully complete a series of pre-delegation tests. These pre-delegation tests must be completed successfully within a specified period as a prerequisite for delegation into the root zone.

C. Public Comment

Comments from the community on successive drafts of the evaluation procedures, application questions, and scoring criteria were also considered by the Board. In particular, changes were made to provide greater clarity on the information being sought, and to more clearly distinguish between the minimum requirements and additional scoring levels.

There was feedback from some that the evaluation questions were more complicated or cumbersome than necessary, while others proposed that ICANN should set a higher bar and perform more stringent evaluation, particularly in certain areas such as security. ICANN has sought to consider and incorporate these comments in establishing a balanced approach that results in a rigorous evaluation process in line with ICANN's mission for what is to be the initial gTLD evaluation round. See http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm.

IV. The Board's Analysis of the Evaluation Process Associated with the gTLD Program

A. Who the Board Consulted Regarding the Evaluation Process

- Legal Counsel
- The GNSO stakeholder groups

- ICANN's Governmental Advisory Committee

- The At-Large Advisory Committee

- Various consultants were engaged throughout the process to assist in developing a methodology that would meet the above goals. These included InterIsle, Deloitte, KPMG, Gilbert and Tobin, and others.

- All other Stakeholders and Community members through public comment forums and other methods of participation.

B. What Significant Non-Privileged Materials the Board Reviewed

- Public Comments; http://icann.org/en/topics/new-gtlds/comments-analysis-en.htm
- Benchmarking of Registry Operations; http://icann.org/en/topics/new-gtlds/benchmarking-report-15feb10-en.pdf

C. What Factors the Board Found to Be Significant

The Board considered a number of factors in its analysis of the evaluation process for the new gTLD program. The Board found the following factors to be significant:

- the principle that the Board should base its decision on solid factual investigation and expert consultation and study;

- the addition of new gTLDs to the root in order to stimulate competition at the registry level;

- the responsibility of ensuring that new gTLDs do not jeopardize the security or stability of the DNS;

- an established set of criteria that are as objective and measurable as possible;

- the selection of independent evaluation panels with sufficient expertise, resources and geographic diversity to review applications for the new gTLD program; and

- an evaluation and selection procedure for new gTLD registries that respects the principles of fairness, transparency and non-discrimination.

V. The Board's Reasons for Concluding the Evaluation Process was Appropriate for the gTLD Program

- The evaluation process allows for any public or private sector organization to apply to create and operate a new gTLD. However, the process is not like simply registering or buying a second-level domain. ICANN has developed an application process designed to evaluate and select candidates capable of running a registry. Any successful applicant will need to meet the published operational and technical criteria in order to ensure a preservation of internet stability and interoperability.

- ICANN's main goal for the evaluation process was to establish criteria that are as objective and measurable as possible while providing flexibility to address a wide range of business models. Following the policy advice, evaluating the public comments, and addressing concerns raised in discussions with the community, the Board decided on the proposed structure and procedures of the evaluation process to meet the goals established for the program.

3. ICANN Board Rationale on Fees Associated With the gTLD Program

3. ICANN Board Rationale on Fees Associated With the gTLD Program

I. Introduction

The launch of the new gTLD program is anticipated to result in improvements to consumer choice and competition in the DNS. However, there are important cost implications, both to ICANN as a corporate entity and to gTLD applicants who participate in the program. It is ICANN's policy, developed through its bottom-up, multi-stakeholder process, that the application fees associated with new gTLD applications should be designed to ensure that adequate resources exist to cover the total cost of administering the new gTLD process. http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf.

On 2 October 2009, the Board defined the directive approving the community's policy recommendations for the implementation of the new gTLD policy. That policy included that the implementation program should be fully self-funding. The Board has taken great care to estimate the costs with an eye toward ICANN's previous experience in TLD rounds, the best professional advice, and a detailed and thorough review of expected program costs. The new gTLD program requires a robust evaluation process to achieve its goals. This process has identifiable costs. The new gTLD implementation should be revenue neutral and existing ICANN activities regarding technical coordination of names, numbers and other identifiers should not cross-subsidize the new program. See http://icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf

II. Brief History of ICANN's Analysis of Fees Associated with the gTLD Program

This section sets forth a brief history of the significant Board consideration on the subject of fees associated with the gTLD program.

- In December 2005 – September 2007, the GNSO conducted a rigorous policy development process to determine whether (and the

circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to stimulate competition further and for numerous other reasons and that evaluation fees should remain cost neutral to ICANN. The GNSO's Implementation Guideline B stated: "Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process."

- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO's policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880

- On 2 November 2007, the Board reviewed the ICANN Board or Committee Submission No. 2007-54 entitled Policy Development Process for the Delegation of New gTLDs. The submission discussed application fees and stated, "[a]pplication fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process. Application fees may differ for applicants." http://www.icann.org/en/minutes/minutes-18dec07.htm.

- On 23 October 2008, ICANN published the initial draft version of the gTLD Applicant Guidebook, including an evaluation fee of USD 185,000 and an annual registry fee of USD 75,000. http://www.icann.org/en/topics/new-gtlds/comments-en.htm

- At the 12 February 2009 Board Meeting, the ICANN Board discussed the new version of the Applicant Guidebook ("AGB"). The Board determined that the application fee should remain at the proposed fee of USD 185,000 but the annual minimum registry fee should be

reduced to USD 25,000, with a transaction fee at 25 cents per transaction. Analysis was conducted and budgets were provided to support the USD 185,000 fee. The decrease in of the registry fee to USD 25,000 was based on a level of effort to support registries. http://www.icann.org/en/minutes/minutes-12feb09.htm

- On 6 March 2009, the Board reviewed ICANN Board Submission No. 2009-03-06-05 entitled Update on new gTLDs. The submission analyzed recent public comments and detailed how ICANN incorporated those comments and changes into the fee structure. It also pointed out that the annual registry fee was reduced to a baseline of USD 25,000 plus a per transaction fee of 25 cents once the registry has registered 50,000 names. Also, the submission highlighted a refund structure for the USD 185,000 evaluation fee, with a minimum 20% refund to all unsuccessful applicants, and higher percentages to applicants who withdraw earlier in the process.

- On 25 June, ICANN Published the New gTLD Program Explanatory Memorandum – New gTLD Budget which broke down the cost components of the USD 185,000 application fee. http://www.icann.org/en/topics/new-gtlds/new-gtld-budget-28may10-en.pdf

- On 30 May 2011, ICANN posted a new version of the Applicant Guidebook, taking into account public comment and additional comments from the GAC. http://icann.org/en/topics/new-gtlds/comments-7-en.htm

III. Major Principles Considered by the Board

A. Important Financial Considerations

The ICANN Board identified several financial considerations it deemed to be important in evaluating and deciding on a fee structure for the new gTLD program. On 23 October 2008, ICANN published an explanatory memorandum

describing its cost considerations and identified three themes which shaped the fee structure: (1) care and conservatism; (2) up-front payment/incremental consideration; and (3) fee levels and accessibility. See http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf.

1. Care and Conservatism

ICANN coordinates unique identifiers for the Internet, and particularly important for this context, directly contracts with generic top level domain registries, and cooperates with country code registries around the world in the interest of security, resiliency and stability of the DNS. There are more than 170,000,000 second-level domain registrations that provide for a richness of communication, education and commerce, and this web is reaching ever more people around the world. ICANN's system of contracts, enforcement and fees that supports this system, particularly for the 105,000,000 registrations in gTLDs, must not be put at risk. Therefore, the new gTLD must be fully self funding.

The principle of care and conservatism means that each element of the application process must stand up to scrutiny indicating that it will yield a result consistent with the community-developed policy. A robust evaluation process, including detailed reviews of the applied-for TLD string, the applying entity, the technical and financial plans, and the proposed registry services, is in place so that the security and stability of the DNS are not jeopardized. While the Board thoughtfully considered process and cost throughout the process design, cost-minimization is not the overriding objective. Rather, process fidelity is given priority.

2. Up-Front Payment/Incremental Consideration

ICANN will collect the entire application fee at the time an application is submitted. This avoids a situation where the applicant gets part way through the application process, then may not have the resources to continue. It also assures that all costs are covered. However, if the applicant elects to withdraw its application during the process, ICANN will refund a prorated amount of the fees to the applicant.

A uniform evaluation fee for all applicants provides cost certainty with respect to ICANN fees for all applicants. Further, it ensures there is no direct cost penalty to the applicant for going through a more complex application (except, when necessary, fees paid directly to a provider). A single fee, with graduated refunds, and with provider payments (e.g. dispute resolution providers) made directly to the provider where these costs are incurred seems to offer the right balance of certainty and fairness to all applicants.

3. Fee Levels and Accessibility

Members of the GNSO community recognized that new gTLD registry applicants would likely come forward with a variety of business plans and models appropriate to their own specific communities, and there was a commitment that the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination.

Some community members expressed concern that financial requirements and fees might discourage applications from developing nations, or indigenous and minority peoples, who may have different sets of financial opportunities or capabilities relative to more highly developed regions of the world. The Board addressed these concerns with their "Application Support" program (which is discussed more in depth below).

B. Important Assumptions

In the explanatory memorandum on cost considerations published on 23 October 2008, ICANN identified the three assumptions on which it would rely in determining the fee structure for the program: (1) estimating methodology; (2) expected quantity of applications; and (3) the new gTLD program will be ongoing.

1. Estimating Methodology

Estimators for the various costs associated with the application evaluation strove to use a maximum-likelihood basis to estimate the costs. A detailed

approach was taken to get the best possible estimates. The evaluation process was divided into 6 phases, 24 major steps and 75 separate tasks. Twenty-seven separate possible outcomes were identified in the application process, probabilities were identified for reaching each of these states, and cost estimates were applied for each state. Estimates at this detailed level are likely to yield more accurate estimates than overview summary estimates.

Further, whenever possible, sensitivity analysis was applied to cost estimates. This means asking questions such as "How much would the total processing cost be if all applications went through the most complex path? Or "How much would the total processing cost be if all applications went through the simplest path?" Sensitivity analysis also helps to explore and understand the range of outcomes, and key decision points in the cost estimation mode.

2. Expected Quantity of Applications

While ICANN has asked constituents and experts, there is no sure way to estimate with certainty the number of new TLD applications that will be received. ICANN has based its estimates on an assumption of 500 applications in the first round. This volume assumption is based on several sources, including a report from a consulting economist, public estimates on the web, oral comments at public meetings and off-the-record comments by industry participants. While the volume assumption of 500 applications is consistent with many data points, there is no feasible way to make a certain prediction.

If there are substantially fewer than 500 applications, the financial risk is that ICANN would not recoup historical program development costs or fixed costs in the first round, and that higher fixed costs would drive the per unit application costs to be higher than forecast. Still, the total risk of a much smaller-than-anticipated round would be relatively low, since the number of applications would be low.

If there are substantially more than 500 applications, the risk is that application processing costs would again be higher than anticipated, as ICANN would need to bring in more outside resources to process applications in a timely

fashion, driving the variable processing costs higher. In this case, ICANN would be able to pay for these higher expected costs with greater-than-expected recovery of fixed cost components (historical program development and other fixed costs), thus at least ameliorating this element of risk.

3. The New gTLD Program Will Be Ongoing

ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round.

It is reasonable to expect that various fees may be lower in subsequent application rounds, as ICANN processes are honed, and uncertainty is reduced.

C. Cost Elements Determined by the Board

1. Application Fee

The Board determined the application fee to be in the amount of USD 185,000. The application fee has been segregated into three main components: (a) Development Costs, (b) Risk Costs, and (c) Application Processing (see www.icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf). The breakdown of each component is as follows (rounded):

Development Costs:	USD 27,000
Risk Costs:	USD 60,000
Application Processing:	USD 98,000
Application Fee:	USD 185,000

The application fee was also extrapolated and further analyzed under several assumptions including receiving 500 applications (see

www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf).

a. Development Costs

These costs have two components:

i) Development costs which are the activities necessary to progress the implementation of the gTLD policy recommendations. This includes resolving open concerns, developing and completing the AGB, managing communication with the Internet community, designing and developing the processes and systems necessary to process applications in accordance with the final Guidebook, and undertaking the activities that have been deemed high risk or would require additional time to complete.

The costs associated with the Development Phase have been funded through normal ICANN budgetary process and the associated costs have been highlighted in ICANN's annual Operating Plan and Budget Documents

ii) Deployment costs which are the incremental steps necessary to complete the implementation of the application evaluation processes and system. Such costs require timing certainty and include the global communication campaign, on-boarding of evaluation panels, hiring of additional staff, payment of certain software licenses, and so on.

b. Risk Costs

These represent harder to predict costs and cover a number of risks that could occur during the program. Examples of such costs include variations between estimates and actual costs incurred or receiving a significantly low or high number of applications. ICANN engaged outside experts to assist with developing a risk framework and determining a quantifiable figure for the program.

c. Application Processing

Application Processing represents those costs necessary to accept and process new gTLD applications, conduct contract execution activities, and conduct pre-delegation checks of approved applicants prior to delegation into the root zone. Application processing costs consist of a variable and fixed costs.

Variable costs are those that vary depending on the number of applications that require a given task to be completed. Whereas fixed costs are necessary to manage the program and are not associated with an individual application.

The application fee is payable in the form of a USD 5,000 deposit submitted at the time the user requests application slots within the TLD Application System ("TAS"), and a payment of USD 180,000 submitted with the full application. See http://icann.org/en/topics/new-gtlds/intro-clean-12nov10-en.pdf.

2. Annual Registry Fee

ICANN's Board has determined to place the Annual Registry Fee at a baseline of USD 25,000 plus a variable fee based on transaction volume where the TLD exceeds a defined transaction volume.

3. Refunds

In certain cases, refunds of a portion of the evaluation fee may be available for applications that are withdrawn before the evaluation process is complete. An applicant may request a refund at any time until it has executed a registry agreement with ICANN. The amount of the refund will depend on the point in the process at which the withdrawal is requested. Any applicant that has not been successful is eligible for, at a minimum, a 20% refund of the evaluation fee if it withdraws its application.

According to the AGB, the breakdown of possible refund scenarios is as follows:

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Within 21 calendar days of a GAC Early Warning	80%	USD 148,000
After posting of applications until posting of Initial Evaluations results	70%	USD 130,000
After posting Initial Evaluation Results	35%	USD 65,000
After the applicant has completed Dispute Resolution, Extended Evaluation, or String Contention Resolution(s)	20%	USD 37,000
After the applicant has registered into a registry agreement with ICANN		None

4. Application Support (JAS WG Charter)

As mentioned above, some community members expressed concerned that the financial requirements and fees might discourage applications from developing nations, or indigenous or minority peoples, who may have different financial opportunities. The Board addressed these concerns with their "Application Support" program, and recognized the importance of an inclusion in the new gTLD program by resolving that stakeholders work to "develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs." See http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#20.

In direct response to this Board resolution, the GNSO Council proposed a Joint SO/AC Working Group ("JAS WG"), composed by members of ICANN's Supporting Organizations ("SOs") and Advisory Committees ("ACs"), to look into applicant support for new gTLDs. See https://st.icann.org/so-ac-new-gtld-wg/index.cgi.

IV. The Board's Analysis of Fees

A. Why the Board Addressed Fees

- ICANN's mission statement and one of its founding principles is to promote user choice and competition. ICANN has created significant competition at the registrar level that has resulted in enormous benefits for consumers. To date, ICANN has not created meaningful competition at the registry level. Based upon the report and recommendation from the GNSO to introduce new gTLDs, the Board decided to proceed with the new gTLD program.

- While the primary implications of the new gTLD program relate to possible improvements in choice and competition as a result of new domain names, there are also important cost implications, both to the ICANN corporate entity and to gTLD applicants. The Board initially determined that the application fees associated with new gTLD applications should be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process**.**

- Both the Board and members of the community have commented on the application fee structure for the new gTLD program. From those comments the Board has determined that the new gTLD implementation should be fully self-funding and revenue neutral, and that existing ICANN activities regarding technical coordination of names, numbers, and other identifiers should not cross-subsidize the new program.

B. Who the Board Consulted Regarding Fees

- Legal Counsel

- The GNSO

- ICANN's Supporting Organizations

- The ALAC
- The GAC
- Other ICANN Advisory Committees
- All other Stakeholders and Community members through public comment forums and other methods of participation.

C. Public Comments Considered by the Board

Over 1200 pages of feedback, from more than 300 entities, have been received since the first Draft AGB was published. The Board has analyzed and considered these comments in the context of the GNSO policy recommendations.. The Board received many comments on the fee structure, both the annual registry fee and application evaluation fee. Regarding the annual registry fee, the Board received comments stating that the annual minimum and percentage fee for registries was perceived by some to be too high.

Furthermore, the Board incorporated many suggestions from public comments pursuant to its JAS WG Application Support Program. http://forum.icann.org/lists/soac-newgtldapsup-wg.

D. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of fees. The Board found the following factors to be significant:

- The principle that the Board should base its decision on solid factual investigation and expert consultation and study;
- The addition of new gTLDs to the root in order to stimulate competition at the registry level;

- That the new gTLD implementation should be fully self funding and revenue neutral; and

- That existing ICANN activities regarding technical coordination of names, numbers, and other identifiers should not cross-subsidize the new program.

- That any revenue received in excess of costs be used in a manner consistent with community input.

- Evaluation fees will be re-evaluated after the first round and adjusted.

V. The Board's Reasons for Deciding the Proposed Fee Structure is Appropriate

While the primary implications of this new policy relate to possible improvements in choice and competition as a result of new domain names, there are also important cost implications, both to ICANN as a corporate entity and to gTLD applicants with regard to the implementation of the policy through the acceptance and processing of applications as set out in the policy adopted by the community and accepted by the Board.

After evaluating public comments, addressing initial concerns and carefully evaluating the twenty-seven separate possible outcomes that were identified in the application process, the Board decided on the proposed fee structure to ensure that the new gTLD implementation would be fully self-funding and revenue neutral.

4. ICANN Board Rationale on Geographic Names Associated with the gTLD Program

4. ICANN Board Rationale on Geographic Names Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, one of the areas of interest to governments and other parties was the treatment of country/territory names and other geographic names. This area has been the subject of stakeholder input and discussion throughout the implementation process.

This memorandum focuses on the Board's consideration of the provisions for geographic names in the new gTLD program. The memorandum summarizes the Board's consideration of the issue, and the Board's rationale for implementing the new gTLD program containing the adopted measures on geographic names.

II. Brief History of ICANN's Consideration of Geographic Names Associated with The New gTLD Program

This section sets forth a brief history of significant actions on the subject of geographic names associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for other reasons.

- On 28 March 2007, the GAC adopted principles to govern the introduction of new gTLDs (the "GAC Principles"). Sections 2.2 and 2.7 of the GAC Principles address geographic names issues at the top and second level.
    - 2.2 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.
    - 2.7 Applicant registries for new gTLDs should pledge to: a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of

governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD, and b) ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.
http://gac.icann.org/system/files/gTLD_principles_0.pdf

- On 23 May 2007, the GNSO Reserved Names Working Group issued its final report. Recommendation 20 of the report stated that: (1) there should be no geographical reserved names; and (2) governments should protect their interests in certain names by raising objections on community grounds.
http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm

- On 8 August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 20 of the report intended to provide protections for geographical names, stating that an application for a new gTLD should be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be targeted.
http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- On 26 June 2008, the Board approved the GNSO's Recommendations for the introduction of new gTLDs and directed staff to develop an implementation plan.
http://www.icann.org/en/minutes/resolutions-26jun08.htm

- On 24 October 2008, ICANN published Version 1 of the new gTLD Applicant Guidebook ("Version 1"), which incorporated various concepts set forth in the GAC Principles. Version 1 required applications involving geographic names to be accompanied by documents of support or non-objection from the relevant government authority. Geographic names included country and territory names, sub-national names on the ISO 3166-2 list, city names (if the applicant was intending to leverage the city name), and names of continents and regions included on a UN-maintained

list. http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf

- The 24 October 2008 posting also included an explanatory memorandum on the topic of geographical names, describing the various considerations used in arriving at the proposed approach. http://www.icann.org/en/topics/new-gtlds/geographic-names-22oct08-en.pdf

- On 28 December 2008, the ccNSO commented on Version 1. The ccNSO stated that (1) the restriction of protections for country/territory names to the 6 official United Nations languages needed to be amended to translation in any language; and (2) All country names and territory names should be ccTLDs – not gTLDs and should not be allowed until the IDN ccPDP process concluded. http://forum.icann.org/lists/gtld-evaluation/msg00015.html

- On 12 February 2009, the Board met to discuss: (1) proposed changes to Version 1; and (2) the implementation of policy recommendations given by the GAC and GNSO. http://www.icann.org/en/minutes/minutes-12feb09.htm

- On 18 February 2009, ICANN published an analysis of public comments received http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf

- Also on 18 February 2009, ICANN published Version 2 of the new gTLD Applicant Guidebook ("Version 2"), which clarified the definition of geographic names set forth in Version 1. In addition, Version 2 expanded protection for country and territory names involving meaningful representations in any language, and augmented requirements for documentation of support or non-objection from relevant governments and public authorities. http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf; http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm

- On 6 March 2009, the Board resolved that it was generally in agreement with Version 2 as it related to geographic names, but directed staff to revise the relevant portions of Version 2 to provide greater specificity on the scope of protection at the top level for the

names of countries and territories listed in the ISO 3166-1 standard. The Board also directed ICANN staff to send a letter to the GAC by 17 March 2009 identifying implementation issues that have been identified in association with the GAC's advice, in order to continue communications with the GAC to find a mutually acceptable solution.
http://www.icann.org/en/minutes/resolutions-06mar09.htm

- On 17 March 2009, Paul Twomey delivered a letter to Janis Karklins that: (1) outlined the Board's 6 March 2009 resolution; (2) stated that ICANN's treatment of geographic names provided a workable compromise between the GAC Principles and GNSO policy recommendations; and (3) sought advice to resolve implementation issues regarding the protection of geographic names at the second level. http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf

- On 9 April 2009, the ccNSO commented on Version 2. The ccNSO reiterated that all country and territory names are ccTLDs – not gTLDs.
http://forum.icann.org/lists/2gtld-guide/pdfc3uGsuV7CG.pdf

- On 24 April 2009, Janis Karklins delivered a letter to Paul Twomey stating that: (1) countries should not have to use objection process and should instead wait for the IDN ccTLD PDP to delegate country names; (2) the names contained on three lists be reserved at the second level at no cost for the government; and (3) ICANN should notify registries and request the suspension of any name if the government notifies ICANN that there was a misuse of a second level domain name.
http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf

- On 29 May 2009, Janis Karklins delivered a letter to Paul Twomey. The letter that stated that: (1) the proposed changes to Version 2 in relation to geographic names at the second level were acceptable to the GNSO; and (2) the GNSO and the GAC were not in agreement with regard to other issues relating to Geographic names at the top level. http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf

- On 31 May, 2009, ICANN published an analysis of the public comments received concerning draft version 2 of the Applicant Guidebook. http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf

- On 26 June 2009, the Board discussed proposed changes to the geographic names section of the Applicant Guidebook. These proposed changes were intended to provide greater specificity on the scope of protection at the top level for the names of countries and territories and greater specificity in the support requirements for continent or region names. The changes also provided additional guidance to applicants for determining the relevant government or public authority for the purpose of obtaining the required documentation. http://www.icann.org/en/minutes/resolutions-26jun09.htm

- On 18 August 2009, Janis Karklins delivered a letter to Peter Dengate Thrush that stated that (1) strings that were a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space; and (2) government or public authority should be able to initiate the redelegation process in limited circumstances. http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf

- On 22 September 2009, Peter Dengate-Thrush delivered a letter to Janis Karklins, responding to GAC comments on draft version 2 of the Applicant Guidebook and describing the rationale for the proposed treatment of country names, as well as the Board's general intention to provide clear rules for applicants where possible with reference to lists. http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf

- On 04 October 2009, ICANN published Version 3 of the new gTLD Applicant Guidebook ("Version 3"). http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf

- On 21 November 2009, ccNSO delivered a letter to the Board, raising concerns about the treatment of country and territory

names. ccNSO also submitted these comments via public comments. http://www.icann.org/correspondence/disspain-to-dengate-thrush-21nov09-en.pdf

- On 15 February 2010, ICANN published an analysis of the public comments received. http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf

- On 12 March 2010, the Board resolved that ICANN should consider whether the Registry Restrictions Dispute Resolution Procedure or a similar post-delegation dispute resolution procedure could be implemented for use by government supported TLD operators where the government withdraws its support of the TLD. http://www.icann.org/en/minutes/resolutions-12mar10-en.htm

- On 31 May 2010, ICANN published Version 4 of the new gTLD Applicant Guidebook ("Version 4"). Version 4 excluded country and territory names from the first gTLD application round, continuing with the existing definition of country and territory names in Version 3. http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm

- On 23 September 2010, Heather Dryden delivered a letter to Peter Dengate Thrush that stated that that Version 4 still did not take fully into consideration GAC's concerns regarding the definition of country/territory names. http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf

- On 25 September 2010, the Board met in Trondheim, Norway and decided: (1) not to include translations of the ISO 3166-1 sub-national place names in the Applicant Guidebook, and (2) to augment the definition of Continent or UN Regions in the Applicant Guidebook to include UNESCO's regional classification list. At the same meeting, the Board resolved that ICANN staff should determine if the directions indicated by the Board regarding geographical names and other issues are consistent with GAC comments, and recommend any appropriate further action in light of GAC's comments. http://icann.org/en/minutes/resolutions-25sep10-en.htm

- On 28 October, 2010, the Board discussed the scope, timing and logistics of a consultation needed with GAC regarding remaining geographic names issues in the new gTLD program. The Board agreed that staff should provide a paper on geographic names to GAC. http://www.icann.org/en/minutes/prelim-report-28oct10-en.htm

- On 12 November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the "Proposed Final Guidebook"). http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf

- On 23 February 2011, the GAC released its Indicative Scorecard on New gTLD Outstanding Issues. This scorecard included advice from the GAC on the topics of Post-Delegation Disputes and Use of Geographic Names. http://gac.icann.org/system/files/20110223_Scorecard_GAC_outstanding_issues_20110223.pdf

- On 28 February – 1 March 2011, the Board met with GAC representatives at a meeting in Brussels to discuss the issues raised by the GAC.

- On 4 March 2011, the Board published its notes on the GAC Indicative Scorecard. The Board provided an indication of whether each component of the GAC's advice was consistent (fully or partially) or inconsistent with the Board's position on each of the issues. http://gac.icann.org/system/files/2011-03-04-ICANN-Board-Notes-Actionable-GAC-Scorecard.pdf

- On 12 April 2011, the GAC published comments on the Board's response to the GAC Scorecard. http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf

- On 15 April 2011, ICANN posted a discussion draft of the Applicant Guidebook (the "Discussion Draft Guidebook"). This version expanded the definition of country names to include "a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization" as well as providing clarification to applicants that in the event of a dispute between a

government (or public authority) and a registry operator that submitted documentation of support from that government or public authority, ICANN will comply with a legally binding order from a court in the jurisdiction of the government or public authority that has given support to an application.
http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf

- On 26 May 2011, the GAC provided comments on the 15 April 2011 Discussion Draft.
http://gac.icann.org/system/files/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf

- On 30 May 2011, ICANN posted another version of the Applicant Guidebook, taking into account public comment and the additional comment from the GAC. This version includes some clarifications but no significant changes from the 15 April 2011 Discussion Draft.
http://icann.org/en/topics/new-gtlds/comments-7-en.htm

III. The Board's Analysis of Geographic Names Associated with the gTLD Program

A. Brief Introduction to Geographic Names

This section sets forth an overview of the treatment of geographic names in the Applicant Guidebook.

- Section 2.2.1.4 provides the following guidance for applications involving geographic names.
    - Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names.
    - Certain types of applied-for strings are considered geographical names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities. These include:

- An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard;

- An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name;

- An application for any string that is an exact match of a sub-national place name, such as a county, province, or state, listed in the ISO 3166-2 standard; and

- An application for a string which represents a continent or UN region appearing on the "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list.

  - Applications for strings that are country or territory names will not be approved, as they are not available under the new gTLD program in this application round.

  - The requirement to include documentation of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds, under which applications may be rejected based on objections showing substantial opposition from the targeted community.

- Section 2.3.1 of the Draft Discussion Guidebook provides additional guidance:

  - If an application has been identified as a geographic name requiring government support, but the applicant has not provided sufficient evidence of support or non-objection from all relevant governments or public authorities by the end of the initial evaluation period, the applicant will have additional time to obtain and submit this information in the extended evaluation period.

B. Why the Board Addressed Geographic Names

- The treatment of geographic names in the new gTLD space was an area of significant concern to many stakeholders.
- The Board received extensive advice from the GAC regarding the protection of geographic names.
- The GNSO, in its policy development work, balanced a number of stakeholder considerations in the formation of advice on the treatment of geographic names.
- The Board recognized that government stakeholders have important interests in protecting certain geographic names.
- The Board wished to create an appropriate balance between the interests of governments in protecting certain geographic names, and the multiple uses possible for various types of names in the namespace.

C. Who the Board Consulted

- Legal Counsel
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community members through public comment forum and other methods of participation.

D. What Significant Non-Privileged Materials the Board Reviewed

- **Communications from GAC**

- On 28 March 2007, GAC adopted the GAC Principles http://gac.icann.org/system/files/gTLD_principles_0.pdf
- On 31 October 2007, GAC issued a communiqué http://gac.icann.org/communiques/gac-2007-communique-30
- On 26 June 2008, GAC expressed concern to Board and GNSO that the GNSO proposals do not include provisions reflecting GAC Principles regarding new gTLDs http://www.icann.org/en/minutes/resolutions-26jun08.htm
- On 8 September 2008, Paul Twomey participated in a conference call with the GAC to discuss treatment of GAC Principles
- On 2 October 2008, Paul Twomey delivered a letter to Janis Karklins http://www.icann.org/en/correspondence/twomey-to-karklins-02oct08.pdf
- On 8 November 2008: GAC issued a communiqué http://gac.icann.org/communiques/gac-2008-communique-33
- On 4 March 2009, GAC issued a communiqué http://gac.icann.org/communiques/gac-2009-communique-34
- On 17 March 2009, Paul Twomey delivered a letter to Janis Karklins http://www.icann.org/correspondence/twomey-to-karklins-17mar09-en.pdf
- On 24 April 2009, Janis Karklins delivered a letter to Paul Twomey http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf

- On 29 May 2009, Janis Karklins delivered a letter to Paul Twomey http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf

- On 24 June 2009, GAC issued a communiqué http://gac.icann.org/communiques/gac-2010-communique-38

- On 18 August 2009, Janis Karklins delivered a letter to Peter Dengate http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf

- On 22 September 2009, Peter Dengate-Thrush delivered a letter to Janis Karklins http://www.icann.org/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf

- On 10 March 2010, Janis Karklins delivered a letter to Peter Dengate-Thrush http://www.icann.org/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf

- On 23 September 2010, Heather Dryden delivered a letter to Peter Dengate-Thrush http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf

  On 23 February 2011, the GAC delivered its Indicative Scorecard on New gTLD Outstanding Issues http://gac.icann.org/system/files/20110223_Scorecard_GAC_outstanding_issues_20110223.pdf

- **GNSO Policy Recommendations**

  - On 23 May 2007, GNSO Reserved Names Working Group issued its final report

http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm

- On 8 August 2007, GNSO issued its final report regarding the introduction of new gTLDs http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- **ccNSO Comments**

  - On 28 December 2008, ccNSO commented on Version 1 http://forum.icann.org/lists/gtld-evaluation/msg00015.html

  - On 9 April 2009, ccNSO commented on Version 2 http://forum.icann.org/lists/2gtld-guide/pdfc3uGsuV7CG.pdf

  - On 6 July 2009, ccNSO commented on an excerpt from Version 3 http://forum.icann.org/lists/e-gtld-evaluation/msg00006.html

  - On 21 November 2009, ccNSO commented on Version 3 again http://www.icann.org/correspondence/disspain-to-dengate-thrush-21nov09-en.pdf

- **Public Comments**

  - Comments from the community http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm

E. What Concerns the Community Raised

- There is a need for clarification of the geographic names process in the Application Guidebook.

- The new gTLDs should respect the sensitivity regarding terms with national, cultural, geographic and religious significance.

- The enumerated grounds for objection might not provide sufficient grounds to safeguard the interest of national, local and municipal governments in the preservation of geographic names that apply to them.

- Delegation and registration of country and territory names is a matter of national sovereignty.

- There is concern over the fees involved in the dispute resolution process, particularly for governments.

- There is concern over perceived inconsistencies with the GNSO policy recommendations.

F. What Factors the Board Found to Be Significant

- The balance of retaining certainty for applicants and demonstrating flexibility in finding solutions;

- The goals of providing greater clarity for applicants and appropriate safeguards for governments and the broad community;

- The goal of providing greater protections for country and territory names, and greater specificity in the support requirements for the other geographic names;

- The goal of respecting the relevant government or public authority's sovereign rights and interests;

- The risk of causing confusion for potential applicants and others in the user community; and

- The risk of possible misuse of a country or territory name or the misappropriation of a community label.

G. The Board's Reasons For the Proposed Approach to Geographic Names

- ICANN's Core Values include introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

- The Board has accepted GAC advice to require government approval in the case of applications for certain geographic names.

- The Board intended to create a predictable, repeatable process for the evaluation of gTLD applications. Thus, to the extent possible, geographic names are defined with respect to pre-existing lists.

- The Board recognized that the community objection process recommended by the GNSO to address misappropriation of a community label would be an additional avenue available to governments to pursue a case where a name was not protected by reference to a list.The Board discussed this topic extensively with the GAC. As a result of the consultation on this and other topics, the Applicant Guidebook was revised to incorporate an Early Warning process which governments could use to flag concerns about a gTLD application at an early stage of the process. These procedures could also help address any concerns from governments about geographic names not already protected in the process.

- The Board also confirmed that the GAC has the ability to provide GAC Advice on New gTLDs concerning any application. Thus, governments would not be required to file objections and participate in the dispute resolution process, but rather, may raise their concerns via the GAC. This process could be used, for example, for governments to object to an application for a string considered by a government to be a geographic name.

- The formal objection and dispute resolution process does remain available to governments as an additional form of protection. Limited funding support from ICANN for objection filing fees and dispute resolution costs is available to governments.

- The Board adopted GAC recommendations for protections of geographic names in second-level registrations.

5. ICANN Board Rationale on the Risk of Increased Malicious Conduct Associated with the New gTLD Program

5. ICANN Board Rationale on the Risk of Increased Malicious Conduct Associated with the New gTLD Program

I. Introduction

Through the development of the new gTLD program and the numerous opportunities for public comment and receipt of community input on the new gTLD program, one of the issues that emerged as a commonly-raised concern was the potential for an increased risk of instances of malicious conduct associated with the introduction of New gTLDs. ICANN committed to (and remains committed to) addressing this issue. The Affirmation of Commitments of the United States Department of Commerce and ICANN includes the following provision:

> ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.

http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm. These issues were not newly identified in the Affirmation of Commitments. From the outset, ICANN has sought to address these issues as it has prepared to implement the new gTLD program, and has mechanisms and processes designed to address this concern.

This memorandum focuses on the Board's consideration of the risk of a potential increase in malicious conduct associated with the introduction of new gTLDs. The memorandum summarizes: the Board's consideration of the issue, measures approved to mitigate instances of malicious conduct, and the Board's rationale for implementing the new gTLD program while adopting and implementing measures to mitigate that risk.

II. History of the Board's Consideration of Malicious Conduct

This section contains a brief history of significant actions taken by the ICANN Board to mitigate the potential for malicious conduct associated with the new gTLD program.

- On 26 June 2008, the Board adopted the Generic Names Supporting Organization's ("GNSO") policy recommendations for the introduction of new gTLDs, and directed ICANN staff to continue to develop a detailed implementation plan.
  See Board Resolution at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- On 16 May 2009, the Board participated in a workshop on issues related to the new gTLD program, including the security and stability of the Internet generally and the potential risk of malicious conduct in particular.Rationale-all -final-20110609.doc

- On 20 June 2009, the Board participated in another workshop on issues related to the new gTLD program, including the risk of malicious conduct on the Internet.

- On 26 June 2009, the Board resolved that new gTLDs be prohibited from using Domain Name System ("DNS") redirection and synthesized DNS responses; directed ICANN staff to amend the draft Applicant Guidebook accordingly; and further directed ICANN staff to educate the community about the harms associated with DNS redirection and synthesized DNS responses and how to stop them.
  See Board Resolution at https://icann.org/en/minutes/resolutions-26jun09.htm; see Board Meeting Transcript at http://syd.icann.org/files/meetings/sydney2009/transcript-board-meeting-26jun09-en.txt

- During its study of malicious conduct, ICANN staff solicited and received comments from multiple outside sources, including the Anti Phishing Working Group (APWG), Registry Internet Safety Group (RISG), the Security and Stability Advisory Committee (SSAC), Computer Emergency Response Teams (CERTs) and members of the banking/financial and Internet security communities. These parties described several potential malicious conduct issues and encouraged ICANN to consider ways these might be addressed or mitigated in new gTLD registry agreements.

- On 1 October 2009, ICANN announced the launch of the Expedited Registry Security Request ("ERSR") process. ICANN intends that

gTLD registries will use the ERSR process for security incidents that require immediate action by the registry in order to avoid adverse effects upon DNS stability or security. The ERSR, a web-based submission procedure, reflects the result of a collaborative effort between ICANN and existing gTLD registries to develop a process for quick action in cases where gTLD registries: (1) inform ICANN of a present or imminent security threat to their TLD and/or the DNS; and (2) request a contractual waiver for actions they may take or already have taken to mitigate or eliminate the threat. http://www.icann.org/en/announcements/announcement-01oct09-en.htm

- On 3 October 2009, ICANN published an Explanatory Memorandum on Mitigating Malicious Conduct, part of a series of documents published by ICANN to assist the global Internet community in understanding the development of the new gTLD program and the requirements and processes presented in the Applicant Guidebook. https://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf

- On 24 November 2009, ICANN announced that it was soliciting members for two new temporary expert advisory groups to study issues related to the risk of malicious conduct: (1) the establishment of a high security TLD designation; and (2) centralized zone access. https://icann.org/en/announcements/announcement-03dec09-en.htm

- On 3 December 2009, ICANN announced that it had formed the High Security Zone Advisory Group and the Centralized Zone File Access Advisory Group. http://www.icann.org/en/announcements/announcement-03dec09-en.htm

- On 22 February 2010, ICANN published papers by the High Security Zone Advisory Committee and the Central File Access Advisory Committee and solicited public comments. As the result of the latter paper, a uniform method of accessing registry data is now incorporated into the Guidebook. http://www.icann.org/en/announcements/announcement-22feb10-en.htm

- On 28 May 2010, ICANN published an Updated Explanatory Memorandum of Mitigating Malicious Conduct. The paper described specific malicious conduct mitigation measures that were recommended by recognized experts in this area that were subsequently incorporated into the Applicant Guidebook. http://www.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-memo-update-28may10-en.pdf

- On 16 June 2010, ICANN solicited comments on the High Security Zone Advisory Committee's Policy Development Snapshot #2. http://www.icann.org/en/topics/new-gtlds/hstld-program-snapshot-2-16jun10-en.pdf

- On 22 September 2010, ICANN published a Request for Information on the proposed High Security Zone program and requested that all submissions be made by 23 November 2010.

- On 23 September 2010, the GAC outlined to the Board its concerns and recommendations for the new gTLD program and its comments on version 4 of the Draft Applicant Guidebook. http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf

- On 24-25 September 2010, the Board participated in another workshop on issues related to the new gTLD program, including discussions on background screening, orphan glue records, and the High-Security Top-Level Domain (HSTLD) concept. http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.8

- On 12 November 2010, ICANN published a second Updated Explanatory Memorandum of Mitigating Malicious Conduct. https://icann.org/en/topics/new-gtlds/explanatory-memo-mitigating-malicious-conduct-12nov10-en.pdf. This memo noted ICANN's adoption of the Zone File Access Advisory Group's Strategy Proposal for a recommendation to create a mechanism to support the centralization of access to zone-file records. This centralized approach is intended to streamline the access and approval process and standardize the format methodology for zone file consumers (e.g. anti-abuse and trademark protection organizations, researchers, academia, etc.). The Centralized Zone Data Access Provider pilot program was deployed for testing in June 2011 and a

production version program is anticipated to be deployed before any new gTLDs are delegated in the root. Rationale-all -final-20110609.doc

- On 9 December 2010, the GAC provided ICANN with a list of issues it considered to be "outstanding" and requiring further consideration, including consumer protection/the risk of malicious conduct.
  http://gac.icann.org/system/files/Cartagena_Communique.pdf

- On 10 December 2010, the Board resolved that ICANN had addressed the issue of the risk of increased malicious conduct in new gTLDs by adopting and implementing various measures, including centralized zone file access. The Board further stated that these solutions reflected the negotiated position of the ICANN community, but that ICANN would continue to take into account public comment and the advice of the GAC.
  See Board Resolution at https://icann.org/en/minutes/resolutions-10dec10-en.htm; see Board Meeting Minutes at https://icann.org/en/minutes/minutes-10dec10-en.htm

- On 21 February 2011, ICANN published a briefing paper on issues the GAC had identified as "outstanding" in September 2010, including certain issues related to the risk of increased malicious conduct.
  http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm

- On 28 February 2011 and 1 March 2011, the GAC and the Board conferred about remaining outstanding issues related to the new gTLD program, including certain issues related to the risk of increased malicious conduct.
  http://www.icann.org/en/announcements/announcement-23feb11-en.htm

- On 4 March 2011, the Board published its comments on the GAC Scorecard.
  http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf

- On 15 April 2011, ICANN posted a discussion draft of the Applicant Guidebook (the "Discussion Draft Guidebook").

http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf

- On 26 May 2011, the GAC provided comments on the 15 April 2011 Discussion Draft. http://gac.icann.org/system/files/GAC%20Comments%20on%20the%20new%20gTLDs%20-%2026%20May%202011.pdf

- The GAC-Board discussions resulted in additional forms of background checks and requirements for new registries to cooperate with law enforcement.

- On 30 May 2011, ICANN posted another version of the Applicant Guidebook, taking into account public comment and the additional comment from the GAC. http://icann.org/en/topics/new-gtlds/comments-7-en.htm

III. The Board's Analysis of the Risk of Increased Malicious Conduct Associated with the New gTLD Program

A. Why the Board is Addressing This Issue Now

- ICANN's mission statement and one of its founding principles is to promote competition. The expansion of TLDs will allow for more innovation and choice in the Internet's addressing system. The ICANN Board seeks to implement the new gTLD program together with measures designed to mitigate the risk of increased malicious conduct on the Internet.

- ICANN committed to the U.S. Department of Commerce that it would address the risk of malicious conduct in new gTLDs prior to implementing the program.

- The ICANN Board is committed to making decisions based on solid factual investigation and expert analysis.

B. Who the Board Consulted

- The GNSO

- The GAC

- The At-Large Community and ALAC

- The ICANN Implementation Recommendation Team ("IRT")
- The Anti-Phishing Working Group
  http://www.antiphishing.org/
- The Registry Internet Safety Group
  http://registrysafety.org/website/
- The ICANN Security and Stability Advisory Committee
  http://www.icann.org/en/committees/security/
- Computer Emergency Response Teams ("CERTs")
  See, e.g., http://www.us-cert.gov/
- The ICANN Zone File Access Advisory Group
  http://www.icann.org/en/topics/new-gtlds/zone-file-access-en.htm
- The ICANN High Security Zone TLD Advisory Group
  http://www.icann.org/en/topics/new-gtlds/hstld-program-en.htm
- The Registration Abuse Policies Working Group
  https://st.icann.org/reg-abuse-wg/
- The Registrar Stakeholder Group
  http://www.icannregistrars.org/
- The Registries Stakeholder Group
  http://www.gtldregistries.org/
- Members of the banking and financial community, including the BITS Fraud Reduction Program, the American Bankers Association, the Financial Services Information Sharing and Analysis Center ("FS-ISAC"), and the Financial Services Technology Consortium ("FSTC")
  See, e.g., www.icann.org/en/correspondence/bell-to-beckstrom-11aug09-en.pdf; and
  http://www.icann.org/en/correspondence/evanoff-to-beckstrom-13nov09-en.pdf
- Members of the Internet security community, including the Worldwide Forum of Incident Response and Security Teams ("FIRST"), which consists of computer and network emergency response teams from 180 corporations, government bodies,

universities and other institutions spread across the Americas, Asia, Europe, and Oceania; as well as various law enforcement agencies

- Other stakeholders and members of the community
- Legal counsel

C. What Significant Non-Privileged Materials the Board Reviewed

- Reports and Comments from Committees and Stakeholders
    - Centralized Zone File Access:
        - 18 February 2010 gTLD Zone File Access in the Presence of Large Numbers of TLDs: Concept Paper https://icann.org/en/topics/new-gtlds/zfa-concept-paper-18feb10-en.pdf
        - 12 May 2010 gTLD Zone File Access For the Future: Strategy Proposal http://www.icann.org/en/topics/new-gtlds/zfa-strategy-paper-12may10-en.pdf
    - Wild Card Resource Records:
        - 10 November 2006 ICANN Security and Stability Advisory Committee Paper: Why TLDs Should Not Use Wild Card Resource Records http://www.icann.org/en/committees/security/sac015.htm
    - Phishing Attacks:
        - 26 May 2008 ICANN Security and Stability Advisory Committee Paper: Registrar Impersonation Phishing Attacks http://www.atlarge.icann.org/files/atlarge/ssac-registrar-impersonation-24jun08.pdf
        - 17 June 2009 Anti-Phishing Working Group Paper https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:

20090619162304-0-3550/original/DRAFT%20Potential%20malicious%20use%20issues%2020090617.pdf

- DNS Response Modification:
  - 20 June 2008 ICANN Security and Stability Advisory Committee Paper: DNS Response Modification https://par.icann.org/files/paris/PiscitelloNXDOMAIN.pdf
- Centralized Malicious Conduct Point of Contact:
  - 25 February 2009 ICANN Security and Stability Advisory Committee Paper: Registrar Abuse Point of Contact http://www.icann.org/en/committees/security/sac038.pdf
- High Security Zone:
  - 18 November 2009 A Model for High Security Zone Verification Program: Draft Concept Paper https://icann.org/en/topics/new-gtlds/high-security-zone-verification-04oct09-en.pdf
  - 17 February 2010 High Security Zone TLD: Draft Program Development Snapshot https://icann.org/en/topics/new-gtlds/hstld-program-snapshot-18feb10-en.pdf
  - 13 April 2010 High Security TLD: Draft Program Development Snapshot https://st.icann.org/hstld-advisory/index.cgi?hstld_program_development_snapshot_1
  - 16 June 2010 High Security Zone TLD: Draft Program Development Snapshot http://www.icann.org/en/topics/new-gtlds/hstld-program-snapshot-2-16jun10-en.pdf
- Redirection and Synthesized Responses:

- 10 June 2001 ICANN Security and Stability Advisory Committee Paper: Recommendation to Prohibit Use of Redirection and Synthesized Responses (*i.e.*, Wildcarding) by New TLDs http://www.icann.org/en/committees/security/sac041.pdf

- Thick vs. Thin WHOIS:

  - 30 May 2009 ICANN Explanatory Memorandum on Thick vs. Thin WHOIS for New gTLDs http://www.icann.org/en/topics/new-gtlds/thick-thin-whois-30may09-en.pdf

- Trademark Protection:

  - 29 May 2009 Implementation Recommendation Team Final Draft Report to ICANN Board http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

  - See the Board Rationale Memorandum on Trademark Protection for a more detailed summary of non-privileged materials the Board reviewed on this topic.

- Malicious Conduct Generally:

  - 15 April 2009 ICANN Plan for Enhancing Internet Security, Stability and Resiliency http://www.icann.org/en/topics/ssr/ssr-draft-plan-16may09-en.pdf

  - 19 May 2009 Registry Internet Safety Group's Paper: Potential for Malicious Conduct in New TLDs https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:20090519220555-0-2071/original/RISG_Statement_on_New_TLDs-20090519.pdf

  - 19 August 2009 ICANN Security and Stability Advisory Committee Paper: Measures to Protect Domain

Registration Services Against Exploitation or Misuse http://www.icann.org/en/committees/security/sac040.pdf

- 3 October 2009 ICANN's Explanatory Memorandum on Mitigating Malicious Conduct https://icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf

- 30 November 2009 Online Trust Alliance's Comments on the New gTLD Program http://www.icann.org/en/correspondence/spiezle-to-pritz-30nov09-en.pdf

- 28 May 2010 ICANN's Updated Memorandum on Mitigating Malicious Conduct http://www.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-memo-update-28may10-en.pdf

- 29 May 2010 Registration Abuse Policies Working Group Final Report http://www.gnso.icann.org/issues/rap/rap-wg-final-report-29may10-en.pdf

- 13 September 2010 ICANN's Updated Plan for Enhancing Internet Security, Stability and Resiliency http://icann.org/en/topics/ssr/ssr-draft-plan-fy11-13sep10-en.pdf

- 12 November 2010 ICANN's Second Updated Memorandum on Mitigating Malicious Conduct https://icann.org/en/topics/new-gtlds/explanatory-memo-mitigating-malicious-conduct-12nov10-en.pdf

- 21 February 2011 ICANN briefing paper on issues the GAC had identified as "outstanding" in September 2010, including certain issues related to the risk of increased malicious conduct http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm

- Comments from the Community

D. What Concerns the Community Raised

- There was concern expressed that the new gTLD program will lead to an expansion of crime on the Internet, including look-alike domains, drop catching, domain tasting, domain hijacking, malware distribution, identity theft and miscellaneous deceptive practices.
- Wrongdoers may apply to operate registries.
- Wrongdoers may exploit technical weaknesses in the Internet, including automated registration services.
- End user confusion about new gTLDs may lead to increased fraud. For example, end users may be confused about TLDs whose mere names raise expectations of security.
- Certain new gTLDs may not comply with some national laws.
- There is a need for an enhanced control framework for TLDs with intrinsic potential for abuse, including those involving e-service transactions requiring a high confidence infrastructure (such as electronic financial services or electronic voting) and those involving critical assets (such as energy infrastructures or medical services).
- There is a need for better and more efficient identification of domain name resellers.
- There is a need to ensure the integrity and utility of registry information.
- The new gTLD program should safeguard the privacy of personal and confidential information.
- New gTLDs may adversely affect trademark owners.
- ICANN and others should better enforce provisions in agreements with registries and registrars.
- ICANN should impose new requirements on TLD operators.

- There is a need for systemic processes to combat abuse on the Internet.

E. What Steps the Board Resolved to Take to Mitigate Malicious Conduct

The Board believes the following measures will greatly help to mitigate the risk of increasing malicious conduct arising from new gTLDs. ICANN has incorporated the majority of these measures in the current version of the Applicant Guidebook and/or the registry agreement, and its efforts to implement the remaining measures are ongoing. http://www.icann.org/en/topics/new-gtlds/dag-en.htm

- Required vetting of registry operators: The application process includes standardized, thorough background and reference checks for companies and individuals (key officers) to mitigate the risk that known felons, members of criminal organizations or those with histories of bad business operations (including cybersquatting) will become involved in registry operations or gain ownership or proxy control of registries.

- Required demonstrations of plans for Domain Name System Security Extensions ("DNSSEC") deployment: DNSSEC is designed to protect the Internet from most attacks, including DNS cache poisoning. It is a set of extensions to the DNS which provide: (1) origin authentication of DNS data; (2) data integrity; and (3) authenticated denial of existence.

- Prohibition on wildcarding: The prohibition on wildcarding bans DNS redirection and synthesized DNS responses to reduce the risk of DNS redirection to a malicious site.

- Required removal of orphan glue records: Removal of orphan glue records destroys potential name server "safe havens" that abusers can use to support criminal domain registrations. Registry operators will be required to remove orphan glue records when presented with evidence in written form that such records are present in connection with malicious conduct.

- Mandatory thick WHOIS records: Registry Operators must maintain and provide public access to registration data using a thick WHOIS data model. Thick WHOIS will help mitigate malicious conduct and

trademark abuse by ensuring greater accessibility and improved stability of records.

- Centralization of zone file access: Central coordination of zone file data will allow the anti-abuse community to efficiently obtain updates on new domains as they are created within each zone, and to reduce the time necessary to take corrective action within TLDs experiencing malicious activity. The program is designed to reduce differences in and complexities of contractual agreements, standardize approaches and improve security and access methods.

- Mandatory documentation of registry level abuse contacts and procedures: Registry operators will provide a single abuse point of contact for all domains within the TLD who is responsible for addressing and providing timely responses to abuse complaints received from recognized parties, such as registries, registrars, law enforcement organizations and recognized members of the anti-abuse community. Registries also must provide a description of their policies to combat abuse.

- Required participation in the Expedited Registry Security Request ("ERSR") process: ICANN developed the ERSR process in consultation with registries, registrars and security experts, based on lessons learned in responding to the Conficker worm, to provide a process for registries to inform ICANN of a present or imminent "security situation" involving a gTLD and to request a contractual waiver for actions the registry might take or has taken to mitigate or eliminate the security concerns. "Security situation" means: (1) malicious activity involving the DNS of a scale and severity that threatens the systematic security, stability and resiliency of the DNS; (2) potential or actual unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards; or (3) potential or actual undesired consequences that may cause or threaten to cause a temporary or long-term failure of one or more of the critical functions of a gTLD registry as defined in ICANN's gTLD Registry Continuity Plan.

- Framework for High Security Zones Verification: The concept of a voluntary verification program is a mechanism for TLDs that desire

to distinguish themselves as secure and trusted, by meeting additional requirements for establishing the accuracy of controls for the registry, registrar and registrant processing, as well as periodic independent audits. A draft framework was created by the HSTLD working group.. The working group's Final Report may be used to inform further work. ICANN will support independent efforts toward developing voluntary high-security TLD designations, which may be available to gTLD applicants wishing to pursue such designations.

F. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of the potential for malicious conduct associated with the new gTLD program. The Board found the following factors to be significant:

- the principle that the Board should base Policy on solid factual investigation and expert analysis;
- whether new gTLDs would promote consumer welfare;
- certain measures intended to mitigate the risk of malicious conduct may raise implementation costs for new gTLD registries;
- the creation of new TLDs may provide an opportunity for ICANN to improve the quality of domain name registration and domain resolution services in a manner that limits opportunities for malicious conduct;
- most abuse takes place in larger registries because that is where abusive behavior "pays back,"; a more diverse gTLD landscape makes attacks less lucrative and effective;
- the risk of increasing exposure to litigation; and
- the lack of reported problems concerning increased criminal activity associated with ICANN's previous introductions of new TLDs.

IV. The Board's Reasons for Proceeding with the New gTLD Program While Implementing Measures to Mitigate the Risk of Malicious Conduct

- Modest additions to the root have demonstrated that additional TLDs can be added without adversely affecting the security and stability of the domain name system.

- ICANN's "default" position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate. New gTLDs offer new and innovative opportunities to Internet stakeholders.

- Most abuse takes place in larger registries. A more diverse gTLD landscape makes attacks less lucrative and effective.

- New gTLD users might rely on search functions rather than typing a URL in an environment with many TLDs, lessening the effectiveness of forms of cyber-squatting.

- Brand owners might more easily create consumer awareness around their brands as a top-level name, reducing the effectiveness of phishing and other abuses.

- ICANN has worked with the community to address concerns relating to potential malicious conduct in the new gTLD space. New and ongoing work on these issues in the policy development arena may provide additional safeguards recommended as a result of the bottom-up process, and ICANN will continue to support these efforts.

- Data protection is best accomplished by data protection tools, including audits, contractual penalties such as contract termination, punitive damages, and costs of enforcement, as well as strong enforcement of rules.

- The measures adopted by ICANN, including centralized zone file access, and other mechanisms, address the principal concerns raised by stakeholders about the potential for proliferation of malicious conduct in the new gTLD space. A combination of verified security measures and the implementation of DNSSEC will

allow users to find and use more trusted DNS environments within the TLD market.

- Revised applicant procedures and agreements reflecting the measures to mitigate the risk of malicious conduct will permit ICANN to address certain risks of abuse contractually and also will permit ICANN to refer abuses to appropriate authorities. ICANN can amend contracts and the applicant guidebook to address harms that may arise as a direct or indirect result of the new gTLD program.

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

I. Introduction

Recommendation 12 of the Generic Names Supporting Organization (GNSO) Final Report on the Introduction of New gTLDs (http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm), and approved by the Board in June 2008 (http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171) states that, "[D]ispute resolution and challenge processes must be established prior to the start of the process." Further, Implementation Guideline H, also set forth by the GNSO, states "External dispute providers will give decisions on objections."

Based on the GNSO Policy and implementation planning, it was determined that four of the GNSO recommendations should serve as a basis for an objection process managed by external providers. Those include the following:

(i) Recommendation 2 "Strings must not be confusingly similar to an existing top-level domain or a Reserved Name" (String Confusion Objection);

(ii) Recommendation 3 "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law" (Legal Rights Objection);

(iii) Recommendation 6 "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law" (Limited Public Interest Objection); and

(iv) Recommendation 20 "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted" (Community Objection).

Thus, a process allowing third parties to object to applications for new gTLDs on each the four grounds stated above was developed.[2]

Subsequent to the development and refinement of the original Objection Procedures based on the GNSO recommendations and set out in Module 3 of the Applicant Guidebook (*see* http://www.icann.org/en/topics/new-gtlds/objection-procedures-clean-30may11-en.pdf) a separate process has been established for the GAC. That process is also set out in Module 3 of the Applicant Guidebook. In short, there is now a formal process for the GAC to provide advice in relation to the approval of an application.

II. History of the Development of the Objection Processes and Procedures Associated with the New gTLD Program

This section sets forth a history of significant actions taken on the subject of the objection process associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.

- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 12 of the report ("Recommendation 12") states that "[d]ispute resolution and challenge processes . . . must be established prior to the start of the process" and Implementation Guideline H states that "External dispute providers will give decisions on objections." http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- In December 2007, ICANN posted a call for expressions of Interest from potential Dispute Resolution Service Providers (DSRP) for the new gTLD Program. http://www.icann.org/en/announcements/announcement-21dec07.htm

[2] The International Centre for Dispute Resolution (ICDR) has agreed to administer disputes brought pursuant to String Confusion Objections. The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) has agreed to administer disputes brought pursuant to Legal Rights Objections. The International Center of Expertise of the International Chamber of Commerce (ICC) has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

- Throughout 2008, external dispute resolution service providers were evaluated and selected. As noted above in footnote 1, the ICDR will administer disputes brought pursuant to String Confusion Objections, WIPO will administer disputes brought pursuant to Legal Rights Objections and the ICC will administer disputes brought pursuant to Limited Public Interest and Community Objections.

- Also throughout 2008, ICANN conducted public consultations, as well as thorough and global research to help define the standing requirements and standards to be used by dispute resolution panels to resolve the disputes on the various Objection grounds.

- In October 2008, ICANN published draft version 1 of the Applicant Guidebook, including Module 3, which laid out the Dispute Resolution Procedures. At that same time, ICANN posted a paper for community discussion entitled "Morality and Public Order Objection Considerations in New gTLDs," which summarized the implementation work that had been accomplished in response to Recommendation 6 (now called Limited Public Interest Objection). http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf

- In February 2009, the Board discussed who would have standing to object to an applied-for string on the basis of morality and public order. There was a sense that an objection-based dispute resolution process was the appropriate method for addressing possible disputes. There was also a sense that any injured party would have standing to object. Limiting standing to governments or other official bodies might not address the potential harm. http://www.icann.org/en/minutes/minutes-12feb09.htm

- Also in February 2009, with the second draft version of the Applicant Guidebook, ICANN posted the separate "New gTLD Dispute Resolution Procedure". http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf

- Also in February 2009, ICANN posted a paper for community discussion entitled "Description of Independent Objector for the New gTLD Dispute Resolution Process," which explored the potential benefits of

allowing an "Independent Objector" to object within the dispute resolution process.
http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf

- In May 2009, along with revised excerpts of the Applicant Guidebook, ICANN posted a paper for community discussion entitled "Standards for Morality and Public Order Research," which summarized the research relating to the development of standards for morality and public order (now Limited Public Interest) objections.
http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf

- In May 2010, ICANN posted a paper entitled "'Quick Look' Procedure for Morality and Public Order Objections," which summarized a procedure requested by community members by which morality and public order objections could be dismissed if they are determined to be "manifestly unfounded and/or an abuse of the right to object."
http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf

- In August 2010, Heather Dryden, Chair of the GAC, delivered a letter to Peter Dengate Thrush, Chairman of the Board, requesting that the proposed procedure for morality and public order objections be replaced with an alternative mechanism.
http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf

- Also in August 2010, the Board considered Submission No. 2010-08-05-15, which discussed the feedback received by the GAC with regard to the proposed procedure for morality and public order objections.
http://www.icann.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf

- In September 2010, the cross-stakeholder group known as the New gTLD Recommendation 6 Cross-Community Working Group ("Rec6 CWG") published a report on the Implementation of the Recommendation (the "Rec6 CWG report"). The report provided guidance to the Board with regard to procedures for addressing culturally objectionable and/or sensitive strings, while protecting internationally recognized freedom of expression rights. This report

was posted for public comment. *See* link at http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm

- Also in September 2010, the Board met in Trondheim, Norway and stated that they would "accept the [Rec6 CWG] recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and [would] work to resolve any inconsistencies." At the same meeting, the Board agreed that it had "ultimate responsibility for the new gTLD program … however, [that it wished] to rely on the determination of experts on these issues." http://www.icann.org/en/minutes/resolutions-25sep10-en.htm

- In October 2010, the Board again discussed the Rec6 CWG report, indicating that several of the working group recommendations could be included in the Guidebook for public discussion and that the working group recommendations should be discussed publicly at ICANN's upcoming meeting in Cartagena. http://www.icann.org/en/minutes/resolutions-28oct10-en.htm

- In November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the "Proposed Final Guidebook"), which adopted several of the recommendations set forth in the Rec6 CWG report. http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf

- Also in November 2010, ICANN posted an explanatory memorandum entitled "'Limited Public Interest Objection," which described the recommendations set forth in the Rec6 CWG report, ICANN's responses to those recommendations and ICANN's rationale for its responses. http://www.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf

- In December 2010 in Cartagena, Columbia, the Board had two separate sessions with the Rec6 CWG to help achieve further understanding of the working group's positions.

- On 23 February the GAC issued the "GAC indicative scorecard on new gTLD issues listed in the GAC Cartagena Communique" ("Scorecard")

identifying the Objection Process as one of twelve areas for discussion. http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf

- On 28 February and 1 March 2011, the Board and the GAC had a two-day consultation in Brussels, Belgium to discuss the issued raised in the Scorecard, including the suggestion that the GAC should not be subject to the Objection Procedures for Limited Public Interest Objections. Instead, a process was discussed by which the GAC could provide public policy advice on individual gTLD applications directly to the Board

- On 12 April 2011, the GAC issued "GAC comments on the ICANN's Board's response to the GAC Scorecard" that also addressed the Objection Procedures. http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf

- On April 15 2011, ICANN posted the April 2011 Discussion Draft of the Applicant Guidebook, containing a new "GAC Advice" section detailing the procedure by which the GAC could provide advice to the Board concerning gTLD applications. http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-redline-15apr11-en.pdf

- Also on 15 April 2011, ICANN posted an Explanatory Memorandum entitled 'GAC and Government Objections; Handling of Sensitive Strings; Early Warning" to describe details of the new procedures. http://www.icann.org/en/topics/new-gtlds/gac-objections-sensitive-strings-15apr11-en.pdf

- Also on 15 April 2011, ICANN posted "Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response" discussing its response to the GAC's concerns on the Objection Process. http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf

- On 20 May the Board and GAC had further consultations that included discussion on the Objection Process. http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf

- On 30 May, ICANN posted the current version of the Applicant Guidebook with additional refinements to the Objection Process as it relates to the GAC. http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

- On 19 June 2011, the Board and the GAC had additional consultations.

III. The Board's Analysis of the Objection Process Associated with the New gTLD Program

A. Brief Introduction to the Objection Process

1. Brief Overview of the Objection Process for all except the GAC.

- The new gTLD process is an objection-based process, in which parties with standing may file with an identified independent dispute resolution provider a formal objection to an application on certain enumerated grounds (see footnote 1 for list of providers). The grounds for filing a formal objection to an application are:

    - the gTLD string is confusingly similar to an existing TLD or another applied-for gTLD string in the same round of applications ("String Confusion Objection")

    - the gTLD string infringes the existing legal rights of the objector ("Legal Rights Objection")

    - the gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law ("Limited Public Interest Objection")

    - there is substantial opposition to the application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted ("Community Objection").

  http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf

- If the objectors have standing, their objections will be considered by a panel of qualified experts, that will issue a Determination.

- Specific standards under which each of the four types of objections will be evaluated are set forth in detail in Module 3 of the current Applicant Guidebook.

- There will be objection fees (fixed for String Confusion and Community Objections and hourly for Limited Public Interest and Community Objections) that will be refundable to the prevailing party.

2. Brief Overview of the GAC Advice Process.

- The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

- For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period

- Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

- ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

- The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

B. Why the Board Addressed the Objection Process as it has

- The GNSO Policy Recommendations called for the creation of a dispute resolution or objection process in the new gTLD program.

- The GNSO also provided implementation guidelines suggesting that external dispute resolution providers should be utilized.

- A fully established objection process, with uniform standing requirements and standards available to the dispute resolution service providers, ensures that a reasonably objective process is in place. It further ensures that experts in dispute resolution make any determinations on the disputes after considering all of the evidence.

- A fully established dispute resolution process provides parties with a cost-effective alternative to initiating action in court, if there is a valid objection.

- The GAC advised the Board that it was not amendable to utilizing the standard Objection Process established for the new gTLD program. Accordingly, the Board worked closely with the GAC to develop a mutually acceptable "objection" mechanism, in the form of GAC Advice.

C. Who the Board Consulted

- Legal Counsel

- International arbitration experts

- Judges from various international tribunals such as the International Court of Justice

- Attorneys who practice in front of international tribunals such as the International Court of Justice

- The GNSO

- The GAC

- The ALAC

- The ccNSO

- The SSAC

- All other Stakeholders and Community Members

D. Significant Non-Privileged Materials the Board Reviewed

- GAC Principles Regarding New gTLDs. http://gac.icann.org/system/files/gTLD_principles_0.pdf

- GNSO "Final Report – Introduction of new generic top-level domains." http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- Report on Implementation of GNSO New GTLD Recommendation #6. *See* link to Report from http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm

- All materials related to the Board/GAC consultation. *See* http://www.icann.org/en/topics/new-gtlds/related-en.htm

- All relevant GAC letters and Communiques. *See* http://www.icann.org/en/correspondence/ and http://gac.icann.org/communiques.

- Applicant Guidebook, related explanatory memoranda, other related documents and related comment summaries and analyses:

    - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with numerous pages of public comment summaries and analysis related to the Objection Procedures. *See* (i) http://www.icann.org/en/topics/new-gtlds/comments-en.htm; (ii) http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem; (iii) http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm; (iv) http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm; (v) http://www.icann.org/en/topics/new-gtlds/gnso-consultations-reports-en.htm; (vi) http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm; (vii) http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm; (viii) http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm; (ix)

http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm; (x) http://www.icann.org/en/topics/new-gtlds/dag-en.htm; (xi) http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm; and (xii) http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

E. Significant Concerns the Community Raised

- What will be done if there is an application for a highly objectionable name, but there are no objectors within the process?
- There is a need for clarification on what type of string would be considered to be "contrary to generally accepted legal norms relating to morality and public order . . . recognized under international principles of law."
- Are the standards set out for each objection appropriate?
- How will fees be determined?
- Will ICANN fund certain stakeholders' objections?
- Should it be a dispute process rather than a mere objection process?
- Are the independent dispute resolution providers the rights ones to handle the specific objections?
- Neither Governments nor the GAC should be required to utilize the Objection Procedures.

F. Factors the Board Found to Be Significant

- The Dispute Resolution Process is designed to protect certain interests and rights, those interests identified by the GNSO in their policy recommendations that were approved by the ICANN Board.
- The Dispute Resolution Process will be more cost effective and efficient than judicial proceedings. Fees will be paid directly to the dispute resolution providers.

- The Dispute Resolution Process should be independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion.

- It is critical to address risk to the established processes and to ICANN by providing a path for considering controversial applications that might otherwise result in litigation or attacks to the process or to the ICANN model.

- Governments have a particular interest in having an unencumbered process to provide advice to the Board without having to utilize the formal independent objection process.

G. The Board's Reasons for Supporting the Two-pronged Objection Process Established for the New gTLD Program

- The Dispute Resolution Process complies with the policy guidance provided by the GNSO.

- The Dispute Resolution Process provides a clear, predictable path for objections and objectors.

- The Dispute Resolution Process provides clear standards that will lead to predictable, consistent results.

- The Dispute Resolution Process provides for an independent analysis of a dispute.

- The Dispute Resolution Process provides a bright line between public comment and a formal objection process so parties understand the manner in which a challenge to a particular application should be brought (a lesson learned from previous rounds).

- The Dispute Resolution Process appropriately limits the role for the Board.

- The Dispute Resolution Process limits involvement to those who truly have a valid objection.

- The Dispute Resolution Process provides for a more efficient and cost effective approach to dispute resolution than judicial proceedings.

- The Dispute Resolution Process, which provide for an "Independent Objector" to object is an important step to achieving the goal of independence and ensuring the objectionable strings are challenged.

- The GAC Advice process provides an avenue for the GAC to provide public policy advice to the Board on individual applications in a relatively timely fashion and consistent manner.

- The GAC Advice process was developed after close consultations with the GAC and provides a prescribed manner and time frame in which the Board will be able to consider GAC advice with respect to a particular string or applicant.

7. ICANN Board Rationale on Root Zone Scaling in the New gTLD Program

7. ICANN Board Rationale on Root Zone Scaling in the New gTLD Program

I. Introduction

When ICANN was formed in 1998 as a not for profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, its primary purpose was to promote competition in the domain name system ("DNS") marketplace while ensuring internet security and stability. ICANN's Bylaws and other foundational documents articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. See ICANN Bylaws, Article 1, Section 2.6.

One part of this mission is fostering competition by allowing additional Top Level Domains ("TLDs") to be created. ICANN began this process with the "proof of concept" round for a limited number of new gTLDs in 2000, and then permitted a limited number of additional "sponsored" TLDs in 2004-2005. These additions to the root demonstrated that TLDs could be added without adversely affecting the security and stability of the domain name system.

After an extensive policy development process, in August 2007, the GNSO issued a lengthy report in which it recommended that ICANN permit a significant expansion in the number of new gTLDs. The report recognized that the introduction of new gTLDs would require the expansion of the top-level DNS zone in the DNS hierarchy known as the DNS root zone ("root zone"). This expansion of the root zone, along with ICANN's recent and concurrent implementation of other changes to the root of the DNS, caused some members of the community to ask ICANN to review how the expansion of the root zone could impact root zone stability. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

Between 2004 and 2010, the root of the DNS underwent significant changes, both in content as well as support infrastructure. These changes included the addition of Internationalized Domain Names ("IDNs") to the root, the deployment of IPv6 and implementation of Domain Name System Security

Extensions ("DNSSEC"). The broad scope of these changes was unprecedented. Now with new gTLDs on the horizon, further substantive changes in the root of the DNS are expected.

In response to comments from members of the community, ICANN commissioned a number of studies to address the capacity and scaling of the root server system with the goal of ensuring the stable and secure addition of new gTLDs. The studies improved ICANN's understanding of the scalability of the root zone as it pertains to new gTLDs, and they reinforced confidence in the technical capability and stability of the root zone at the projected expansion rates. The studies also helped to inform and improve ICANN's approach to monitoring the scalability and stability of the root zone.

II. Brief History of ICANN's Consideration of Root Zone Scaling Associated with the New gTLD Program

This section sets forth a brief history of significant Board actions on the subject of root zone scaling associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.

- At the 2 November 2007 ICANN Board Meeting, the Board considered the GNSO's policy recommendation and passed a resolution requesting that ICANN staff continue working on the implementation analysis for the introduction of the new gTLD program and report back to the Board with a report on implementation issues. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm; http://www.icann.org/minutes/resolutions-02nov06.htm#_Toc89933880

- On 6 February 2008, ICANN published a paper entitled DNS Stability: The Effect of New Generic Top Level Domains on the Internet Domain Name System which addressed TLD Strings, technical stability and the capacity of the root zone. http://www.icann.org/en/topics/dns-stability-draft-paper-06feb08.pdf

- On 6 February 2008, in response to ICANN's publication of the paper entitled DNS Stability: The Effect of New Generic Top Level Domains in the Internet Domain System, the Board requested public comments and community feedback regarding technical issues relevant to the addition of new gTLDs. The Board also requested guidance on how best to facilitate transparency in implementing the recommendations of the paper. http://www.icann.org/en/announcements/announcement-06feb08.htm

- In February 2009, the Board resolved that the Security and Stability Advisory Committee ("SSAC") and the DNS Root Server System Advisory Committee ("RSSAC") should jointly conduct a study analyzing the aggregate impact of the proposed implementation of various changes to the root zone and any potential effects on the security and stability within the DNS root server system. These changes include the still-recent addition of IPv6 access to the root servers, the planned addition of IDNs at the root level, signing the root zone with DNSSEC, and the provisioning of new country code IDN TLDs and new gTLDs.

- On 7 September 2009, the Root Zone Scaling Team ("RSST") released its study entitled Scaling the Root. http://www.icann.org/en/committees/dns-root/root-scaling-study-report-31aug09-en.pdf

- On 17 September 2009, the DNS Operations Analysis and Research Center ("DNS-OARC") released the "L" Root Study entitled Root Zone Augmentation and Impact Analysis.

http://www.icann.org/en/topics/ssr/root-zone-augementation-analysis-17sep09-en.pdf

- On 29 September 2009, the Netherlands Organization for Applied Scientific Research ("TNO") released a report directed by the RSST to develop a quantitative model of the DNS Root Server System to analyze the impact of the addition of new gTLDs, IDN TLDs, IPv6 and DNSSEC. That study is entitled Root Scaling Study: Description of the DNS Root Scaling Model. http://www.icann.org/en/committees/dns-root/root-scaling-model-description-29sep09-en.pdf

- On 14 October 2009, the Chair of the Internet Architecture Board ("IAB"), Olaf Kolkman, sent a letter to ICANN's Board in response to the publication of the RSST Study. He stated that the report's recommendations were accurate and that security, stability and resiliency are the most important properties of the system and they need to continue to be monitored and safeguarded by ICANN. http://www.icann.org/en/correspondence/kolkman-to-ceo-board-14oct09-en.pdf

- On 3 March 2010, ICANN released its Draft Delegation Rate Scenarios for New gTLDs, laying out the plan for limiting delegation rates and outlining expected demand for new gTLDs based on: (1) current participation in the new gTLD process; (2) brand and famous mark holders; and (3) regional, national and other geographic regions that are not currently participating. http://www.icann.org/en/announcements/announcement-03mar10-en.htm

- On 25 September 2010, the Board adopted a resolution approving a model and a rationale for the maximum rate of applications. It set the number at 1,000 applications per year. The Board noted that the initial survey of the root server operator's ability to support growth was successful and directed ICANN staff to revisit that estimate on a regular basis. The Board directed ICANN to consult with root zone operators

to define, monitor and publish data on root zone stability. http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.3

- On 6 October 2010, ICANN released its Delegation Rate Scenarios for New gTLDs, laying out in final form the plan for limiting delegation rates for new gTLDs.

- On 5 November 2010, the ICANN Board received a letter from the Chair of ICANN's Board Risk Committee, Bruce Tonkin, stating that the Risk Committee is seeking advice from RSSAC on the capability of the root server system to support the planned introduction of new gTLDs in 2011/2012. http://www.icann.org/en/correspondence/tonkin-to-murai-05nov10-en.pdf

- On 25 November 2010, the ICANN Board received a letter from the Chair of RSSAC, Jun Murai, stating that the recent successful implementation of DNSSEC in the root zone was a good example of how to proceed with new capabilities. He further stated that in the case of the proposed gradual expansion of no more than 1,000 new gTLD entries per year for the next several years, the RSSAC expected the system to remain stable and robust. http://www.icann.org/en/correspondence/murai-to-board-25nov10-en.pdf

- On 10 December 2010, the Board indicated that the overarching issue of root zone scaling had been addressed through expert consultation and study. The studies indicate that rate-limited addition of TLDs can be implemented without any expected impact on the stability of the root zone system. The Board also agreed to implement communications and monitoring systems to oversee the new gTLD program. http://www.icann.org/en/minutes/minutes-10dec10-en.htm

III. Major Root Zone Scaling Studies Commissioned by the Board

On 3 February 2009, the ICANN Board unanimously directed the RSSAC and SSAC to jointly study "the impact to security and stability within the DNS root server system of [the IPv6, IDN TLDs, DNSSEC and new gTLDs] proposed implementations." The Board resolution stated that the joint studies should: (1) address the implications of the initial implementation of these changes occurring during a compressed time period; (2) address the capacity and scaling of the root server system to address a wide range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes; and (3) ensure that the process for establishing the study terms, design and implementation will address technical and operational concerns regarding expanding the DNS root zone. http://www.icann.org/en/minutes/minutes-03feb09.htm.

In response to the Board's 3 February 2009 Resolution, ICANN commissioned two studies. The "L" Root Study focused on the impact of the scaling of the root on one server. The RSST Study modeled the processes in the root management system and analyzed the results of scaling the system.

The studies made important observations about possible limits to the root system, including limits to the pace of scaling and limitations other than purely technical, e.g. in processing TLD applications through ICANN, NTIA and VeriSign. Neither study found meaningful technical limitations in system scaling. The RSST Study recommended ongoing system modeling and monitoring, and encouraged improved communication with ICANN staff on gTLD forecasts and plans. To follow up on the RSST Study, the TNO put together a modeling contribution in conjunction with the RSST Study to transform the information and findings in the RSST Study into a quantitative model and simulation software.

A. The "L" Root Study

The DNS-OARC released the "L" Root Study on 17 September 2009. The DNS-OARC conducted the study pursuant to a contract with ICANN. The study focused specifically on the impact of adding IPv6, DNSSEC and new TLDs to a laboratory simulation of the "L" Root Server. See

http://www.icann.org/en/topics/ssr/root-zone-augementation-analysis-17sep09-en.pdf.

The DNS-OARC performed a number of simulations and measurements with BIND and NSD server software and varying zone sizes to better understand how the new gTLD program changes may affect the performance of, and resource requirements for, the root DNS server infrastructure. The analysis looked at five key areas that would have an impact on operations: (1) zone size; (2) name server reload and restart times; (3) DNS response latency; (4) inter-nameserver bandwidth utilization; and (5) potential increases in Transmission Control Protocol usage.

The "L" Root Study concluded that at least that one root server could easily handle both the deployment of the new technologies as well as the new gTLD program.

B. The RSST Study

The RSST released their study on 7 September 2009. It undertook to determine if, how, and to what extent "scaling the root" will affect the management and operation of the root system. The RSST Study considered the "L" Root Study as part of its input and outsourced the development of a simulation of root management processes and conducted interviews with root server operators, IANA staff, VeriSign, NTIA and others. The RSST Study reviewed the impact on the root servers, and on the provisioning systems that lead up to the root zone being propagated to the root servers. See http://www.icann.org/en/topics/ssr/root-zone-augementation-analysis-17sep09-en.pdf.

The study provided qualitative and quantitative models of the root system that show how the root zone's different parts are related and how the root zone responds to changes in the parameters that define its environment. The RSST Study's conclusions assume that the estimate of less than 1,000 new gTLDs being added to the root zone per year is accurate. The study also assumes that other parameters relating to the management of the DNS root will not be substantively

altered. With these assumptions in mind, the RSST Study concluded that normal operational upgrade cycles and resource allocations will be sufficient to ensure that scaling the root, both in terms of new technologies as well as new content, will have no significant impact on the stability of the root system.

The principal results of the study are qualitative and quantitative models. These models enable the static simulation of popular "what-if" scenarios—*e.g.*, "what would happen if the size of the root zone increased by three orders of magnitude (assuming that everything in the system remained as it is today)?"—but also a far more useful dynamic analysis of the way in which the system responds and adapts to changes in the DNS environment over time. The analysis allows the community to anticipate the consequences of scaling the root, identify and recognize "early warning signs" of system stress, and plan ahead for any mitigating steps that may be necessary to keep the system running smoothly if and when signs of stress appear. The RSST Study also recommended that the Board call on ICANN's staff to take on a monitoring role in collaboration with other system partners as an element of the new gTLD program rollout.

C. The TNO Report

To follow up on the RSST Study, the TNO put together a modeling contribution in conjunction with the RSST Study to transform the information and findings in the RSST Study into a quantitative model and simulation software. The TNO Report was able to simulate several cases for the purpose of model validation and to illustrate typical use of the simulation model. More specifically, this study was directed by the RSST to apply quantitative modeling expertise to develop a quantitative model of the DNS Root Server System to analyze ways it responds to the addition of new gTLDs, IDN TLDs, IPv6 and DNSSEC. The TNO suggested that the model be fine-tuned as the new gTLD program is implemented, and that the model be used as a tool by ICANN in order to give ICANN more accurate boundaries for the scalability of the root. See http://www.icann.org/en/committees/dns-root/root-scaling-model-description-29sep09-en.pdf.

IV. The Board's Analysis of Root Zone Scaling

A. Why the Board Commissioned Studies on Root Zone Scaling

- ICANN's mission statement and one of its founding principles is to promote user choice and competition. ICANN has created significant competition at the registrar level that has resulted in enormous benefits for consumers. To date, ICANN has not created meaningful competition at the registry level. Based upon the report and recommendation from the GNSO to introduce new gTLDs, the Board decided to proceed with the new gTLD program.

- Both the Board and members of the community have commented that the introduction of new gTLDs would require the expansion of the root zone and could impact root zone stability. To address these comments, on 3 February 2009, the Board adopted a resolution approving the SSAC/RSSAC Stability Studies which led to the commissioning of the "L" Root Study and RSST Study.

B. Who the Board Consult Regarding Root Zone Scaling

- Legal Counsel
- The GNSO
- The GAC
- DNS-OARC
- The SSAC
- The RSSAC
- The TNO

- All other Stakeholders and Community members through public comment forum and other methods of participation.

C. What Significant Non-Privileged Materials the Board Reviewed

In evaluating the issue of root zone scaling, the ICANN Board reviewed various materials to determine the stability of the root zone: (1) Deployment Experience; (2) Studies and Models; and (3) Public Comments.

1. Deployment Experience

In order to determine the stability of the root zone with the implementation of the new gTLD program, the Board closely evaluated the impact of the significant changes that had already been implemented or were in the process of being implemented into the root zone. Since February 2008, there have been significant additions to the root zone with the adoption and implementation of IDNs, IPv6 and DNSSEC. In fact, during the period between July 2004 when the first IPv6 addresses were added to the root zone for TLD name servers, until July 2010 when the root was DNSSEC-signed and Delegation Signer Records were inserted, the root DNS service continued with no reported or publicly visible degradation of service. The Board evaluated the impact of each individual addition to the root zone to date, and determined that the addition of IPv6 to the root system, IDN TLDs and the deployment of DNSSEC had no significant harmful effects that were observed by or reported to ICANN's Board. Below is a timeline of the various additions to the root zone since July 2004:

Date	Technology	Event
July 2004	IPv6	First IPv6 addresses added to the root zone for top-level domains (KR and JP).
November 2005	DNSSEC	First top-level domain (.SE) signed.
June 2007	DNSSEC	IANA DNSSEC-signed root test bed made available.

August 2007	IDNs	Test IDN top-level domains added to the root.
February 2008	IPv6, gTLDs	First IPv6 addresses added for root servers (A, F, J, K, L and M). A limit of a maximum of less than 1,000 new gTLDs per year is derived from estimates of gTLD processing times.
January 2010	DNSSEC	Deliberately Unvalidatable Root Zone (DURZ) published on first root server ("L").
May 2010	IDNs, DNSSEC	First production IDNs added to the root (for Egypt, Saudi Arabia and United Arab Emirates). DURZ deployed on all 13 root servers.
June 2010	DNSSEC	First DS records are published in the root zone (for .UK and .BR).
July 2010	DNSSEC	Root is DNSSEC-signed and the root trust anchor is published.

http://icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf

The deployment of new technologies continues without any significant impact to root zone stability. Deployment of IPv6 in the root, which began in 2004, caused no significant harmful effects. Insertion of IDNs into the root in 2007 similarly was a non-event from the perspective of stability of the DNS, and deployment of DNSSEC in the root starting in January 2010 resulted in no observable or reported negative consequences. The empirical data drawn from the deployment of these new technologies can be used to validate the observations. Furthermore, the Board looked at this data, and the continued stability of the root zone throughout the implementation of these programs, as a demonstration that the introduction of the new gTLD program at the proposed max rate of 1,000 applications per year would similarly not impact the stability of the root zone.

2. Studies and Models

As previously mentioned, the ICANN Board commissioned two studies in order to analyze any impact the new gTLD program might have on the root zone. Both of these studies took a different approach to evaluate the possible impact the new gTLD program might have on root zone stability. Along with the TNO Report, the studies concluded that if the proposed new gTLD program is implemented pursuant to the adopted model of a maximum of 1,000 applications per year, the program will have no significant impact on the stability of the root system.

3. Public Comments and the Board's Response

Throughout the Board's analysis of the new gTLD program, in particular with respect to its possible impact to root zone stability, the Board considered public comments made by individuals both in public comment forums and in direct response to the release of the two root zone stability studies. The universe of comments pertaining to root zone scaling is still available. See http://forum.icann.org/lists/scaling/index.html.

The ICANN Board's responses to those comments made in response to the RSST Study were published for the public. See http://icann.org/en/committees/dns-root/summary-analysis-root-scaling-study-tor-04oct09-en.pdf.

D. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of root zone scaling. The Board found the following factors to be significant:

- the principle that the Board should base its decision on solid factual investigation and expert consultation and study;
- the addition of new gTLDs to the root in order to stimulate competition at the registry level;
- the stable and secure addition of addition of new gTLDs to the DNS;

- the continued security, stability and resiliency of the root zone; and
- the continued monitoring of the root zone system.

V. The Board's Reasons for Concluding the Introduction of New gTLDs Will Not Harm the Root Zone

The overarching issue of root zone scaling has been addressed through conversations with the public, expert consultation and expert analysis of the impact of the new gTLD program. These studies, consultations and interactions with the community facilitated the Board's study of the possible impacts the introduction of new gTLDs may have on root zone stability. The Board concluded that the additional gTLDs may be delegated without any significant impact on the stability of the root zone system.

The Board will continue to closely monitor the stability of the root zone and will call on its staff to take on a monitoring regime along with other system partners as an element of the new gTLD program roll-out. Furthermore, the Board will ensure that ICANN staff and system partners establish effective communication channels with root zone operators and RSSAC to ensure a timely response to any changes in the root zone environment.

8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

8. ICANN Board Rationale on String Similarity and String Contention Associated with the gTLD Program

I. Introduction

Through the development of the new gTLD program, the Board has given consideration to issues of potential user confusion resulting from the delegation of many similar TLD strings, as well as to creating procedures for resolving contention cases (i.e., where there is more than one qualified applicant for a TLD).

The foundational policy guidance for the program contains the principle that strings likely to cause user confusion should be avoided. Additionally, policy guidance recommended that there should be a preference for community applications in contention situations.

This memorandum focuses on the Board's review of these issues in implementing these principles in the new gTLD program. The memorandum summarizes the Board's consideration of these issues, and the Board's rationale for implementing the new gTLD program with the provisions on string contention and string similarity.

II. Brief History of ICANN's Analysis of String Similarity and String Contention Associated With the gTLD Program

This section sets forth a brief history of significant actions on the subject of string contention associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for other reasons.

- In February 2007, Bruce Tonkin sent an email to the GNSO Council, describing the type of contention resolution methods under discussion for the gTLD process, including self-resolution, among the parties, third-party mediation, a bidding process, auctions, and testing for community affiliations.

http://forum.icann.org/lists/gtld-council/msg00358.html; http://forum.icann.org/lists/gtld-council/msg00359.html

- In March 2007, the Governmental Advisory Committee issued its GAC Principles regarding New gTLDs. This included: 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced. http://gac.icann.org/system/files/gTLD_principles_0.pdf

- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs, including Recommendation 2, which stated that "strings must not be confusingly similar to an existing top-level domain or a Reserved Name." http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- The GNSO's Final Report also included Implementation Guideline F, which stated: If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe; ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- In March 2008, ICANN reported on preliminary work with SWORD to develop a potential algorithm that could help to automate the process for assessing similarity among proposed and existing TLD strings. http://www.icann.org/en/minutes/prelim-report-27mar08.htm

- On 26 June 2008, the Board adopted the Generic Names Supporting Organization's ("GNSO") policy recommendations for the introduction of new gTLDs, and directed ICANN staff to continue to develop a detailed implementation plan. See Board Resolution at http://www.icann.org/en/minutes/resolutions-

26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- In August 2008, ICANN considered the use of auctions as a tie-breaking mechanism within the new gTLD process. https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm

- Also in August 2008, ICANN posted a paper for community discussion, entitled "The Economic Case for Auctions," which explores the potential benefits of auctions as a tie-breaking mechanism. https://www.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf

- Also in August 2008, ICANN considered the use of a string similarity algorithm to help automate the process for assessing similarity among the proposed and existing TLD strings. SWORD completed a beta algorithm and reviewed several test cases with ICANN staff to refine the parameters and discuss how the algorithm could be successfully integrated as a tool to help implement the GNSO's recommendation that new gTLD strings should not result in user confusion. https://www.icann.org/en/topics/new-gtlds/program-updates-2008.htm; http://www.icann.org/en/announcements/announcement-08aug08-en.htm

- In October 2008, the Board passed a resolution, authorizing the CEO, COO and/or General Counsel of ICANN to enter into an agreement for algorithm related services with SWORD. https://www.icann.org/en/minutes/prelim-report-01oct08.htm

- On 24 October 2008, ICANN published Version 1 of the new gTLD Applicant Guidebook ("Version 1"), as well as an explanatory memorandum, "Resolving String Contention,", http://www.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf, describing the reasons for the contention procedures found in the draft Guidebook. The Guidebook included a preliminary establishment of contention sets based on similarity between strings, opportunities for applicants to self-resolve such contention, a comparative evaluation process, and an objective

mechanism as a last resort. http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf

- These procedures have been continually revised, updated, and posted for comment through successive drafts of the Guidebook. In February 2009, auctions were identified as an objective mechanism of last resort for resolving string contention, included in an updated memorandum, http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf, and beginning in draft version 2 of the Guidebook. http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-18feb09-en.pdf

- Comments on successive drafts of the Guidebook expressed a desire for greater clarity around the standards to be used for comparative evaluation, including requests for examples of applications that would and would not meet the threshold. In response to these comments, ICANN developed detailed explanatory notes for each of the scoring criteria to give additional guidance to applicants. These were included beginning in draft version 3 of the Guidebook. http://www.icann.org/en/topics/new-gtlds/draft-string-contention-clean-04oct09-en.pdf

- In May 2010, ICANN issued draft version 4 of the Guidebook. The comparative evaluation was renamed the Community Priority Evaluation, to more accurately convey the purpose and nature of the evaluation (i.e., not comparing applicants to one another but comparing each against a common set of criteria). Version 4 also included definitions for terms used in the explanatory notes as well as clarifications and expanded guidance in several areas. http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm

- In June 2010, the GNSO Council and the Registries Stakeholder Group requested that exceptions be granted from findings of confusing similarity. The reason for granting an exception would be that a string pair that was found to be confusingly similar constituted a case of "non-detrimental confusion." http://gnso.icann.org/mailing-lists/archives/council/msg09379.html; http://forum.icann.org/lists/string-similarity-

amendment/msg00002.html;
http://www.icann.org/en/minutes/board-briefing-materials-1-25sep10-en.pdf

- In September 2010, the Board discussed the subject of string similarity and resolved to encourage policy development as needed to consider any exceptions from findings of confusing similarity. http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.4

- On 30 May 2011, ICANN posted the Applicant Guidebook for consideration by the Board. http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

III. The Board's Analysis of String Similarity and String Contention

A. Brief Introduction to String Similarity and String Contention

1. String Similarity

This section sets forth an overview of the string similarity determination:

- What is the Concern over String Similarity?
  - The Board determined that delegating highly similar TLDs in the new gTLD program created the threat of detrimental user confusion.
- How Is It Determined that String Similarity Exists?
  - The preliminary similarity review will be conducted by a panel of String Similarity Examiners, who will use the following standard to test for whether string confusion exists:

> String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

- The examination will be informed by human judgment assisted by criteria and an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. http://icann.sword-group.com/algorithm/

- What Happens Once the Determination is Made that String Similarity Exists?

  - In the simple case in which an applied-for TLD string is identical to an existing TLD, the application system will not allow the application to be submitted.

  - An application that fails the string confusion review and is found too similar to an existing TLD string will not pass the Initial Evaluation stage of the evaluation process, and no further reviews will be available.

  - An application that passes the string similarity review in the Initial Evaluation is still subject to challenge regarding string similarity in the current application round. That process requires that a specific string similarity objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity may be claimed by an objector, visual, phonetic, and semantic similarity.

  - An application that passes the string similarity review and is not subject to a string confusion objection would proceed to the next relevant stage of the process.

2. String Contention

This section sets forth an overview of the string contention process:

- What is String Contention?

  - String contention is said to occur when the strings of two or more applications are identical or found to be so similar that delegation of both will create a threat of user confusion.

- What Components Are Involved in the String Contention Process?

- Identifying gTLD strings that are likely to deceive or cause user confusion in relation to either existing TLDs or reserved names or applied-for gTLDs; and

- Resolving the string contention.

- How is a Contention Set Identified?

  - In the initial evaluation of an applied for gTLD, a string similarity panel, using the procedures described above, will determine whether two or more applications for gTLDs are in direct string contention. The applications that are determined to be in direct string contention will be marked for later resolution of the contention and proceed to the subsequent process steps. Applications that are not part of a contention set can proceed to the next stage of the evaluation process without further action.

    - Applications are in direct string contention if their proposed strings are identical or so similar that string confusion would occur if both were to be delegated as TLDs. The determination is based on human judgment assisted by an algorithmic test performed on applications.

    - Two applications are in indirect string contention if they are both in direct string contention with a third application, but not with each other.

  - During the objection process, an applicant may file a string confusion objection to assert string confusion. If the objection is upheld by the panel adjudicating the objection, the applications will be deemed to be in a direct string contention and the relevant contention sets will be modified accordingly.

  - The final contention sets are established once the extended evaluation and objection process have been concluded, because some applications may be excluded in those steps.

- How is a Contention Set Resolved?

- Voluntary settlements or agreements can occur between applications that result in the withdrawal of one or more applications. These can occur at any stage of the process, once ICANN has posted the applications received. However, material changes to an application may require a re-evaluation.

- Community priority evaluation can be used only if at least one of the applications involved is community-based and has expressed a preference for community priority evaluation. A panel will receive and score the community-based applications against the established criteria for: (1) community establishment; (2) nexus between the proposed string and community; (3) dedicated registration policies; and (4) community endorsement. If one application is a "clear winner" (i.e., meets the community priority criteria), the application proceeds to the next step and its direct contenders are eliminated. If there is no "clear winner," the contention set will be resolved through negotiation between the parties or auction. It may occur that more than one application meets the community priority criteria, in which case time will be allowed for resolving the remaining contention by either applicant withdrawing, otherwise an auction between those applicants will resolve the contention.

- A community application that prevails in a community priority evaluation eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria. Arriving at the best outcome in a contention situation requires careful balancing of several variables, and this is the reason that a number of factors are included in the analysis.

- Auction is available as a last resort mechanism for resolving string contention when (1) contending applicants successfully complete all evaluations; (2) contending applicants elect not to use community priority evaluation, were not eligible for community priority evaluation, or

community priority evaluation did not provide a "clear winner"; and (3) contending applications have not resolved the contention among themselves.

B. Why The Board Addressed String Similarity and String Contention

- The new gTLD program will increase the number of domain names available, implying a risk that "confusingly" similar strings will appear.
- It is in the interests of consumer confidence and security to protect against the threat of user confusion and to avoid increasing opportunities for bad faith entities who wish to defraud users.
- Measures should be in place to protect internet users from the potential harm in delegating confusingly similar strings in the new gTLD program.
- The Board wants to create greater certainty in the domain name marketplace by crafting a fair and practical approach on how to identify and how best to resolve contention sets.
- The Board adopted the GNSO policy recommendations, including the implementation guideline implying that a community-based TLD application could be given a priority in cases of contention.

C. Who the Board Consulted

- Legal Counsel
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community members through public comment forum and other methods of participation.

D. What Significant Non-Privileged Materials the Board Reviewed

- **GNSO Policy Recommendations**

  - Recommendation 2: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

  - Implementation Guideline F: If there is contention for strings, applicants may:

  i) resolve contention between them within a pre-established timeframe

  ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and

  iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- **GAC Principles**

  - Recommendation 2.4: In the interests of consumer confidence and security, new gTLDs should not be confusingly similar to existing TLDs. To avoid confusion with country-code Top Level Domains, no two letter gTLDs should be introduced http://gac.icann.org/system/files/gTLD_principles_0.pdf

- **Comments from the Community**

  - http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm

E. What Concerns the Community Raised

- There is a need for clarification on the definition of "confusing similarity."

- There are questions about the definitions for "standard" vs. "community-based" TLD types.

- There is a need for objective procedures and criteria for the community priority evaluation.

- A special form of resolution should be considered for a contention set involving two community-based applicants of equal strength, so that such a contention set is not required to go to auction.

- There is concern over using the auction process (and the receipt of auction proceeds) as a means to resolve contention for TLDs.

- There is concern that the string similarity algorithm only accounts for visual similarity, and does not accurately gauge the human reaction of confusion.

- Proceeds from auctions may be used for the benefit of the DNS and be spent through creation of a foundation that includes oversight by the community.

F. What Factors the Board Found to Be Significant

- There should be a consistent and predictable model for the resolution of contention among applicants for gTLD strings;

- The process should be kept as straightforward as possible to avoid unnecessary risks;

- There is potential harm in confusingly similar TLD strings that extends not only to the interests of existing TLD operators, but also to Internet users; and

- The protections set forth in the current string similarity process will safeguard both user and operator interests;

IV. The Board's Reasons for Supporting the String Contention Process Contemplated in the new gTLD Program

- The Algorithm is a tool to aid the string similarity analysis.

  - The algorithm will be a consistent and predicable tool to inform the string confusion element of the new gTLD program. The algorithm will provide guidance to applicants and evaluators;

  - The role of the algorithm is primarily indicative; it is intended to provide informational data to the panel of examiners and expedite their review.

- The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes

- Human judgment will be the determining factor in the final decisions regarding confusing similarity for all proposed strings.

- Contending applicants should be given the opportunity to settle contention among themselves – this will result in innovative and economic solutions.

- The community priority evaluation stage of the string contention process features sufficient criteria to: (a) validate the designation given to community-based applications; and (b) assess a preference for community-based applications in a contention set. Both the GNSO Final Report and GAC Principles encourage the special consideration of applications that are supported by communities. http://GNSO.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm; http://gac.icann.org/system/files/gTLD_principles_0.pdf

- The GAC Principle that two-letter TLDs should not be delegated to avoid confusion with ccTLDs was adopted.

- There are advantages to an auction as a resolution mechanism of last resort.

    - It is an objective test; other means are subjective and might give unfair results, are unpredictable, and might be subject to abuses.

    - It assures the round will finish in a timely way.

    - It is thought than few auctions will actually occur. A negotiated settlement will be a lower-cost solution for the parties than an auction. The availability of auctions will encourage parties to settle. Even if there are proceeds from auctions, these will be expended in a process that includes independent oversight.

    - Ascending clock auctions typically employ an "activity rule," where a bidder needs to have been "in" at early prices in the auction in order to continue to stay "in" at later prices. This is useful because in an ascending clock auction, bidders are

informed of the number of contending applications that have remained “in” after each round, but not their identities. With the specified activity rule, this demand information has real significance, as a competitor who has exited the auction cannot later re-enter.

- The auctioneer in ascending clock auctions has the ability to pace the speed at which prices increase. This facet has greatest importance if related items are auctioned simultaneously, as their prices can then be paced to increase together in relation to the level of demand. This has the advantage of providing bidders with information about the level of demand for other new gTLDs—and hence the value of a new gTLD—while the auction is still in progress.

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

9. ICANN Board Rationale On Trademark Protection in the New gTLD Program

I. Introduction

One of ICANN's core values is "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest." http://www.icann.org/en/general/bylaws.htm. In furtherance of this core value, ICANN is committed to ensuring that the concerns of all community members, including trademark holders, are considered and addressed to the extent practicable before launching the new generic top level domain ("gTLD") program.

ICANN has long recognized the importance of ensuring that the introduction of new gTLDs is conducted consistently with the protection of the rights of trademark holders, communities and other rights holders from abusive registration and infringement. In each previous expansion to the domain name system ("DNS"), the protection of legal rights of third parties was a feature of the application and evaluation process. For the new gTLD Program, ICANN has sought input from numerous stakeholders, including trademark holders, trademark lawyers, businesses, other constituencies and governments, to devise a multi-layered approach to protecting the rights of third parties. The approach includes a pre-delegation dispute resolution process for protecting existing legal rights at the top level. Also included in this approach are numerous rights protection mechanisms at the second level such as: (i) the establishment of a trademark clearinghouse to support both sunrise and trademark claims processes, a trademark post-delegation dispute resolution procedure (PDDRP), the Uniform Rapid Suspension System (URS) and the requirement for registries to maintain a thick Whois database. Of course, also available to all is the existing, long-standing and tested Uniform Domain Name Dispute Resolution Policy (UDRP).

II. History of the Board's Consideration of Trademark Protection

This section contains a brief history of significant actions taken to address trademark protection in the new gTLD program.

- On 1 February 2007, the Generic Names Supporting Organization ("GNSO") Council approved a request to form a Working Group on

Protecting the Rights of Others. http://gnso.icann.org/meetings/minutes-gnso-01feb07.html

- On 15 March 2007, the GNSO Council ratified a Statement of Work for the newly-formed GNSO Working Group on Protecting the Rights of Others. http://gnso.icann.org/meetings/minutes-gnso-15mar07.html

- On 26 June 2007, the GNSO Working Group on Protecting the Rights of Others published its Final Report. gnso.icann.org/drafts/pro-wg-final-report-26jun07.pdf

- On 8 August 2008, the GNSO issues its "Final Report – Introduction of New Generic Top-Level Domains," including a recommendation that "Strings must not infringe the existing legal rights of others". http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

- On 21 December 2007, ICANN requested "expressions of interest from potential dispute resolution service providers for the new gTLD program." http://www.icann.org/en/topics/drsp-call-for-expressions-of-interest.pdf

- On 26 June 2008, the Board adopted the GNSO's Policy recommendations for the introduction of new gTLDs. See Board Resolution at http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171; see Board Meeting Transcript at https://par.icann.org/files/paris/ParisBoardMeeting_26June08.txt

- On 22 October 2008, ICANN published an Explanatory Memorandum on Protection of Rights of Others in New gTLDs and solicited comments. http://www.icann.org/en/topics/new-gtlds/protection-rights-22oct08-en.pdf

- After receiving significant community input, on 6 March 2009, the Board recognized trademark protection in the new gTLD program as an issue requiring additional input and analysis, the resolution of which would benefit the new gTLD program. The Board requested that the GNSO's Intellectual Property Constituency convene an Implementation Recommendation Team ("IRT") to solicit input,

analyze the issue, and prepare draft and final reports. http://www.icann.org/en/minutes/resolutions-06mar09.htm#07

- On 24 April 2009, the IRT published its Preliminary Report for public comment. http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf; see public comments at http://forum.icann.org/lists/irt-draft-report/

- On 16 May 2009, the Board participated in a workshop on issues related to the new gTLD program, including trademark protections in particular.

- On 29 May 2009, the IRT published its Final Report and an "Open Letter from the IRT Introducing our Work." ICANN and the IRT recognized that a significant intersection exists in between strategies to facilitate trademark protection and strategies to mitigate the risk of increased malicious conduct on the Internet. http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

- On 20 June 2009, the Board participated in another workshop on issues related to the new gTLD program, including trademark protection.

- On 21 June 2009, the IRT presented its Final Report to the ICANN Board at the ICANN Sydney Open Meeting and provided briefings to the GNSO, interested constituencies and others. http://syd.icann.org/full-sched

- On 26 June 2009, the Board acknowledged and thanked the IRT for its "intensive engagement" and its "detailed and articulate proposals." http://www.icann.org/en/minutes/resolutions-26jun09.htm

- Also on 26 June 2009, the Board acknowledged that ICANN staff had posted material on the new Draft Applicant Guidebook for public comment; thanked the community; and requested that all further comments be submitted by the close of the comment period on 20 July 2009. The Board also requested that the ICANN staff prepare a comprehensive set of implementation documents before the Board's meeting on 30 October 2009. See Board

Resolution at https://icann.org/en/minutes/resolutions-26jun09.htm; see Board Meeting Transcript at http://syd.icann.org/files/meetings/sydney2009/transcript-board-meeting-26jun09-en.txt

- On 12 September 2009, the Board continued its discussion about trademark protection in new gTLDs at a Board Retreat.

- On 12 October 2009, the Board sent a letter to the GNSO, requesting that it review trademark protection policy for the new gTLD program as described in the Draft Applicant Guidebook and accompanying memoranda, including the proposals for a Trademark Clearinghouse and a Uniform Rapid Suspension System. http://www.gnso.icann.org/correspondence/beckstrom-to-gnso-council-12oct09-en.pdf

- On 28 October 2009, the GNSO adopted a resolution creating the Special Trademarks Issues review team ("STI"), which included representatives from each stakeholder group, the At-Large community, nominating committee appointees, and the Governmental Advisory Committee ("GAC"). http://gnso.icann.org/resolutions/#200910

- On 30 October 2009, the Board issued a resolution encouraging additional comments on the Draft Applicant Guidebook and new gTLD program.
  See Board Resolution at https://icann.org/en/minutes/resolutions-30oct09-en.htm; see Board Meeting Transcript at https://icann.org/en/minutes/index-2009.htm

- On 11 December 2009, the STI published its Report.
  See link to Report in http://gnso.icann.org/resolutions/#200912

- On 18 December 2009, the GNSO unanimously approved the recommendations contained in the STI's report. http://gnso.icann.org/resolutions/#200912

- On 15 February 2010, ICANN published for public comment proposals for trademark protection in the new gTLD program, including the Trademark Clearinghouse, a Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure.

http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm

- On 10 March 2010, the GAC outlined to the Board some concerns and recommendations for the new gTLD program and its comments on version 3 of the Draft Applicant Guidebook. http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-10mar10-en.pdf

- On 12 March 2010, the Board acknowledged the community recommendations for trademark protections in the new gTLD program, including the development of a Trademark Clearinghouse and a Uniform Rapid Suspension System; resolved that the proposals for both be incorporated into version 4 of the Draft Applicant Guidebook; and directed ICANN staff to review any additional comments and develop final versions of the proposals for inclusion in the Draft Applicant Guidebook. http://www.icann.org/en/minutes/resolutions-12mar10-en.htm

- Also on 12 March 2010, the Board approved the concept of a post-delegation dispute resolution procedure; and directed ICANN staff to review any additional comments and synthesize them, as appropriate, into a final draft procedure, and include the procedure in version 4 of the Draft Applicant Guidebook. http://www.icann.org/en/minutes/resolutions-12mar10-en.htm

- On 28 May 2010, in response to further comments from the community, ICANN published for public comment revised proposals for the Trademark Clearinghouse, Uniform Rapid Suspension System, and a post-delegation dispute resolution procedure. http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm

- On 5 August 2010, the Board responded to the GAC's comments on version 3 of the Draft Applicant Guidebook and described the steps it took to protect trademarks in version 4 of the Draft Applicant Guidebook. http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-05aug10-en.pdf

- On 23 September 2010, the GAC outlined to the Board its concerns and recommendations for the new gTLD program and its comments on version 4 of the Draft Applicant Guidebook.

http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf

- On 24-25 September 2010, the Board participated in another workshop on issues related to the new gTLD program, including trademark protections and passed some resolutions specifically addressing trademark protections. http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6

- On 12 November 2010, ICANN posted for public comment version 5 of the Draft Applicant Guidebook, incorporating a number of protections for the rights of others, and a series of papers explaining certain aspects of the current proposals for the Trademark Clearinghouse, the Uniform Rapid Suspension System and related comments and analysis. http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf

- On 10 December 2010, the Board resolved that ICANN had addressed the issue of trademark protection in new gTLDs by adopting and implementing various measures, including the establishment of a Trademark Clearinghouse, the Uniform Rapid Suspension System and the Post-Delegation Dispute Resolution Procedure. The Board further stated that these solutions reflected the negotiated position of the ICANN community, but that ICANN would continue to take into account public comment and the advice of the GAC.
  See Board Resolution at https://icann.org/en/minutes/resolutions-10dec10-en.htm; see Board Meeting Minutes at https://icann.org/en/minutes/minutes-10dec10-en.htm

- On 21 February 2011, ICANN published numerous briefing papers on the trademark issues the GAC had identified as "outstanding" in September 2010. http://www.icann.org/en/announcements/announcement-6-21feb11-en.htm

- On 23 February 2011, the GAC issued it "Indicative Scorecard" which included 30 specific recommendations relating to trademark protections on which it intended to consult with the.

http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf

- On 28 February 2011 and 1 March 2011, the GAC and the Board participated in a special two-day consultation to address the remaining outstanding issues related to the new gTLD program, including certain issues related to trademark protection. http://www.icann.org/en/announcements/announcement-23feb11-en.htm

- On 4 March 2011, the Board published its comments on the GAC Scorecard. http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf

- On 15 April 2011, ICANN published an Explanatory Memorandum on Trademark Protection in the new gTLD program. http://www.icann.org/en/topics/new-gtlds/trademark-protection-claims-use-15apr11-en.pdf

- Also on 15 April 2011, ICANN posted for comment version 6 of the Draft Applicant Guidebook, incorporating additional protections for the rights of others. http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm

- Also on 15 April 2011, ICANN issued "Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response" http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf

- On 19 April 2011, the GAC issued "Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms" http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf

- On 26 May 2011, the GAC issued "GAC comments on the Applicant Guidebook (April 15th, 2011 version)" http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf

- On 30 May 2011, ICANN posted the current version of the Applicant Guidebook.
  http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

III. The Board's Analysis of Trademark Protection in the New gTLD Program

A. Why the Board is Addressing This Issue Now

- ICANN's mission statement and one of its founding principles is to promote competition. The expansion of gTLDs will allow for more innovation and choice in the Internet's addressing system. The ICANN Board seeks to implement the new gTLD program together with measures designed to protect the rights of others on the Internet.
  http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm

- The Board endorsed GNSO policy recommendation states that gTLD strings should not infringe the rights of others. The Board took that recommendation as an emphasis on the need to protect intellectual property rights.

- ICANN committed to the Internet community and governments, including the U.S. Department of Commerce that it would address trademark protection in new gTLDs prior to implementing the program.

- The ICANN Board is committed to making decisions based on solid factual investigation and expert analysis.

B. Who the Board Consulted

- The GNSO
  http://gnso.icann.org/

- The GAC
  http://gac.icann.org/

- The ICANN Implementation Recommendation Team ("IRT")
  https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20090407232008-0-9336/original/IRT-Directory.pdf

- The GNSO's Special Trademark Issues Working Team ("STI")
- The At-Large Advisory Committee ("ALAC") http://www.icann.org/en/committees/alac/
- All other stakeholders and members of the community
- Legal counsel

C. What Significant Non-Privileged Materials the Board Reviewed

- In addition to all public comments received on all versions of the Applicant Guidebook, as well as all relevant GAC Communiqués (*see* http://gac.icann.org/communiques), the ICANN Board reviewed the following reports from Stakeholders:
    - 1 June 2007 GNSO Working Group on Protecting the Rights of Others' Final Report http://www.gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf
    - 8 August 2007 GNSO Final Report – Introduction of New Generic Top Level Domains. http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm
    - 24 April 2009 IRT Draft Report and Public Comment Summary http://forum.icann.org/lists/irt-draft-report/pdfuyqR57X82f.pdf
    - 24 April 2009 IRT Preliminary Report, and public comment thereon http://www.icann.org/en/topics/new-gtlds/irt-draft-report-trademark-protection-24apr09-en.pdf; see public comments at http://forum.icann.org/lists/irt-draft-report/
    - 29 May 2009 IRT Final Report http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf
    - 29 May 2009 Implementation Recommendation Team Final Draft Report to ICANN Board

http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

- 4 October 2009 ICANN Comment and Analysis on IRT Report: Post-Delegation Dispute Mechanism and Other Topics http://www.icann.org/en/topics/new-gtlds/summary-analysis-irt-final-report-04oct09-en.pdf

- 11 December 2009, STI Report
  See link to Report in
  http://gnso.icann.org/resolutions/#200912

- 12 December 2009 letter from the members of the former IRT to ICANN unanimously supporting the work of the STI process and recommendations concerning a trademark clearinghouse and a mandatory Uniform Rapid Suspension system http://www.icann.org/en/correspondence/irt-group-to-dengate-thrush-15dec09-en.pdf

- 23 February 2011 GAC "Indicative Scorecard"
  http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf

- 19 April 2011 GAC issued "Remaining points of difference between the ICANN Board and the Governmental Advisory Committee on New gTLD Rights Protection Mechanisms"
  http://gac.icann.org/system/files/20110419-GAC_comments_on_NewgTLD_Rights_Protection.pdf

- 26 May 2011, the GAC issued "GAC comments on the Applicant Guidebook (April 15th, 2011 version)"
  http://www.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf

- ICANN prepared materials

  - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with hundreds of pages of public comment summaries and analysis related to trademark protections.
    (i) http://www.icann.org/en/topics/new-gtlds/comments-

en.htm; (ii) http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem; (iii) http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm; (iv) http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm; (v) http://www.icann.org/en/topics/new-gtlds/gnso-consultations-reports-en.htm; (vi) http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm; (vii) http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm; (viii) http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm; (ix) http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm; (x) http://www.icann.org/en/topics/new-gtlds/dag-en.htm; (xi) http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm; and (xii) http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm

D. What Concerns the Community Raised

- There is a need for adequate protection of intellectual property rights in new and existing gTLDs.
- If the introduction of new gTLDs leads to increased malicious conduct on the Internet, then trademark owners may pay a disproportionate percentage of costs associated with enforcing standards of behavior.
- Defensive domain name registrations in new gTLDs generate substantial costs for trademark owners.
- Registry behavior may cause or materially contribute to trademark abuse, whether through a TLD or through domain name registrations in the TLD.
- Legal rights that a party seeks to protect through Rights Protection Mechanisms should be capable of being authenticated, at least if the authenticity of such rights is challenged.

- Administrative dispute resolution procedures provide trademark owners with relatively swift and inexpensive alternatives to arbitration and litigation.

- Recurring sanctions may not be a sufficient remedy for wrongful conduct; suspension and termination may be necessary remedies.

- Policies developed to prevent and remedy trademark abuses in the DNS are expected to build upon the framework of existing intellectual property laws to minimize burdens on trademark owners and contribute to the orderly functioning of the DNS.

- The introduction of new gTLDs may lead to consumer confusion if one trademark owner registers its mark in one gTLD while another registers an identical or similar mark in another gTLD. To the extent that Internet users are unable (or become unaccustomed) to associate one mark with a specific business origin, the distinctive character of the mark will be diluted.

E. What Steps ICANN Has Taken or Is Taking to Protect the Rights of Others in New gTLDs

The Board believes the following measures will significantly help to protect the rights of others on the Internet. ICANN has incorporated the majority of these measures into the current version of the Applicant Guidebook and the registry agreement, and its efforts to implement the remaining measures are ongoing:

- Pre-delegation objection procedures.

- Mandatory publication by new gTLDs of policy statements on rights protection mechanisms, including measures that discourage registration of domain names that infringe intellectual property rights, reservation of specific names to prevent inappropriate name registrations, minimization of abusive registrations, compliance with applicable trademark and anti-cyber squatting legislation, protections for famous name and trademark owners and other measures.

- Mandatory maintenance of thick Whois records to ensure greater accessibility and improved stability of records.

- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars

- The requirement for all new registries to offer both a Trademarks Claims service and a Sunrise period.

- Post-delegation dispute resolution procedures that allow rights holders to address infringing activity by a registry operator that may be taking place after delegation.

- Implementation of the Uniform Rapid Suspension System that provides a streamline, lower-cost mechanism to suspend infringing names

- The continued application of the Uniform Domain Name Dispute Resolution Policy on all new gTLDs.

F. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of trademark protection in the new gTLD program. The Board found the following factors to be significant:

- The GNSO's Working Group on Protecting the Rights of Others was not able to reach consensus on "best practices" for Rights Protection Mechanisms;

- While economic studies revealed that there will be both benefits and cost to trademark holders associated with new gTLDs, no determination could be made that the costs outweigh the benefits.

- New gTLDs would promote consumer welfare.

- The availability and efficacy of dispute resolution mechanisms and appropriately-designed modifications of ICANN procedures for protecting intellectual property.

- The need for dispute resolution mechanisms to be comprehensive enough to expand with the addition of new gTLDs.

- The need to balance the protection of trademark rights with the practical interests of compliant registry operators to minimize operational burdens and the legitimate expectations of good faith domain name registrants.

- The risk of increasing exposure of participants to litigation.

- The lack of reported problems with ICANN's previous introductions of new TLDs.

IV. The Board's Reasons for Proceeding to Launch the New gTLD Program While Implementing Measures to Protect Trademarks and Other Rights

- ICANN's "default" position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate.

- New gTLDs offer new and innovative opportunities to Internet stakeholders.

- Brand owners might more easily create consumer awareness around their brands as a top-level name, reducing the effectiveness of phishing and other abuses.

- Revised applicant procedures and agreements reflecting the measures to mitigate the risk of malicious conduct will permit ICANN to address certain risks of abuse contractually and also will permit ICANN to refer abuses to appropriate authorities. ICANN can amend contracts and the applicant guidebook to address harms that may arise as a direct or indirect result of the new gTLD program.

- ICANN has addressed the principal concerns raised by stakeholders about the potential for proliferation of malicious conduct in the new gTLD space by implementing measures to mitigate that risk, including centralized zone file access, a high security TLD designation and other mechanisms. A combination of verified security measures and the implementation of DNSSEC will allow users to find and use more trusted DNS environments within the TLD market.

- ICANN has addressed the principal concerns raised by stakeholders about the protection of trademarks in the new gTLD space by

implementing other measures to enhance protections for trademarks and other rights, including pre-delegation dispute resolution procedures, a trademark clearinghouse, and post-delegation dispute resolution procedures.

- To the extent that there are costs to trademark owners or others, ICANN has worked with the community to address those concerns, and ICANN pledges to continue that effort.

crowell moring

Reference Material 12.

ICANN New Generic Top-Level Domains

Applicant Guidebook

The Applicant Guidebook provides a step-by-step procedure for new gTLD applicants.

It specifies what documents and information are required to apply, the financial and legal commitments of operating a new gTLD, and what to expect during the application and evaluation periods.

APPLICANT GUIDEBOOK

Presented in Full and by Module

Note: Due to the technical complexity and length of the Applicant Guidebook, translated versions are not always published on the same date as the English version. The most recently translated versions are posted here.

English	Arabic	Chinese	French	Russian	Spanish
New gTLD Applicant Guidebook 4 June 2012 (/en/applicants/agb/guidebook-full-04jun12-en.pdf) [PDF, 5.88 MB]	gTLD دليل المتقدم بطلب 2011 سبتمبر 19 في http://www.icann.org/ar/topics/new-gtlds/rfp-clean-19sep11-ar.pdf) [PDF] 5 ميغابايت]	gTLD 申请人指导手册 2012 年 1 月 11 日版 (/zh/applicants/agb/guidebook-full-11jan12-zh.pdf) [PDF, 3.49 MB]	Guide du candidat pour les nouveaux gTLD 19 sept 2011 (http://www.icann.org/fr/topics/new-gtlds/rfp-clean-19sep11-fr.pdf) [PDF, 4.51 MB]	Руководство кандидата программы ввода новых рДВУ от 19 сентября 2011 г. (http://www.icann.org/ru/topics/new-gtlds/rfp-clean-19sep11-ru.pdf) [PDF, 10.12 MB]	Guia para el Solicitante de Nuevos gTLDs 19 de septiembre de 2011 (http://www.icann.org/es/topics/new-gtlds/rfp-clean-19sep11-es.pdf) [PDF, 3.1 MB]
Module 1 Introduction to the gTLD Application Process (/en/applicants/agb/intro-04jun12-en.pdf) [PDF, 501 KB]	**الوحدة 1** مقدمة للتعريف gTLD بعملية تقديم طلبات الحصول على (/ar/applicants/agb/intro-11jan12-ar.pdf) [PDF, 459 KB]	**模块 1** 通用顶级域名 (gTLD) 申请流程简介 (/zh/applicants/agb/intro-11jan12-zh.pdf) [PDF, 842 KB]		**Модуль 1** Введение в процесс подачи заявок на рДВУ (/ru/applicants/agb/intro-11jan12-ru.pdf) [PDF, 641 KB]	
Module 2 Evaluation Procedures (/en/applicants/agb/evaluation-procedures-04jun12-en.pdf) [PDF, 917 KB] *Key Content* Evaluation Questions and Criteria (/en/applicants		**模块 2** 评估程序 (/zh/applicants/agb/evaluation-procedures-11jan12-zh.pdf) [PDF, 1.01 MB] *主要内容* 评估问题和标准 (/zh/applicants/agb/evaluation-questions-criteria-			

/agb/evaluation-questions-criteria-04jun12-en.pdf) [PDF, 746 KB]		11jan12-zh.pdf) [PDF, 634 KB]			
Module 3 Objection Procedures (/en/applicants/agb/objection-procedures-04jun12-en.pdf) [PDF, 261 KB] *Key Content* New gTLD Dispute Resolution Procedure (/en/applicants/agb/dispute-resolution-procedure-04jun12-en.pdf) [PDF, 120 KB]		**模块 3** 异议程序 (/zh/applicants/agb/objection-procedures-11jan12-zh.pdf) [PDF, 458 KB] *主要内容* 新 gTLD 争议解决程序 (/zh/applicants/agb/dispute-resolution-procedure-11jan12-zh.pdf) [PDF, 318 KB]			
Module 4 String Contention Procedures (/en/applicants/agb/string-contention-procedures-04jun12-en.pdf) [PDF, 429 KB]	**الوحدة 4** اجراءات التنازع على السلسلة (/ar/applicants/agb/string-contention-procedures-11jan12-ar.pdf) [PDF, 605 KB]	**模块 4** 字符串争用问题程序 (/zh/applicants/agb/string-contention-procedures-11jan12-zh.pdf) [PDF, 644 KB]	**Module 4** Procédures de conflits de chaînes (/fr/applicants/agb/string-contention-procedures-11jan12-fr.pdf) [PDF, 475 KB]	**Модуль 4** Процедуры разрешения разногласий в отношении строк (/ru/applicants/agb/string-contention-procedures-11jan12-ru.pdf) [PDF, 586 KB]	
Module 5 Transition to Delegation (/en/applicants/agb/transition-delegation-04jun12-en.pdf) [PDF, 320 KB] *Key Content* Base Agreement & Specifications (/en/applicants/agb/base-agreement-specs-04jun12-en.pdf) [PDF, 917 KB] Uniform Rapid Suspension (/en/applicants/agb/urs-04jun12-en.pdf) [PDF, 280 KB]		**模块 5** 授权移交 (/zh/applicants/agb/transition-delegation-11jan12-zh.pdf) [PDF, 450 KB] *主要内容* 新 gTLD 协议 (/zh/applicants/agb/base-agreement-specs-11jan12-zh.pdf) [PDF, 635 KB] 统一快速暂停系统 (URS) (/zh/applicants/agb/urs-11jan12-zh.pdf) [PDF, 258 KB]			

Trademark Clearinghouse (/en/applicants/agb/trademark-clearinghouse-04jun12-en.pdf) [PDF, 163 KB] Post Delegation Dispute Resolution (PDDRP) (/en/applicants/agb/pddrp-04jun12-en.pdf) [PDF, 181 KB] Registry Restriction Dispute Resolution (RRDRP) (/en/applicants/agb/rrdrp-04jun12-en.pdf) [PDF, 257 KB]		商标信息交换机构 (/zh/applicants/agb/trademark-clearinghouse-11jan12-zh.pdf) [PDF, 284 KB] 商标授权后争议解决程序 (商标 PDDRP) (/zh/applicants/agb/pddrp-11jan12-zh.pdf) [PDF, 248 KB] 注册管理机构注册限制争议解决程序 (RRDRP) (/zh/applicants/agb/rrdrp-11jan12-zh.pdf) [PDF, 228 KB]			
Module 6 Application Terms & Conditions (/en/applicants/agb/terms-04jun12-en.pdf) [PDF, 130 KB]	**الوحدة 6** ملكيات تعليمات المستوى الأعلى - الشروط والشروط (ar/applicants/) /agb/terms-11jan12-ar.pdf) [PDF, 132 KB]	**模块 6** 顶级域申请 - 条款和条件 (/zh/applicants/agb/terms-11jan12-zh.pdf) [PDF, 285 KB]	**Module 6** Candidature à un domaine de premier niveau – Conditions générales (/fr/applicants/agb/terms-11jan12-fr.pdf) [PDF, 478 KB]	**Модуль 6** Заявка на домен верхнего уровня - условия и положения (/ru/applicants/agb/terms-11jan12-ru.pdf) [PDF, 195 KB]	
Supporting Material	**دعم المواد**	**辅助材料**		**вспомогательные материалы**	
Summary of Changes to the Applicant Guidebook (/en/applicants/agb/summary-changes-applicant-guidebook-04jun12-en.pdf) [PDF, 121 KB] **Change Review Process: gTLD Applicant Guidebook** (http://www.icann.org/en/topics/new-gtlds/change-review-applicant-guidebook-19sep11-en.pdf) [PDF, 271 KB] (19 Sept 11)	ملخص التغييرات التي طرأت على دليل مقدم الطلب (ar/applicants/) /agb/summary-changes-applicant-guidebook-11jan12-ar.pdf) [PDF, 379 KB] عملية مراجعة التغييرات: كتيب المتقدم بطلب لترشح الجديد gTLD (http://www.icann.org/ar/topics/new-gtlds/change-review-applicant-guidebook-19sep11-ar.pdf) [PDF, 109 KB]	申请人指导手册变更摘要 (/zh/applicants/agb/summary-changes-applicant-guidebook-11jan12-zh.pdf) [PDF, 981 KB] 变更审核流程：新 gTLD 申请人指南 (http://www.icann.org/zh/topics/new-gtlds/change-review-applicant-guidebook-19sep11-zh.pdf) [PDF, 335 KB]	**Changer Processus d'examen: Guide de candidature pour les nouveaux gTLD** (http://www.icann.org/fr/topics/new-gtlds/change-review-applicant-guidebook-19sep11-fr.pdf) [PDF, 347 KB]	Сводка изменений Руководства кандидата (/ru/applicants/agb/summary-changes-applicant-guidebook-11jan12-ru.pdf) [PDF, 549 KB] **Процесс пересмотра и внесения изменений: Руководство кандидата программы ввода новых рДВУ** (http://www.icann.org/ru/topics/new-gtlds/change-review-applicant-guidebook-19sep11-ru.pdf) [PDF, 494 KB]	**Proceso de revisión de cambios: Guía para el Solicitante de Nuevos gTLDs** (http://www.icann.org/es/topics/new-gtlds/change-review-applicant-guidebook-19sep11-es.pdf) [PDF, 339 KB]

Financial Projection Templates (/en/applicants/agb/fin-proj-template-28dec11-en.pdf) [Excel (/en/applicants/agb/fin-proj-template-28dec11-en.xls)]

Instructions: TLD Applicant – Financial Projections (/en/applicants/agb/fin-proj-instrux-12dec11-en.pdf)

Evaluation Questions (/en/applicants/agb/evaluation-questions-criteria-04jun12-en.pdf)

Site Map

crowell moring

Reference Material 13.

NEW GTLD UPDATE (30 MAY 2012)

New gTLD Update by Akram Atallah, COO

The TLD Application System, or TAS, has now closed.

As of 23.00 GMT/UTC today, with one hour remaining before the system closed, just over 1900 applications had been submitted in TAS.

We will reconcile all payments and submitted applications, and will release the final numbers when the applied-for domain names are published. As we said yesterday, our target date for publishing the list of applied-for domain names is 13 June 2012.

We thank all applicants and the ICANN community for their support throughout the application process.

Site Map

crowell moring

Reference Material 14.

Karla Valente: Good morning everybody. My name is Karla Valente. I'm with ICANN. I'm Director of Communication Product Services. I joined ICANN in 2007 as Director of the New gTLD Program. I saw the program up to the launch of the first Applicant Guidebook, and now I'm concentrating my time more on outreach and communication activities around the program.

When you joined us at the reception, you probably received a package, and in this package, besides the agenda, you have a fact sheet about the new gTLD program. And this is the program that I'm going to be talking about. You also have a fact sheet about IDMs that speaks very generically about IDMs. And you have a fact sheet about Fast Track process, which is a different program, different from new gTLDs. And, Baher is going to give a presentation a little bit later today and talk about IDMs.

Also, you should have received a feedback form, and we would appreciate if you could fill out the form and tell us what you think about the different programs that we are running at ICANN, and also about this event.

So for now, we are going to go over ICANN's mission and new gTLDs. Why is ICANN doing new gTLDs? How is that tied to ICANN's mission; a brief historical background about gTLDs, the development of the policy, and also, some aspects of the gTLDs or generic top-level domains before, and, the policy development overview, and the program overview.

ICANN's mission and new gTLDs: So, new gTLDs are part of ICANN's mission or part of the founding documents. One of them is the 1998 ICANN Agreement with the USG and you can see there that define and implement the predictable strategy for selecting new generic top-level domains. In addition to that, we have a white paper in 1998 that also talks about new gTLDs.

Ultimately, the goal that ICANN has is to foster choice and competition in the domain name registry services around the world.

Historical background: So, as you know, we have in the top-level domain space, we have the ccTLDs, over 250, like .ae. And we have the generic top-level domains. The expansion is on the generic side, and if you look back in history, you have now 21 generic top-level domains in the root, and ICANN has an agreement with 16. There were eight that predate ICANN, and one of them is a well-known one which is the .com. And you see others.

We had round that happened in 2000, and you see the list of the names that were introduced in 2000. And, the most recent round happened in 2004. so, I think it's not maybe an accurate thing to say that these are new generic top-

level domains, because top-level domains were introduced previously. So now we are expanding the top-level.

And the difference between what happened before and what happens now is that the program nowadays is much more complex. We learned a lot of lesson from the previous rounds. The previous rounds were very small in scale, very few applicants, and the new round is expected to receive eventually much more application, and is a much more open process and complex process.

So, all of the experiences from the previous rounds helped in developing part of the process, and also helps the policy process, and helps us to develop the program itself.

Some of the key benefits of new gTLDs: And probably this is one of the challenging things to say, because we're talking about the future and we're talking about a future that, to a certain extend, was going to be shaped by the market, because we don't know what generic top-level domains are going to be applied for, how many we are going to see. Are we going to see many community-based, are we going to see many geographical-based, are we going to see many brand-type of TLDs? Are we going to see more of geographic generic? So, we don't know exactly.

So, predicting the future is a bit challenging because it will really be shaped by the market and by the applicants and by the way these TLDs expand and are used in the marketplace. But, one of the main goals that ICANN has is to encourage and foster the creativity and the innovation, the consumer choice in the marketplace, the competition in the domain name space. Also, very important is the introduction of internationalized domain names.

So as I mentioned to you in the beginning, you received three brochures. One of the brochures is going to talk about the Fast Track program. This Fast Track program introduced IDMs into the marketplace, but has very specific rules, and I encourage you to read that. And the new gTLDs are also a way to introduce internationalized domain names and has different requirements.

Nowadays, you see IDMs in the marketplace. You see them on the second level, you see them on the third level. Sometimes you see the internationalized domain names being introduced in the marketplace by the generic top-level domains like .com, or sometimes you see them introduced by the country code top-level domains, for instance .pierre in Poland.

When they introduce IDMs, what kind of languages are chosen, how the introduction is made, whether or not they choose to introduce in the second or the third level, all of those things are really up to the registry to decide. So if you look at the marketplace in the past year, there has been an increase in the introduction of IDMs, but it has been quite inconsistent. It's very difficult to predict what registry is going to introduce and why and how. And what you're going to see in the near future is the IDM on the top level, which is quite different from what we have seen up to now.

The policy development: So as **Lisa** explained in the beginning, at ICANN, you can really divide in two pieces, if you will. One is the policy development side, and the other one is the implementation side. So, the policy development for the new gTLDs started in 2005 and ended in 2007. So as you can see, the GNSO, which is the Generic Names Supporting Organization of ICANN – this is one of the organizations that is the bottom-up process – took two years to develop a policy that is quite complex.

If you look, we have 19 recommendations. Actually, there are 20, but one of them doesn't really count. We have 19 recommendations and those recommendations really serve as a foundation for the ICANN staff to build on the criteria and the processed that you see on the new gTLD program. The policy was approved by the ICANN Board in June 2008, and this was during the ICANN Paris meeting.

The policy conclusions: So, if you look at all of the 19 policies that were developed, what kind of main things could you draw from this policy? One is that new gTLDs will benefit the registrant choice and competition, so a registrant is the one that registers the domain name, which is different than the user that simply searches. Implementation plans should be created and this is what we're doing now. When we say new gTLD program, this is the implementation plan that we're working on.

Implementation plans should also allow for IDMs and ideally, implemented at the same time as the new ASCII TLDs. New gTLDs should not cause security or stability issues, and this is one of the main concern ICANN has in everything it does. For us, it's extremely important that no matter now the Internet grows on the top level, no matter how many TLDs we have out there, we have an Internet that is secure and we have an Internet that is stable and operable around the world.

And then we have also, in the policy, the protection of various interests that require some specific mechanisms, and I'm going to talk about them a little bit later.

Internationalized domain names: I'm not going to expand too much on that, because we have Baher giving an in-depth information about IDMs. But this is just a very quick way to take a look at what happened. They have existed on second level since 2003, and now, we had technical development and we have policy development around IDMs to make sure that they work when they are introduced. And we have two programs within ICANN right now that will enable the introduction of IDMs into the marketplace. And here, it's probably a very dark PowerPoint, but here is what is the availability today, and you see that on the second level here. And, this is the future, which is the TLD on the top level.

Program development and community participation: So we have the policy development aspect, which took two years, and the GNSO group is formed by actually, quite diverse members including intellectual property representation, we had registry, registrars and so forth. So this quite diverse group took two years to develop the policy.

Now, when ICANN implements the criterion, the processes around new gTLDs, one of the important things for us is to make sure that the community is involved in this process. And the way we do that is by sharing, ongoing, sharing the information and getting the input from the community about the different aspects of the program.

There are two ways that we get input. One is when we have public comments, and public comments is really, we say, it starts on a certain date and ends on a certain date. This is the proposal that we have at the table. And what you need to do is just register, and in writing, provide your feedback on what we are proposing.

The other way to give feedback is in meetings or sessions like that. What we will do after this session is just summarized the outcome, and we get back to management and the Board and say, "This is what happened in the sessions. Those were the issues raised. Are they the same or not as the ones we received in writing," and so forth.

So what we have done in the new gTLD program so far? We have published a draft Applicant Guidebook, so the Applicant Guidebook is a document that should explain to the future applicant, from A to Z, what to expect during the application process, what you are going to be required to provide in terms of information, in terms of documentation, some rules around the extension that you're going to select. There are some things that you can or cannot do. So for instance, if you choose and extension that after the dot is composed only by numbers, this is not allowed. There is a technical issue for that.

So, the Applicant Guidebook is a very important document if you are contemplating on applying for a TLD, because it explains to you from A to Z what to do and what to expect during the evaluation process. And we so far have published two drafts. So we published the first draft in November last year. Then we went through a public comment round. We gathered all the comments and then, based on the comments and based on internal, we work a lot with consultants too in different areas of expertise, so we gather the comments and also, continuing input from the consultants. And then, we created the second Applicant Guidebook, which is an advanced version or a modified version of the first Applicant Guidebook. And this sometimes is confusing to people, because "what is the document that I actually have to read in and what is the information that I actually need in order to understand the new gTLD program?" And if you go to the new gTLD page right now, we have over 30 documents and links there, and one can get lost quite easily.

But what I recommend you to do is to read the draft Applicant Guidebook, very badly named DAG, because of this bad habit that ICANN has with acronyms, Version 2. The Version 2 is the most up to date version. In addition to that, there are some excerpts that were posted recently and we expect to post a Version 3 before the ICANN meeting that takes place in Seoul.

So, this is an important document for you to read and for you to understand if you're planning on applying; the Applicant Guidebook.

Now, in addition to that, people are very interested in understanding why certain decisions were made and what is the criteria or the thinking that we had behind, for instance, establishing a $185,000 fee, why it's a fee like that. How did you come up with this number? So, we would have some papers. For instance, explanatory memoranda that are going to explain a little bit more in depth why certain choices were made for the criteria or for a process within the program. And there's a series of explanatory memoranda, and what they do actually, is they compliment the Applicant Guidebook explaining the thinking behind the choices that were made.

So, we continue gathering the feedback, and we continue engaging the community as we develop the program. We have a long way to go still. Our goal is to launch the program, and by launch, I say open the application process to the world. We expect to do that in 2010, but we still have a long way to go. And, it's very important that at this point, you take on the few additional opportunities there will be for public comments. So when the Applicant Guidebook Version 3 is posted for public comments, please look into it and give the feedback to ICANN, because this really helps us to inform the process. This really helps us to understand what people care, especially

around the world. We have posted the previous versions in six languages, and we are going to post the Version 3 also in six languages, and the way we choose the language is just by using this six United Nations languages so far.

However, the program itself is in English, at least for this first round, at least for now. So, when you see the Applicant Guidebook, even though you will read that the Applicant Guidebook in six different languages – you can do that – when you apply for a TLD in the future, the system is in English, the application process is in English, the evaluation and so forth is in English, the contract that a future registry signs with ICANN is also in English. So, it's an English-based program with materials that are provided in other languages, at least for now. We do have a goal to, in the future, expand the program and make it truly multilingual.

Where are we in the process? So, we continue to balance the desire to move forward with also exercising some caution about the issues that were raised and how to resolve that to this other section of the community. So, one of the metaphors used is that we have one foot on the accelerator and another one on the brake all the time balancing out what needs to be done.

We're working on the Version 3 that we plan on posting. And, we're seeking comments to the participation overarching issues. I'm not going to expand too much on the overarching issues, because that is going to take probably half of the day to explain how they were identified, what kind of actions were taken, and what comes next. It's quite a complex thing to explain in a one-day session that we need to cover a lot.

But what happened is that when we posted the Applicant Guidebook Version 1, and even the Version 2, the number of comments that we received from the community, if we classified the comments in a certain way, they fell into four very distinct categories of four overarching issues.

One of the main comments we got from the public was economic analysis. What is the market impact? What is the demand for new gTLDs? And what ICANN did for that is really to work with economists to post economic studies around the issue, and share the economic study with the community, and again, posting it for public comment.

The second issue that was raised by the community was trademark protection on the top level and on the second level. So, several special intellectual property practitioners came back to us and said, "You know what…this is good; however, you're not doing enough to protect the intellectual property protected trademarks in your program, and there's some

things that we would like to see happening. We would like you to be a little bit more rigorous in your criteria. We'd like you to amend some processes in a different way."

Now, I'd like to remind you that when we had the policy development process, we did have the input from the intellectual property community during the policy development. And now we had again, feedback from the intellectual property community in the process development. Of course, when you see things in the process, they look different, and then you can, in a more tangible way, offer some solutions.

The Board came back to the intellectual property community and said, "Work with us, form a group." The group is the IRT, Implementation Recommendation Team. "Work with us. Provide us with proposals. Tell us exactly what the issues are and what do you propose to resolve this issue from a practical standpoint, and we will evaluate that." And they did a remarkable job in a very short period of time. A group of intellectual property experts was assembled with some geographical diversity and they put forth a proposal that is now on the table. It was also submitted for public comments and is now on the table for the Board to see. And this is the second overarching issue.

The third overarching issue is consumer protection or malicious behavior. So, there's a lot of malicious behavior that happens nowadays on the Internet and the concern or the fear from the community is that when we have an expanded number of TLDs, does it mean that the malicious behavior is going to increase and we are going to see X number of security issues in the near future? What is it that we can do in terms of curbing or in terms of somehow controlling the malicious behavior?

Now also, we have to keep in mind that a lot of the things that happen from the malicious behavior at some point nowadays is for the Internet that we know today, but what it's going to be in the future and what kind of malicious behaviors are going to happen in the future is something that we cannot know. So, we need to keep some flexibility in the program.

We have groups like Anti-Phishing Groups and all kinds of consumer protection groups that are now working with ICANN to look into the malicious conduct issues and see what kind of recommendations can we put forth to really help to address those issues in the future with the new TLDs.

And the fourth overarching issue, which is very important for ICANN, it is the root scaling. So, you have the root, and now we're adding generic top-level domains to the root. But we're also adding IDMs, we're also adding DNS

Sec, we're also adding IPV 6, etc. So, a year and a half ago, maybe a little bit more, when we looked at expansion of the root in terms of new gTLDs, there was nothing that was identified in the preliminary assessment. Nothing was identified that said by adding an expanded number of gTLDs we are going to have an issue with the root. So preliminary findings are so far okay.

Now what we're doing is we engaged the SSAC and RSSAC, which are two technical groups from ICANN, and those groups are looking into, more in depth, on the root scaling, not only taking into account the introducing of an unlimited number of gTLDs, but also looking at the root impact as we add IDMs, DNS Sec, IPV 6, and all of the other changes that are taking place. So what's going to happen to the root and how is the root impacted moving forward, again, keeping in mind the security and stability concerns that ICANN always has?

I'm going to – yes, please.

Male: Do you want to take questions now or at the end?

Karla Valente: Whatever works for you. Now is fine.

Male: You don't mind? So, maybe I can ask a quick question. I was in London a month – sorry, my name is (23:01 unintelligible).

Karla Valente: On the 15th.

Male: And there was some discussion in London about what is going to happen after the draft 3 of the Guidebook. So, do you think you can move directly to the final version, or would there be a Version 4 of the Guidebook? What's the current (23:23 unintelligible) because there was some discussion in London (23:26 unintelligible).

Karla Valente: Yes. So, we're discussing that internally, because ideally, we would like to see the Applicant Guidebook Version 3 to be as close as possible to the final, right? And we have these overarching issues pending. So if you look at the four overarching issues, two of them have some advanced work done, which was the economic demand and the trademark protection has very tangible proposals on the table to be evaluated.

The malicious conduct is still on the way. And the root scaling is the study that RSSAC and SSAC is going to provide us with. This is – I would say end of Q3, beginning of Q4. So, we really need to see how we are going to move forward. We're resolving those issues and there's a separate aspect to that, which is ICANN's operational readiness. We want to make sure that the

system is in place, we have the employees in place, we have everything ready to accept the applications. So, all this work is being done, is being constantly evaluated to see what's going to happen for the Applicant Guidebook Version 3, and can we realistically have a Version 3 and then jump to the final, and launch. Or, as Kurt, I think, raised in London, we might even have an Applicant Guidebook Version 4, depending on how much work we can do from now to Seoul.

So, to give you a long answer, just to say I don't know.

Male: So it's still an open issue.

Karla Valente: It's still an open issue whether or not we're going to need a Version 4.

New gTLD program: So what is the program? The program is just the development of the criteria process and the tools that organizations around the world will be able to use in order to apply for the future new gTLDs. The Applicant Guidebook is the main document that actually describes this process and again, every time we developed different pieces of the program or the process, we always kept in mind that we have to continue preserving the DNS stability and security.

Some of the principles of the program: Again, what kind of criteria, how did we go about developing some of the criteria or some of the process used? We looked at doing something that is conservative. This is the first time that we're launching at that scale. Even though we had two rounds before, at that scale, is the first time that we launch. We don't know the number of applications we are going to receive. We hear different numbers from anything that would say from 50 to 500 or thousands. So, we don't really realistically know how many effectively we're going to receive.

So, we tried to develop a program that is with care and conservatisms. We tried to do it in a very efficient manner, but we always look at implementation process in a way that it protects registrants, that is protects the DNS stability and security. This is very important for us.

The evaluation fees are planned to cover costs. So, there was a lot of comments and speculations about the evaluation fee and why ICANN has an evaluation fee being a not-for-profit organization. All of the fees associated with the program, and the evaluation fee is only one of them, it's not for us to have profit. ICANN is a not-for-profit organization, and one of the principles and one of the things about the development of the program, policy wise, is that we recover the costs.

Adrian…

Adrian Kinderis: The floodgates are open now (27:30 Unintelligible) question. Evaluation fee, is that the – well, I would understand as the application fee.

Karla Valente: That's right.

Adrian Kinderis: Because there are fees specifically further on in the process that you must pay should you be (27:45 unintelligible).

Karla Valente: That's right. Yes.

Adrian Kinderis: So, you're talking there about the $185,000 application.

Karla Valente: That's right. Yes.

Adrian Kinderis: So, (27:55 unintelligible) how far is ICANN going back to cover costs? The new gTLD process has been going for, as you pointed out earlier, since the closing of the last round actually, and has been going. Has ICANN taken a conscious decision to go back and try to cover all of those costs or is it more recent? Where was the line in the sand (28:17 unintelligible)?

Karla Valente: Yes. So if you look at the cost documents, I think we're still looking into the model itself, but the model has the historical costs and at a certain point, we looked at the historical costs that dated from the policy development, then from the finalization of the policy. So, I need to check where we are now, because what is historical, right? I don't think historical dates back to the previous 2004, 2000 rounds if I recall.

Adrian Kinderis: (28:28 Unintelligible) importantly, it's good for people to understand that although $185,000 is a lot, there is actually some history there that ICANN is trying to recover costs on. It's not just the cost from when the applications start going forward, it's actually there's quite a significant history there of ICANN (29:01 unintelligible) policy development to get to where they are, but you are seeking to recoup those costs.

Karla Valente: Yes. And I think that we are not going very deep into historical costs. We're really focusing a lot on the development and actually how much would we need really to process the evaluation cost. And we did have some explanatory memoranda that was around costing models and we're looking at the costing models now to see is this the costing model that we're going to have moving forward.

For most applications, we expect that the Applicant Guidebook or the processes that we offer are clear, predictable, and timely, a timely roadmap. So you, as an applicant, would know what happens on each step of the process and how long it's going to take for each step of the process. We also have objection and dispute resolution in some cases where strings - and there's four cases.

One is when the strings infringe someone's existing rights. So for instance, somebody has a trademark and there's a third party applying for the trademark. We have a mechanism for this party to object to this applicant. We have somebody misappropriates a community label, somebody applies saying, "I represent Community X" and then Community X can go back and say, "Wait a minute. This applicant does not represent our community as it stated."

Cause user confusion – and again, by user here, we mean any of us/all of us. When we look at the string after the dot and we put two or more strings together, are we likely to get confused by the string itself? And you can imagine what kind of complexity this means as we add IDMs in different languages.

Then we also have potentially go against morality and public order, which was probably one of the most challenging pieces of the program, because what does it really mean from a global perspective with different value sets and different laws, etc.

And we have, right now, independent parties that are experts in dispute resolution, and these organization are going to be the ones that handle dispute resolution. So, ICANN is going to process applications for new gTLDs, and we are going to use evaluators from outside ICANN, so different companies that we are going to contract with are going to be evaluating pieces of the application. In addition to that, aside, you have organizations or tree organizations that are in charge of managing this objection, the dispute resolution process. If you are going to object to some application, what you're going to do is to lodge an objection with those third parties, not with ICANN.

The application process: So, we are going to have an open predetermined application period. So ideally, the policy wants the new gTLDs to be introduced into the marketplace on an ongoing basis, so basically it's open and you can apply at any time, like nowadays apply for a domain name at any time. But, because we need to understand demand and we need to understand the complexity of the applications that we get, what we are going to be doing from now on is rounds.

So, the first round is envisioned to take place in 2010. It's going to have a very clear starting date for the application period and a closing date for the application period. And then, we're going to go over the evaluation process and at the same time, we plan on announcing when the next round is going to be. Next round again is going to have an application period, and so forth.

It will be web based, which means that you're going to go to the ICANN site and you're going to see a system that is called "TAS." TAS is the TOD Application System. You register, you create a user account, and then you are going to see questions that pertain to the program, for instance about the string you're going to apply, about the company that is applying for the TLD, the technical and financial capability of this company, etc. And you're also going to be asked to provide supporting documents to prove that this company is legitimate and it exists, to prove that it's financially capable of managing a TLD, and so forth.

So, TAS lodges all of these questions and all of the documents from the applicant, but TAS also serves the evaluator so the evaluators can log in and see the applications, and get the specific part that they are going to evaluate. And they can post the evaluation and reports. TAS works as a workflow for us internally too, so staff can see at which stage of the application or evaluation we have each of the applicants. And as I mentioned before, there's the Applicant Guidebook.

Now, who's the applicant? The applicant is any public or privately established organization from anywhere in the world. We're not receiving applications from individuals, so Karla Valente could not apply for a domain name. It must follow all of the application steps and rules that are pre-established and published. So, we are not going to receive incomplete application. Must demonstrate organizational, operational, technical and financial capability.

And probably, this is one of the parts that I consider being quite critical, because when you apply for a top-level domain name, it's not like buying a domain name from a registry or a registrar nowadays. You buy a domain name and your responsibility's only for the content of the site. This is not what is being proposed here. What is being proposed here is a business. So, if you are applying for the top-level domain, you are committing to establishing a business. You are committing to standards of an existing industry. You are committing to having to understand the kind of infrastructure that is going to be required. And, what kind of commitments you're making, not only towards ICANN but towards the community, towards the registrants, towards the registrars and so forth. It's quite a complex

industry and it's quite a complex business, so it's not only to prove your capability, but also to understand what you're getting yourself into. You're not buying a domain name. You're expected to run a business.

And, there's $185,000 application fees. There's other application fees that apply depending on the application path, and I'm going to explain that a little bit later.

So, those fees have to do with the application and the evaluation process. Now, let's say that your top-level domain is accepted and you sign a contract with ICANN, which is – we call it Base Agreement or Registry Agreement, different names, but there's a contract and you find that in the Applicant Guidebook. In this contract, you're going to see that this business or the registry is going to have an ongoing financial commitment with ICANN as well. So, you need to understand from a financial standpoint, it's not only how much is the application fee, it's also other fees that you have to be prepared to pay. It's an ongoing financial commitment if you become a registry. And also, all the investments that one needs to do in order to put together a business like that.

Open application: So, we never really had the intention to develop types of application, even though in the industry, depending who's presenting this program to you is going to talk about geographic top-level domains or dot brand – I hear that a lot – the brand domain names or the community TLDs or the open TLDs. The truth is we never had the intention to do types and we don't refer to the proposals that we have on the table as types of TLDs. But what we have is certain requirements apply to certain applicant, depending on how they really identify the TLD that they're applying for.

So, let me explain that a little bit better. One of the things or the terms that we have used is an open application, which is one that I personally don't like. But an open application has not been designated as a community based, can be used for any purpose consistent with the requirements of the application evaluation criteria. So, I'm going just to throw something like that - .love, not community based, open.

I think a lot of confusion happens with the word or the term "open" when we see this. May or may not have a formal relationship with an exclusive registrant or user population. This is quite confusing and I think what we really mean is that when you have a gTLD or even a ccTLD, there's certain rules that apply. So just because it's a generic top-level domain, it doesn't mean that it's open to anyone everywhere. Sometimes a generic top-level domain has strict rules of who can apply.

So for instance, one of the generic top-level domains that we have in the marketplace is .museum. Well, guess what…Karla Valente cannot apply for .museum unless I am a museum. So this is a generic top-level domain that has restricted rules, so it's not quite open as the terms we use sometimes in the marketplace. Dot Asia is another example. Anyone can apply, yes, but you need to have an address in Asia and Asia has been defined as an X number of countries, and you have to have an address within these X number of countries. Is this open? Well, we say that this is open, but as you can see, there's some restrictions for the registrant in the future that apply.

It may or may not employ eligibility to use or use restrictions. And again, how this TLD is going to be used.

Community-based applications: So again, we have the open-base application, now the community-based application, and this is one that causes also a lot of questions. Community-based gTLDs is a gTLD that is operated for the benefit of a defined community consisting of a restricted population. So, during the application process, the applicant, when they go through the test system, they're going to be asked are you applying for a community-based type of application and if they say yes, they are then committed to answering a number of questions. And they have to be very careful when they designate community based.

When you look at the policy development, the GNSO that designed this community based application, what they had in mind and what they had at heart is really to protect communities like the Navaho community, the communities that really didn't have any other kind of protection, and they wanted to protect these communities in a certain way. And this is why we have this community-based application. If somebody's claiming to represent a certain community, then we need to prove that they indeed represent this community.

So what is the applicant of a community-based application expected to do? They have to demonstrate that they have an ongoing relationship with the defined community that consist of a restricted population. And what does that mean? A restricted population is a population that you can really define and if you have, for instance, somebody apply for .redshoes, people that like red shoes around the world are not quite a restricted population. It's too vague. So, we need this community to be more concise or we need to have a better understanding on how it works.

The term "community" – and that was an interesting aspect when we were developing the application process, because we looked in sociology, we looked in many different academic areas to find the definition of a community

that could be well applied to the application process. And, it was very difficult. Community is defined in different ways by – there was not really a way that was practical to be transformed into a process. It's almost the same as when you try to define culture. What is culture? Is it the language, is it some activities that a specific population does? What is culture? Culture also is one of those terms that has many different definitions.

So, community was quite challenging. So what we did is to define some kind of criteria for people that apply for community based. The gTLD string – the term string is actually what goes after the characters, the set of character or what goes after the dot. Saying top-level domain or TLD string is exactly the same. Strongly and specifically related to the community named in the application.

So, if I'm applying for the .navaho representing the Navaho community, I have the nexus between my TLD string and the community that I'm claiming to represent.

Have proposed dedicated registration and use policies for registrants, and it's proposed gTLD: So, once the registry's established and the TLD is available, what are the rules for the registration for the gTLD? How is this tied to the community that this applicant claims to represent?

Have it's application endorsed in writing by one or more established institutions: And this was also a very challenging one, because when we were developing the process, there came a question about something that is legitimate versus established. So, I originally come from Brazil and we have a lot of indigenous communities in Brazil that are legitimate but they are not established legally. Formally, there's no really piece of paper that might say this tribe is registered. So also, that was quite a challenging balance about what is established versus legitimate.

There's another – go ahead, of course…

Male: So, what I'm understanding in what you're saying there is that if you had (44:32 unintelligible) if you had a (unintelligible) it would be open and truly open so that anyone (unintelligible) have the name, or I could have it to a restricted community that may be…

Karla Valente: Distributors of, yes.

Male: Distributors, for example, of (44:50 unintelligible) products or I go for a community TLD (unintelligible) have to have strict rules around how you become eligible for that namespace.

Karla Valente: Yes.

Male: Why would I want to be a community? What's the benefit of applying for a TLD in community versus an open (45:06 unintelligible)?

Karla Valente: I don't know if it's a benefit, but if one applies for a community-based TLD and let's say that this applicant has a string that is identical or is similar to another applicant, the community-based applicants can go through what we called a comparative evaluation process, and other open applications have to resort to auction. I think this is one of the main differences.

Male: So, where I was heading is there is a - as an applicant, an inherent advantage to applying as a community if you (45:43 unintelligible) or have enough of a community backing to do so, you would have an advantage, would you not, over someone who is doing an open application?

Karla Valente: Yes. The one advantage – I'm looking from a business standpoint, I just don't know if I understand the word "advantage," because if you apply for a community based, you also might have some restriction rules, which might limit your number of applications and if you have an open, you might not. So, it…

Male: (46:06 Unintelligible) actually getting the TLD.

Karla Valente: So, there is a step in the evaluation process that there is advantage to the community-based applicant, because there is an additional string resolution mechanism there. There's the comparative evaluation.

Male: That was where I was heading looking from the slides, is there an (46:28 unintelligible) but there is an advantage to an applicant if you do have a community doing so (unintelligible).

Karla Valente: Yes, if you also have your string identified in a string contention set, right, which is really a leap of faith, right? You don't know. It really depends on what's applied for or what not.

The important thing is really remember what the GNSO had in mind, what the policy had in mind, and the policy – and Adrian is from the Council, he can tell better than I can – which was to protect the communities. The community-based application was nothing more but to protect small communities. That was the intent of the GNSO.

Adrian Kinderis: If I may elaborate.

Karla Valente: Sure, please.

Adrian Kinderis: Adrian Kinderis and I am a member of the GNSO Council. I think that it's the underlying theme was exactly that, was to ensure that the Internet was being represented in a – well, the TLDs were being represented (47:28 unintelligible) community if they choose to participate, and therefore, to give them preference - which is I guess what Tony's picking up on – preference within the process. So that if I'm the Boy Scouts of America and I'm going to go for .scout, I am in a defined community and therefore, I have a preference to that over somebody. If Tony decides to go for .scouts just using it as an open generic TLD, the Boy Scouts of America being a defined community would have preference over Tony. That's the advantage of (47:59 unintelligible).

It's merely an advantage in securing the TLD. Now, it may be that to make (48:03 unintelligible) Tony's idea, you might make him more money or might sell more domains. It's not about that. I think it's important that everyone understands ICANN's not evaluating on that premise. ICANN stays well out of that. Your business model is up to you. If I only ever registered five domains for being the Boy Scouts of America, ICANN stays well out of that. They asked (48:25 unintelligible) representative of the Boy Scouts community and therefore, am more eligible for the .scouts domain in this particular (unintelligible).

Karla Valente: Yes. And it's also important to remember that all of the applications will be evaluated the same way for the business, financial, operational, technical capability. So, this preference or advantage that you see, it's really down the road in a very specific type of path that an application can take. But, all of the applications pay the same fee and they are evaluated. The string of the applicant itself is evaluated on the same kind of requirements.

Male: The only reason I was bringing that up is that whilst that's true, it is very possible that there is an IDN, whether it's a geographic (49:11 unintelligible) geographic network, a corporate namespace, it's very possible that more than one person may be applying for the same string.

Karla Valente: That's right.

Male: And having a community is an advantage from that perspective to help (49:27 unintelligible).

Karla Valente: That's right. And I saw another hand on the back.

Male: (49:31 Unintelligible) means that would be given to you because you are a community?

Male: Absolutely.

Karla Valente: So…

Male: (49:47 Unintelligible) understand the word preference. Preference means (unintelligible).

Karla Valente: So, there's still the comparative evaluation. There's still a point system. So, it's not just because somebody designated an application is community based and in case there's somebody else that applies for this identical or similar string, it doesn't mean that just because one is community based, they're automatically going to be looked favorably and get the TLD. They still need to prove, from an application and string standpoint, the same as other applicants. And in the comparative evaluation, there is a point system. They still need to go through this point system.

Male: (50:29 Unintelligible) all of the community criteria, so I can't just call myself a community.

(50:36 Crosstalk)

Male: (50:41 Unintelligible) ten people are applying from Scouts, but (50:45 unintelligible) would be given to you.

Male: If I fulfill all of the criteria of a community and I have enough points, I've got the maximum amount of points I can possibly get, therefore, in ICANN's eyes, I'm 100% representative of the community that I was going for. For example, I'm pre-existing, I'm (51:10 unintelligible) domain that I'm going for is reflective of the community I'm representing, yadda, yadda, yadda, therefore, I get the – I am first preference in the line.

Now if there's two communities that go for it, (51:22 unintelligible) different set of circumstances. But, that puts me ahead of any open application, and ICANN's – and you can look on the records to see this - was all about who was going to bring value to the DNS. That was the term that (51:41 unintelligible) number of pages. That is saying that communities will be seen to be bringing more value to the DNS than an open, and to protect them, they give them preference.

Male: So preference means would be given to you if we score evenly. But if I'm better than you and I'm open, I can get it.

Male: You don't get a point score if you're open. (52:03 unintelligible). So, if a community's going for (52:06 unintelligible) you have to get a point score…

Male: So, if I'm open, how can I do better than you if you are a community? There is no way.

Male: You cannot, and that's (52:15 unintelligible) find a community that you are representative of; however, in doing so, you restrict your options. You may not be able to sell as many names. You might not be able to reach as many people. This is the real fundamental understanding here of this whole process is about understanding the difference between community and the difference between open, because they have very different impacts to in the process.

Karla Valente: And depending what you say in your application about the way you're going to serve or represent your community or be contractually obliged to fulfill that promise to this community in the base agreement.

Male: (52:51 unintelligible) change your mind afterwards. If ICANN gives you this as a community, you can't then turn around and say, "Oh, you know what…(52:56 unintelligible). ICANN are going to police this very strictly.

Karla Valente: Exactly. This was one of the concerns we had. Somebody applies as a community based to game the system, and then a few years down the road, they said, "You know what…I'm going to copy this other business plan over there because it's more money." We tried to create a system that avoids the gaming as much as is possible.

So, there's another category or another saddle of TLDs that we believe we are going to see, actually a quite considerable number, because a lot of the potential applicants have actually mentioned that, is the geographic names.

Is this about the community?

Male: Yes.

Karla Valente: Okay.

Male: (53:35 Unintelligible) I do understand that during the evaluation process, there is a time where people that can or parties that can object to certain TLDs from being given to certain party. Would it be possible for a party to dispute, at the same time apply for that TLD?

Karla Valente: Yes. An applicant can be an objector at the same time, yes, at least as the current proposal is on the table, yes. I saw another hand. Yes.

Male: What (54:11 unintelligible) someone applies for a .scout and (unintelligible) they might get it, right?

Karla Valente: Yes.

Male: And then (54:27 unintelligible) over there (unintelligible).

Karla Valente: Yes. So, we were looking at we call post delegation. So let me see if I understand the case. So, the gentleman applied for .scout or .navaho. Let me use the big one, Navaho, .navaho. But he applied as an open application, right, and later on after this registry was granted the TLD, signed an agreement with ICANN, and everything. Finally, somebody from the Navaho community understands what went on and says, "Wait a minute, this is not a TLD that his registry should have. This is my TLD. This is my community."

So, we're looking at what we call the post delegation objections. We don't have as much advanced work on that yet, but we're looking at some possibilities for people to later on take a look and maybe take an action, which is not very easy. Because, once the registry becomes operational, it's not only about this registry. Now there are registrants, there are registrars. There's a lot of parties involved and a lot of parties that are going to be impacted should any change take place. So we are kind of waiting what we can do there.

Male: (55:57 Unintelligible) talk about it, becomes very important (56:10 unintelligible) everybody knows this process is happening and be well aware of those who are applying, so that you can object during the process and not likely after. The unfortunate part is (56:20 Unintelligible) and it's good that ICANN – it's a great question – and it's good that ICANN is actually looking into well what happens if it does fall through the system and somehow someone does get the name (56:31 unintelligible).

Karla Valente: So in another way or another type of TLD that people talk a lot about is geographic names. We have heard geographic names as full spell of the name like .paris. We also have heard from applicants that want to do abbreviations like .nyc for New York City and things like that. But, it seems to me doing these kind of events and talking to communities and potential applicants, there's quite an interest from governments and business people in what we call the geographic names TLD. And this was also another area that we quite complex for us to develop, because when you look at

geographic names and the different languages that names of countries and cities can be spelled and different ways that they can be represented, how can we develop a process or a criteria that is going to be fair and apply well to all of these different variables that we see around the world around those names.

So, one of the things that we are doing is that if an applicant applies for a TLD that is a geographic kind of name, and by that you see that it's going to have sub-regional names on the ISO3166-2 list, capital cities of countries, territories, etc., city names only if the application self-identifies city representation. So, we're using some lists for the geographic domain names, but we are asking that the applicant has an approval or a non-objection of the relevant government. And this is still something that we are working on and it's quite complex, because who is the relevant government and the list of countries.

When we first looked at what list of countries or territories or cities to use, it was a challenge, because the United Nations has one list, ISO has a different list. If you put side by side all the different lists by international organizations that we could maybe use as an authoritative list, they're not standardized. So, this is why the complex area, and we got a lot of advice or we got input from the GAC, which is the Government Advisory Committee of ICANN. And, they come to the board with some advice on what to do with situations like that. In some instances, it has been very good. In some instances, the advice was still too vague to really establish a very firm and transform things into a process, a coherent and very tangible process, because there's still a lot of vagueness around those things.

So, there is going to be, for regional names, there's going to require substantial approval of relevant governments, and the Board asked for a greater specification of the terms "meaningful representation" and "substantial number," of course, right. If we have a region like for instance, the European Union, how many countries of the European Union should a .europe applicant get and from what governments, and so forth. So this is one of the parts of the program that we're still working on to have a better definition, better processes that are clear to the general applicant.

Of course, in terms of government representation, we go over all kinds of discussions. For instance, if you get an approval from one government and it's just between transition of governments in a specific region or country, what does it mean? If by the time of application you have a different government taking on the office, and all kinds of things like that. So, a lot of things are still being discussed.

Country territory, name definition: So, how are we going to define, what lists are we going to use moving forward. For instance, how are we going to separate names. Countries usually have several components to their names. How are we going to do that and how are we going to work around the permutations of the names that are listed above.

Regional names: So we have here the United Nations list of 49 regions. This is one of the lists we are using. We still need to do some development work around that.

Here's a very high-level way of looking into the application process. So…sorry.

Male: Going back to geography, how about natural features, like (1:01:31 unintelligible) .himalaya, how do you deal with that?

Karla Valente: I don't think this is one that we have really pinpointed well what to do. That was in the GAC communiqué actually when they had territories and then cultural. I'm trying to remember the exact words, but they had some identifiers and cultural identifiers that were beyond cities and countries, and this was also very complex too to develop. This is still something we're working on.

Male: (1:02:09 Unintelligible) I'm returning to geographic name. If you have two applications for the same name, (1:02:17 unintelligible) evaluation, would be resolved through an auction if I have two (unintelligible) applications for (unintelligible)?

Karla Valente: We have in the evaluation process a panel that is geographic names. So this panel is going to look whether or not the application is legitimate and they're going to look…

Male: (1:02:55 unintelligible).

Karla Valente: Then we have one mechanism for the string resolution, which is the auction.

Male: So, through the auction at the end of the day.

Karla Valente: The evaluation process, this is very high level and I'm ten minutes from you and lunch, so I'm going to try to be efficient.

So, application period again, is going to be a certain application date and a closing date. During this time, you are going to be expected to use the

online system and answer all of the questions, submit all of the documents, pay for the application evaluation fee.

Then we have an initial evaluation period. During this initial evaluation, we have different panels of experts, like the Geographic Names Panel of experts. We also have somebody that is going to evaluate the applicant from the technical standpoint, from the business and financial standpoint, and so forth. So during this initial evaluation, applications would pass or fail, and extended evaluation is something that an applicant can request in the case of failure. Or, depending on if the application actually is proposing registry services that are more complex than what is originally part of the base agreement or what we're used to, we are going to have an additional panel looking at the services that are proposed by this TLD to ensure that we can offer the services in the future and still keep the stability of the Internet.

Again, at the same time here, we have this objection dispute resolution. The objection and dispute resolution, you have to be very careful here, because the objection period is going to be set. So, there is a beginning and an end for the objection period, so we need to be very careful.

When the applications take place, we are going to see on our Website the list of applicants and the TLDs that are applied for. And when this kind of information is made public, this is where third parties would be able to know whether or not they are entitled to object. So again, the objection and dispute resolution is going to be handled by different organizations.

Then we have what we called here "string contention" and string contention is quite an important part of the program, because if we have several applicants for a TLD string that is either identical or similar, we need to have mechanisms that would allow us to resolve the dispute. Which one of these applicants gets the TLD assuming that all of them have passed the evaluation process and have proven to be capable of managing a TLD? So, the string contention happens. Again, we're going to have a panel. There's an algorithm, but most importantly, there is a panel that is going to look at the strings and identify these groups of strings that are either identical or similar.

And, I don't have much time to expand on this specific topic, but I encourage you to read explanatory memoranda about that, because this is quite complex. If you think about the fact that for instance A can be similar to B or B to C, but A to C not necessarily, so you have all kinds of configurations that we need to look at how this is going to play.

And also, the discussion about when you identify something as being similar, when you are grouping those TLDs, are you looking at that only from a visual

perspective and we're looking at visual similarity? Are we looking at meaning similarity, like happens with trademark? Are we looking also at sound similarity? So what do we mean by similarity. So far, we are dealing with visual similarity, but that has been proposed and there has been feedback from the community saying, "We think this is not quite enough," that is, only the visual similarity. So, I encourage you to read some of this document.

But, if we have a situation in string contention, there are two mechanisms that are going to be used in order to resolve the contention. One is auction, and the second one is comparative evaluation, and this is what was discussed a little bit later. The comparative evaluation is a slightly different process from the auction, but the comparative evaluation only applies to the community-based applicant applications.

Here we talk a little bit about the evaluation process, the fact that the applicant has to demonstrate organizational, operation, technical and financial capability. And the proposed string, again, there's some rules about what you can or you cannot do with a TLD that you're proposing. There is a limit of number of characters for instance or how the characters are composed, etc. So, you need to understand what those limitations are before you apply for your TLD.

We are going to have several evaluation panels and examiners. By the way, right now, we have re-opened expressions of interests for evaluators. So, evaluators are going to be selected based on their level of expertise and right now, if you have companies or there are companies that would like to be a panel of examiners, take a look at what you have – take a look at expressions of interest, take a look at the requirements and apply, because this evaluation or the selection of the evaluators, the panel, has been re-opened.

Objection and dispute resolution: Again, the foregrounds for objections are here, and the intent of each of them, why the GNSO (1:09:04 unintelligible) so string confusion, why did we have that? To avoid user confusion. The infringement of rights, why do we have that? To protect intellectual property and other pre-existing rights. Moral and public order, this was something that was asked to provide additional safeguard and protect interest of governments. Community objection to protect community interest, more specifically, the geographically based, indigenous and religious organizations. String contention, I explained that briefly, so have two or more strings. And here are the dispute resolution mechanisms, and it's quite a lot of material to read on the Applicant Guidebook and explanatory memoranda on those.

Then assuming everything goes through, so the evaluation process, there's no objection or this has been resolved, there's no string contention, or this has been resolved, then the applicant is going to go through what we call the delegation phase.

In this delegation phase, the applicant is expected to sign a base agreement. You find that in the Applicant Guidebook. The staff will recommend to the Board the approval of the application and then there's some technical checks. And IANA has also steps that they need to do in order to add this TLD to the root.

So once your TLD passes the evaluation process, you have to take into account some time for all of these delegation steps to take place.

So what is next for ICANN? We will continue to do outreach and education events. The next ICANN meeting is taking place in Seoul in October. We're looking at having events like that in Latin America, Africa. We just had one in Hong Kong. We had two consultation sessions, one in New York and in London. We're looking at doing more webinars, introducing webinars to ICANN actually. We're going to publish a summary of the consultation events that we had, analysis of the IRT proposal that has to do with the trademark protection issues, the Version 3 of the Applicant Guidebook, the Root Scaling Study. And then, if we don't have a Version 4, the final Applicant Guidebook more towards the end of the year.

And that's about it.

Male: (1:11:21 Unintelligible).

Karla Valente: I don't know how much in delays, but if you have – every time you have a new version, if you're counting the public comments period, if you're counting all of that, you're looking at 0 to 90 days increase in the timeline at least, right, if you have a new version.

You're going to do the speech about the timeline aren't you? Yes, go ahead.

Male: Sorry. I'm not going to sit here and tell ICANN to hurry up. I should but I won't. We've all been wanting new TLDs for some time. However, if you are talking about delaying the launch of the application process any length of time, can you please, on this occasion rather than as you have done at every ICANN meeting since – and I've been going to them since 2000 – since we've talked about new gTLDs (1:12:21 unintelligible). I would prefer, as a business owner and CEO, that you pick a date in the future and you stuck to it.

Reason being, I can then plan for it, and I'm sure that there are expected gTLD applicants in this audience that would like to be able to plan for that. And I'm not saying rush it and hurry it, or any (1:12:40 unintelligible) but if you decide that that's five years from now, then so be it, because what I'll do is Tony here will be out of a job and I'll sack him, and I'll sack all the other guys, and I'll go play golf for five years. And then I'll (1:12:52 unintelligible) Tony to come back, and we'll start the process again. But that gives me some certainty to the process.

So, I am implore ICANN that if they are looking at delaying the process to please pick a date that you are comfortable is going to give you another round of the Guidebook if that's required, five more rounds, I don't care. But give us some certainty as to the time so that we can support our clients that are going for new gTLDs and ensure that they can provide – get together their business plans and importantly, the funding. We're burning $100,000 a month on this process at the moment, my organization, in supporting gTLD applicants. And they're burning money, because we're all waiting for this application process to start. We can stop that and pause that if we have some certainty.

Karla Valente: It's point well taken.

Male: (1:13:38 Unintelligible) into a number of applicants and there is a lot of frustration, because it's moving target. You are asking, and quite right, a lot of (1:13:49 unintelligible). We don't know when we can (1:13:57 unintelligible) so there is really a lot of frustration. I understand all the problem over (unintelligible). What I very much (1:14:06 unintelligible) is a date and so people can stop worrying (unintelligible).

Karla Valente: Point well taken.

Male: (1:14:14 Unintelligible). There is a lot of frustration.

Karla Valente: No, and I think this is a very valid point and is being stressed to the Board and to management, and yes, it's being stressed internally.

Male: Does anyone have a job if that (1:14:33 unintelligible) happen?

Male: I have a comment (1:14:36 unintelligible) and then a question. The first one is just a general comment for those that may be new to this process is that all of this about an IDN, International Domain Name, is that correct? So I could have a new gTLD in Arabic if I wish.

Karla Valente: Yes.

Male: Right. I don't think that was made clear, at least to me. (1:14:54 Unintelligible). I know you're going to talk about IDNs later on today, but…

Karla Valente: Yes. So, IDNs, there are two ways that IDNs are being introduced into the marketplace. One is Fast Track, which has very specific rules that apply and you can read the Fast Track brochure and Behar is going to expand on IDNs after lunch and the new gTLD process. So there are two ways that IDNs are being introduced into the marketplace. You have to understand both programs to see what applies to you.

Male: Thank you. The second one is a question. ICANN receives $185,000 for each of these new applicants. This money goes into a pool and part of that pool, to my understanding, is to be used for public awareness of the gTLD program. Is that correct?

Karla Valente: So, we're looking at – I don't think there is a final word on how this money is going to be allocated. It's cost recover and if there's excess, is that what you're taking about, excess?

Male: (1:15:49 unintelligible) talking about the communications campaign and where the funding (unintelligible). So there is being referred to commonly in the Application Guidebook that there is a four-month education (1:16:01 unintelligible) on the process.

Karla Valente: Yes, education notification, because communication is happening throughout the whole process. It's happening today. So during these four months is where we know the final rules of the game, we know the exact application dates, opening and closing, and we will go around the world and hopefully notify governments and trade associations, and posting in main communication venues. We didn't finalize the specifics of what this is, but the idea is that during the four months, we are going to intensively let organizations and governments around the world know this is taking place and is happening now for sure.

Male: Right. So my question then is have (1:16:41 unintelligible) ICANN formalized the process on how this will occur? Is it another RFP on notifying people globally and you're doing it outsourced? Is it more and more of these meetings where we need to (1:16:52 unintelligible) our friends in the community (unintelligible).

Karla Valente: There is no RFP. We are going to be doing that ourselves. We have a database of governments and we have a database of registries and

registrars around the world, and trade associations. We're going to be working through the databases that we have. We're going to be working through the main media outlets that we know to try to do the best possible to notify people that this is happening.

What we are doing now is to make people aware that this is taking place in the future. This four-month window is really concrete information about when the application happens and who applied. It's not only when the application is going to happen. We also later need to let the world know what was applied for and by whom and things like that. Right.

Male: (1:17:38 Unintelligible) once these TLDs go live that the end user knows that when I see .tree, I don't think the Internet broke, because in the past, they always assume that they have a com and .ae, and now I see .tree, and I think (1:17:53 unintelligible) and that can't be a domain name.

Karla Valente: And probably, that is going to be the most challenging part, which is the user education and the user education I think is more effective, and that's a personal option. It's going to be more effective when we actually know what the TLDs are that are going to be applied for. There are several levels of education and communication that we need to do now.

For instance, one of them has to do with the TLD acceptance. We need to make sure that applications around the world understand and when you, in the future, use your Tony@.tree, they accept your email as a valid email or something.idm, they accept. So, there are several levels of awareness that we need to do beyond just saying, "Hey, new gTLDs launch on that date."

Male: (1:18:41 Unintelligible) from you earlier comments about the four overarching issues, the ones dealing with the policy. (Unintelligible) do you expect (unintelligible) finished by Version 3? And the ones you were worried about were things like the implications of having so many IDN ccTLDs, maybe gTLDs (unintelligible) so many gTLDs in the root. Now, I would have expected that these things should have been handled before the call came out (1:19:11 unintelligible).

Karla Valente: We did preliminary studies on – I think you're talking about root scaling, right, the impact of all of those things on the root. We did some preliminary studies or some preliminary assessment to see whether or not any increased number of gTLDs would impact the root, and the preliminary assessment said it doesn't look like it. Now, what RSSAC and SSAC is doing is expanding that preliminary assessment to incorporate not only IDNs and gTLDs, but also DNS Sec and IPV 6. So it's a little bit more complex. And so far, I haven't heard anything that is an adverse impact on the root system.

But when you say all of the four issues be resolved by Applicant Guidebook Version 3, this is one that I don't think we're going to have the study before the Applicant Guidebook Version 3. I could be happily surprised by RSSAC and SSAC, but I don't think it's going to happen before hand.

Male: Just on the back of what Tony was talking about, while I'm imploring ICANN to do a number of things, could you please make it transparent that communications campaign to the industry, because I think it's important for us to run our activities. So whether that's to pass on to applicants that are applying for TLDs and supporting them, or just for ourselves to be able to position ourselves in line with that kind of communications campaign. Rather than ICANN going and do it independently, it would great if all of us, and the greater ICANN community understood where that was going to go…

Karla Valente: And were involved in that.

Male: Exactly. And, when you were going to forward. So, if we want to put an advertisement in a newspaper ourselves, it can be at the same time as your putting advertisements in the newspaper or whatever. So, the campaigns can be done in conjunction. If ICANN (1:21:01 unintelligible) and all of the sudden, I pick up the newspaper at home, that doesn't really help me in my business or the penetration of new gTLDs (1:21:12 unintelligible).

Karla Valente: And it's not the intent of ICANN. We want to work with the community to do that. We just need to be specific and outline this plan.

Male: Visibility and transparency in that process would be (1:21:22 unintelligible).

Karla Valente: Okay.

Male: Sorry, my last one. Sorry. The question about these gTLD (1:21:29 unintelligible) today is fantastic and great, particularly (1:21:31 unintelligible) new to the process. The meetings in New York and London were more detailed, talked about things like the IRT report, overarching issues, these sorts of things.

Karla Valente: They were different meetings. We have two kinds of meetings that are going on. One were the consultation meetings, and the consultation meetings took place in Sidney, New York, and London, and they were very specific to the overarching issues, actually more specific to trademark protection and malicious behavior discussions. Not as much on the demand and the root scaling, because we didn't have as much of the technical work really done to

discuss a concrete proposal or something with the community at this point. So, those three were really intentionally designed as consultation events.

What we have done in Hong Kong, here, and Latin America and Africa and so forth, they are more outreach and education events, because the goal is to not only expand the know how of people about the new gTLDs, but also to engage new people, new industries in understanding what is coming and how they are going to be directly or indirectly impacted by that. So you're going to see, in the future, more of the outreach/education sessions. The consultations are closed, for now at least.

What we're doing with those consultation sessions is we're looking at all of the verbal feedback, we're looking at transcripts, and we're looking at the feedback forms. And we're going to summarize that for the community and say, "This is the outcome of this consultation event. More importantly, this is what we're going to do with the proposals from the IRT moving forward."

So thank you very much for your time and your attention. This was a very long presentation and I'm going to be available here all afternoon if you need anything. If you have any question, I'll be happy to address your question.

Thank you for your time.

And, I think we have lunch now, and lunch is next door.

END TRANSCRIPT

crowell moring

Reference Material 15.

COMMUNITY PRIORITY EVALUATION PANEL AND ITS PROCESSES

Overview

At the time of submitting the new gTLD application, applicants had the opportunity to designate themselves as a community-based application, as prescribed in the section 1.2.3 of the Applicant Guidebook (AGB).

Community Priority Evaluation (CPE) is defined in section 4.2 of the AGB, and allows a community based-application to undergo an evaluation against the criteria as defined in section 4.2.3 of the AGB, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus win the contention set.

Only community-based applicants are eligible to participate in a community priority evaluation. A determination by a community priority panel, appointed by ICANN, must be made before a community name is awarded to an applicant. This determination will be based on the string and the completeness and validity of supporting documentation.

There are two possible outcomes to a Community Priority Evaluation:

- Determination that the application met the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Prevailed.
- Determination that the application did not meet the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Did not prevail.

Section 4.2.2 of the AGB prescribes that the Community Priority Evaluations will be conducted by an independent panel. ICANN selected the Economist Intelligence Unit (EIU) as the panel firm for Community Priority Evaluations.

The Economist Intelligence Unit

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. Consistency of approach in scoring applications is of particular importance. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

EIU evaluators and core team

The Community Priority Evaluation panel comprises a core team, in addition to several independent[1] evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

CPE Evaluation Process

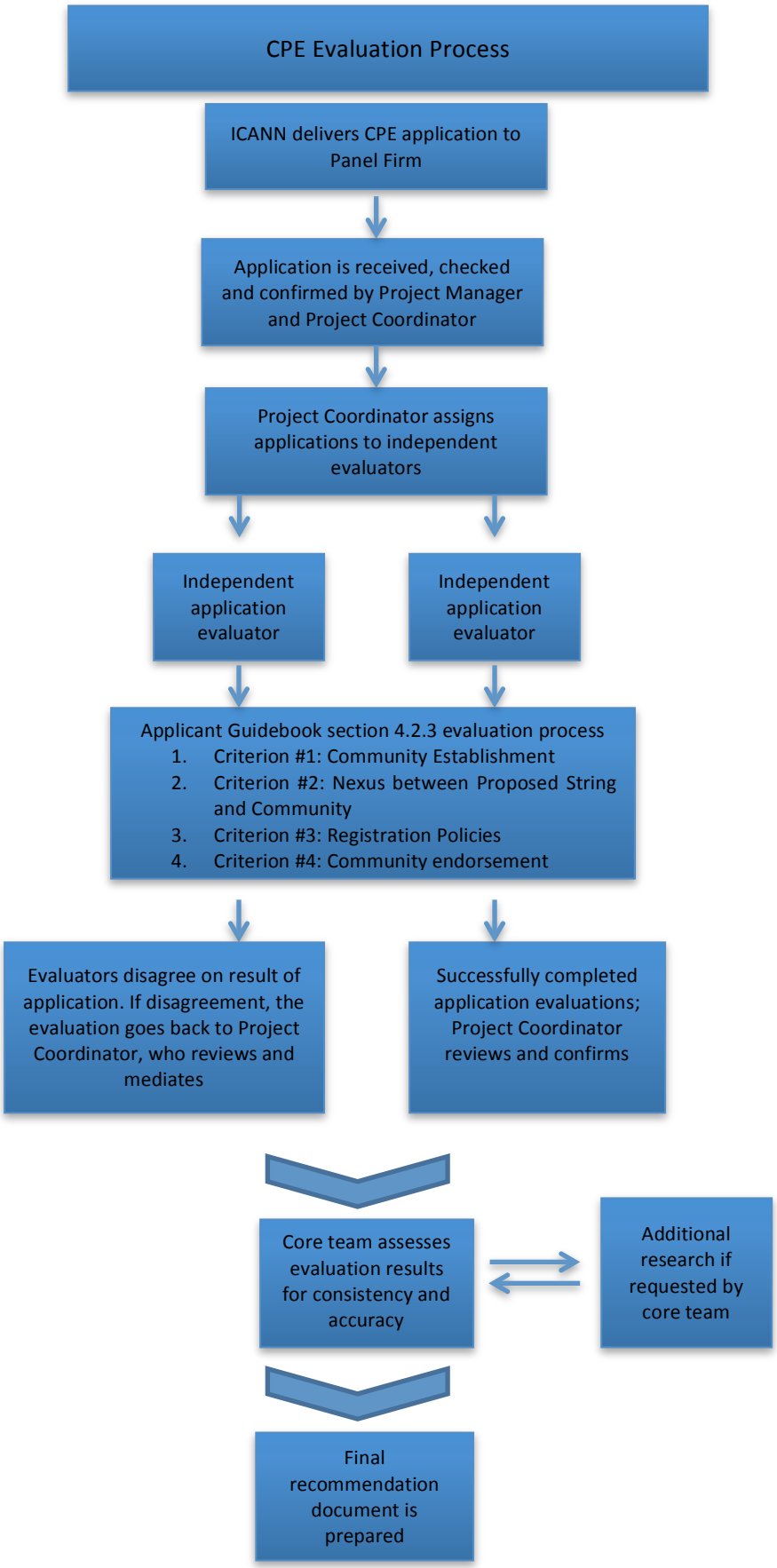
The EIU evaluates applications for gTLDs once they become eligible for review under CPE.
The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

- The Panel Firm's Project Manager is notified by ICANN that an application for a gTLD is ready for CPE, and the application ID and public comments are delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website. The EIU Project Manager reviews the application and associated materials, in conjunction with the EIU Project Coordinator. The Project Coordinator assigns the application to each of two evaluators, who work independently to assess and score the application.
- Each evaluator reviews the application and accompanying documentation, such as letter(s) of support and opposition. Based on this information and additional independent research, the evaluators assign scores to the four CPE criteria as defined in the Applicant Guidebook.
- As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see "Verification of letter(s) of support and opposition" section for further details.)
- When evaluating an application the CPE Panel also considers the public application comments. The public comments are provided to EIU by ICANN following the close of the 14-day window associated with the CPE invitation. For every comment of support/opposition received, the designated evaluator assesses the relevance of the organization of the poster along with the content of the comment. A separate verification of the comment author is not performed as the Application Comments

[1] The term "independent" means that the evaluators do not have any conflict of interest with CPE applicants. It also means that the evaluators sit outside the core EIU team; they provide individual evaluation results based on their assessment of the AGB criteria, application materials, and secondary research without any influence from core team members.

system requires that users register themselves with an active email account before they are allowed to post any comments. However, the evaluator will check the affiliated website to ascertain if the person sending the comment(s) is at that entity/organization named, unless the comment has been sent in an individual capacity.

- Once the two evaluators have completed this process, the evaluation results are reviewed by the Project Coordinator, who checks them for completeness and consistency with the procedures of the Applicant Guidebook.
- If the two evaluators disagree on one or more of the scores, the Project Coordinator mediates and works to achieve consensus, where possible.
- The Project Director and Project Coordinator, along with other members of the core team, meet to discuss the evaluators' results and to verify compliance with the Applicant Guidebook. Justifications for the scores are further refined and articulated in this phase.
- If the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.
- If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.
- When the core team achieves consensus on the scores for each application, an explanation, or justification, for each score is prepared. A final document with all scores and justifications for a given application, including a determination of whether the application earned the requisite 14 points for prevailing, is presented to ICANN.
- The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.
- The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.


CPE Evaluation Process
ICANN delivers CPE application to Panel Firm
Application is received, checked and confirmed by Project Manager and Project Coordinator
Project Coordinator assigns applications to independent evaluators
Independent application evaluator
Independent application evaluator
Applicant Guidebook section 4.2.3 evaluation process
1. Criterion #1: Community Establishment
2. Criterion #2: Nexus between Proposed String and Community
3. Criterion #3: Registration Policies
4. Criterion #4: Community endorsement
Evaluators disagree on result of application. If disagreement, the evaluation goes back to Project Coordinator, who reviews and mediates
Successfully completed application evaluations; Project Coordinator reviews and confirms
Core team assesses evaluation results for consistency and accuracy
Additional research if requested by core team
Final recommendation document is prepared

Verification of letter(s) of support and opposition

As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:

- On a regular basis, the EIU reviews ICANN's public correspondence page (http://newgtlds.icann.org/en/program-status/correspondence) for recently received correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the public correspondence is provided to the evaluators assigned to the evaluation for review.
- For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter verification process.
- With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.
- The exceptions noted above regarding sending verification letter(s) include but may not be limited to:
    - If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.
    - If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.
- The verification email for letter(s) of support/opposition requests the following information from the author of the letter:
    - Confirmation of the authenticity of the organization(s) letter.
    - Confirmation that the sender of the letter has the authority to indicate the organization(s) support/opposition for the application.
    - In instances where the letter(s) of support do not clearly and explicitly endorse the applicant, the verification email asks for confirmation as to whether or not the organization(s) explicitly supports the community based application.
- To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.
- A verbal acknowledgement is not sufficient. The contacted individual must send an email to the EIU acknowledging that the letter is authentic.

crowell moring

Reference Material 16.

New Generic Top-Level Domains

Evaluation Panels Selection Process

The launch of the new gTLD application round requires independent evaluation panels to assess whether applicants meet the minimum criteria as specified in the Applicant Guidebook.

Here you'll find a repository of information and documents associated with the selection process of these evaluation panels.

日本語

EVALUATION PANELS SELECTION PROCESS

ICANN's review and selection process of independent evaluators had 3 phases:

1. General criteria scoring to identify a short list of candidates per panel
2. Oral presentations with short-listed candidates
3. Presentation of recommended candidates to Board

Date of Publication	Subject	Deadline	Details
26 October 2011	Evaluation Panel Firms announced	n/a	Preparing Evaluators for the New gTLD Application Process (/preparing-evaluators-22nov11-en)
23 March 2010	Update on Phase 2 of selection process	n/a	Phase 2 of the selection process has been completed. ICANN met the candidate's leadership and core team members to evaluate in detail the candidate's approach, experience, technical competency, commitment, and proposed costing model. The next and final phase will select the Evaluation Panelists providers and notify the Board of final selections. The retention of the Evaluation Panelist is expected to occur in 2011 and names of the selected evaluation panelists will be published at that time.
11 December 2009	Update on Phase 1 of selection process	n/a	ICANN Continues Reporting on the Selection Process of Independent Evaluators for the New gTLD Program (http://www.icann.org/en/announcements/announcement-11dec09-en.htm)
25 October 2009	Panels Selection Process	n/a	List of Respondents (http://www.icann.org/en/announcements/announcement-25oct09-en.htm)
8 August 2009	Respondents' Conference Call Original Transcript		• Respondents' Conference Call Q&A Transcript (http://www.icann.org/en/topics/new-gtlds/transcript-eoi-11aug09-en.pdf) [72 KB] • The Question & Answer session (http://www.icann.org

			/en/topics/new-gtlds/eoi-q-and-a-27aug09-en.pdf) [152 KB]
31 July 2009	EOI Re-opened: New gTLD Program: Update on Independent Evaluators Search (http://www.icann.org/en/announcements/announcement-2-31jul09-en.htm)	15 September 2009 - 23:59 UTC	**(Please note: new Costs Template Exhibit A, is attached at the back of the original EOI)** • *Applicant Evaluation Teams (Technical and Financial Evaluation)* (http://www.icann.org/en/topics/new-gtlds/eoi-app-eval-31jul09-en.pdf) [172 KB] • *Geographic Name Evaluation* (http://www.icann.org/en/topics/new-gtlds/eoi-geo-names-31jul09-en.pdf) [184 KB] • *String Similarity Examiners* (http://www.icann.org/en/topics/new-gtlds/eoi-string-sim-31jul09-en.pdf) [176 KB] • *Community Priority Evaluation Panel — formerly the Comparative Evaluation Panel* (http://www.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf) [176 KB]
			Q&A • **Previous call for expressions of interest open submissions period:** http://www.icann.org/en/announcements/announcement-2-02apr09-en.htm (http://www.icann.org/en/announcements/announcement-2-02apr09-en.htm) and http://www.icann.org/en/announcements/announcement-25feb09-en.htm (http://www.icann.org/en/announcements/announcement-25feb09-en.htm)
22 April 2009	EOI Extended: Deadline for Independent Evaluator Applications Extended (http://www.icann.org/en/announcements/announcement-2-02apr09-en.htm)	11 June 2009 - 23:59 UTC	• *Applicant Evaluation Teams (Technical and Financial Evaluation)* • *Geographic Name Evaluation* • *String Similarity Examiners* • *Comparative Evaluation Panel*
25 February 2009	EOI: New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (http://www.icann.org/en/announcements/announcement-25feb09-en.htm)	13 April 2009 - 23:59 UTC	• Applicant Evaluation Panel - Financial or Technical (http://www.icann.org/en/topics/new-gtlds/eoi-app-eval-25feb09-en.pdf) [72 KB] • Geographic Names Panel (http://www.icann.org/en/topics/new-gtlds/eoi-geonames-25feb09-en.pdf) [76 KB] • String Similarity Examiners (http://www.icann.org/en/topics/new-gtlds/eoi-string-sim-25feb09-en.pdf) [76 KB] • Comparative Evaluation Panel (http://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf) [80 KB]

Site Map

crowell moring

Reference Material 17.

ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs)
for a New gTLD Comparative Evaluation Panel

25 February 2009

1 Introduction

Generic top-level domains (gTLDs) are an important part of the structure of the DNS. Examples of existing gTLDs include .BIZ, .COM, .INFO and .JOBS. A complete listing of all gTLDs is available at http://www.iana.org/gtld/gtld.htm. The responsibility for operating each gTLD (including maintaining the authoritative registry of all domain names registered within that gTLD) is delegated to a particular organization. These organizations are referred to as "registry operators" or "sponsors," depending upon the type of agreement they have with ICANN.

Following years of community-driven policy development that recommended the introduction of new gTLDs, ICANN is preparing a process to receive applications to operate new generic top-level domain (gTLD) registries. This new program is described in detail at http://www.icann.org/en/topics/new-gtld-program.htm. ICANN has published a draft Applicant Guidebook at http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm that provides detailed information about the process for applying to operate a new gTLD. The Applicant Guidebook will constitute the request for proposals (RFP) for new gTLDs.

The development of the Applicant Guidebook is an iterative process, which includes seeking public comment on draft versions. The comment resulting from the publication of the first draft Applicant Guidebook led to the identification of several overarching issues that will require additional examination and discussion to resolve. Although ICANN has prepared a revised Applicant Guidebook, the information in the Guidebook is not yet fixed and the new gTLD process is not yet launched. While that work goes forward, steps will also be taken to assure there will be a robust, effective and timely evaluation process in place to review applications once the round is launched. Retaining competent evaluation panels with sufficient expertise, resources and geographic diversity is expected to take many months. Some preliminary steps, such as the publication of this call for expressions of interest, are being taken now, even as important decisions regarding the overall implementation process are still being considered.

ICANN is now seeking expertise to enable the formation of panels to evaluate applications against the criteria published in the Applicant Guidebook. Expressions of Interest (EOIs) in providing management and evaluation services are sought in the following five areas of assessment:

1. Has the applicant demonstrated their technical capability to run a registry for the purpose specified in the application, as measured against the criteria in the Applicant Guidebook?

2. Has the applicant demonstrated their financial and organizational capability, as measured against the criteria in the Applicant Guidebook?

3. In the context of the criteria specified in the Applicant Guidebook, does the gTLD represent a geographical name, and if so, have authenticated support from the relevant government?

4. Will the introduction of the proposed gTLD string likely result in user confusion with (i.e., due to similarity with) (i) a reserved name; (ii) an existing TLD; or (iii) other proposed gTLDs?

5. In the context of resolving contention among two or more applicants for the same or similar gTLD string, does an applicant claim to represent a community and if so, satisfy the criteria for prevailing in a comparative evaluation?

ICANN also seeks information from potential providers regarding estimation of reasonable timeframes for each type of evaluation (e.g., per string or per application) and anticipated costs associated with conducting the evaluation. The cost and time to process an application are critical factors that must be carefully considered in the information provided by the interested parties.

This EOI refers to question 5 above and describes the criteria and requirements for providers that seeking to perform the comparative evaluation of applications for identical (or very similar) strings. The comparative evaluation seeks to award a priority to applications representing communities. Providers should respond by 13 April 2009 23:59 UTC with the required information that is described below. From the information provided, ICANN will invite respondents to exchange additional information.

Contracts will not be awarded from this EOI, but ICANN expects to use the responses to identify entities capable of providing the various evaluation roles and better refine the costs and time frames for conducting evaluation as part of the new gTLD process.

2 Background

The Internet Corporation for Assigned Names and Numbers (ICANN) is a not-for-profit, multi-stakeholder, international organization that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) top-level domain name system management, and root server system management functions. ICANN's 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 operation of theseI systems. It coordinates policy development reasonably and appropriately related to these technical functions, consistent with ICANN's core values. Among these values are:

- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet;

- Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment;

- Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; and

- 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.

New gTLDs have previously been established based on proposals that were submitted to ICANN during two specific application periods. Materials from the 2000 application round, which led to the delegation of .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME and .PRO, are available at http://www.icann.org/tlds/app-index.htm. Materials from the 2003 round, which led to the delegation of .ASIA, .CAT, .JOBS, .MOBI, .TEL and .TRAVEL, are available at http://www.icann.org/tlds/stld-apps-19mar04. Applications received during both of these rounds were evaluated on the basis of instructions and criteria contained in the respective RFPs published by ICANN. Applicants that were successful went on to negotiate and enter gTLD agreements with ICANN.

ICANN is now seeking a provider to supply and enable comparative evaluation of applications in cases of contention involving two or more applications for the same or similar strings, when one of the applicants indicates that it represents a community. (Note: A separate EOI is being issued for experts to assist with the Applicant Evaluation, i.e., assessment of technical and financial criteria; geographic names; and string similarity. It is recommended that potential providers review all drafts of the Applicant Guidebook and other resources on the new gTLD program available at http://www.icann.org/en/topics/new-gtld-program.htm).

The number of applications that will be received is unknown; however it is estimated to be several hundred or more. It is therefore vital that the provider be able to convene – or have the capacity to convene - as many panels of evaluators as is necessary to evaluate all the applications, in a timely and complete manner. For example, the provider may wish to consider the process it will use to evaluate applications, and how that process will scale if 100, 250, 500, 700, 900 or more applications are received. There should be a statement describing how 2000 applications would be processed (even though this is thought to be highly unlikely). The provider should also consider how the number of applications may impact evaluation timeframes and costs of evaluations.

It is expected that there will be more than one application round. Therefore, there may be an opportunity for cyclical work in evaluating applications. In the longer term, the work may become continuous with new gTLD applications being submitted and evaluated at any time.

In addition, given the international nature of the ICANN community and the likelihood that applications will be received for both ASCII and non-ASCII new gTLDs, it will be important that the provider can convene – or have the capacity to convene - globally diverse panels familiar with internationalized domain names (IDNs). A non-ASCII domain name, also called an IDN, is one that utilizes characters from the full Unicode set rather than just the “letter-digit-hyphen” characters specified in the original DNS standards. Using IDNs, for example, make it possible to add TLDs in Arabic, Hebrew, Cyrillic and other scripts. For more information on IDNs, please visit http://www.icann.org/en/topics/idn/.

3 Comparative evaluation

If multiple Applicants request the same string, or strings that are determined to be unacceptably similar[1] to one another, a “string contention” process is invoked to determine which Applicant(s) should be permitted to proceed. The new gTLD policy states a claim to support a community by

[1] String similarity is determined through a separate process that takes place prior to comparative evaluation.

one party will be a reason to award priority to that application. “Comparative evaluation” refers to the process whereby the claims of one or more Applicants to represent defined communities[2] are compared with respect to a set of evaluation criteria to determine if such a priority should be given. The process and the evaluation criteria are specified in Module 4 of the Applicant Guidebook and in the new gTLD program explanatory memorandum “Resolving String Contention.” See appendix A, “Applicant Guidebook section describing Comparative Evaluation Process.”

Comparative evaluation is used only when a contention set[3] identified during the string contention process contains one or more self-declared community Applicant(s) and at least one of those community Applicants declared a preference for comparative evaluation. When these conditions are met, comparative evaluation applies to all of the community Applicants in a contention set, including those that did not declare a preference for comparative evaluation during the Application Phase.

Community Applicants will be asked to respond to a set of questions during the Application Phase to provide information should a comparative evaluation be necessary. Before a comparative evaluation begins, an Applicant may be asked by the evaluation service provider sought here to furnish additional information to substantiate its claim to represent the designated community.

String contention is resolved only after Applications have been subjected to and passed other evaluations, however, comparative evaluation is an independent analysis which does not consider any other results.[4]

When comparative evaluation is invoked during the string contention resolution process, a comparative evaluation panel will review and score the community Applicants according to four criteria:

- Nexus between proposed string and community
- Dedicated registration policies
- Community establishment
- Community endorsement

These criteria are defined in Module 4 of the Applicant Guidebook, which also defines the way in which the string contention process incorporates the various possible outcomes of comparative evaluation. The scoring process requires that the evaluators exercise considerable subjective judgment concerning the extent to which each community Applicant meets or fails to meet the standards defined for each of the four criteria. (A section of the Guidebook describing the criteria and scoring is attached in Appendix A.)

4 Criteria

ICANN anticipates expressions of interest (i.e., answers to questions posed in section 5 below) from providers to conduct the comparative evaluation of applications in contention must meet the following criteria:

[2] Comparative evaluation applies only to Applicants claiming to represent different defined communities. Applicants competing to represent the same defined community must resolve their differences outside of the new gTLD program.
[3] The term “contention set” is defined in Module 4 of the Applicant Guidebook.
[4] An Application that fails at any point during IE or EE will, of course, never be involved in string contention.

1. The provider will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
2. The provider must be able to convene (either in advance or rapidly on-demand) a linguistically and culturally diverse panel capable (even though the applications will be submitted in English), in the aggregate, of evaluating Applications from a wide variety of different communities, which may:
   - be local or global in scope;
   - be based on geography, political affiliation, common interests, or other factors;
   - involve either commercial or non-commercial interests (or both); and
   - be either objectively defined or self-defining.[5]
3. The provider must propose a structure and plan for the comparative evaluation panel that is viable for a range in number of Applications, as the number of Applications, and the percentage of those that will invoke the comparative evaluation process, will not be known in advance. It is anticipated that the percentage of applications requiring comparative evaluation will be relatively small compared to the total number. Applications requiring comparative evaluation must: be a self-declared community-based TLD; be in contention with other applicants; and elect comparative evaluation.
4. Considering the comparative evaluation criteria defined in Module 4 of the Applicant Guidebook and described in Section 3 of this document, the provider must propose a panel that is capable of:
   - exercising consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)
   - reaching conclusions that are compelling and defensible, and
   - documenting the way in which it has done so in each case.
5. The provider must convene and operate the comparative evaluation panel so as to prevent communication between the panel (or any of its members) and any party with an interest in the Applications being evaluated, except as may be explicitly permitted by the process as defined in the Applicant Guidebook, and to avoid conflicts of interest.
6. The provider should be comfortable that the Applicant Guidebook is comprehensive and satisfactorily expresses all selection criteria, but understand that it is not finalized. It is possible, that the provider will be selected before the Applicant Guidebook is finalized, it will have the opportunity to review the text to ensure that the basis for the evaluation is clear. The criteria must be objective, measurable, publicly available at the outset of the evaluation process, and described fully in the Applicant Guidebook. All applications will be evaluated against these criteria.
7. The evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.

5 Response to EOI Requirements

Interested parties should respond to each of the eight subject areas below. Responses will be gauged on the basis of the criteria defined in this document and Applicant Guidebook. Candidates desiring to express their interest to ICANN in the comparative evaluation role in the new gTLD program should provide the following:

[5] An example of an objectively defined community is “the registered voters in the city of Perth, Australia”; an example of a self-defining community is “people who are interested in dogs.”

1. A Statement of Suitability that includes a detailed description of the candidate's ability to perform the work described in the previous section which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information.

2. Evidence of the candidate's knowledge of and familiarity with ICANN, its role, structure and processes, including the Internet's Domain Name System (DNS) and past gTLD application and evaluation rounds.

3. The *curriculum vitae* for each person proposed by the candidate to manage or lead work on this project, the candidate's selection process for persons being proposed to ICANN, and explanation of the role that each named person would play. Also indicate the experience and availability of proposed panelists. The submission should identify any potential conflicts that would prevent them from making an objective evaluation of any application and how the conflict can be addressed.

4. A warrant that the candidate, if selected, will operate under ICANN's non-disclosure agreement and standard consulting agreement, and that neither the candidate nor any individual who might be engaged to work on this project (whether or not declared pursuant to (4) above) has a known conflict of interest.

5. A statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency.

6. Considering the nature of the expertise necessary for evaluating applications for financial and technical criteria at a global scale, a statement of the candidate's plan for ensuring that the evaluation teams will consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel.

7. Project and operational timelines.

    a. A proposed work schedule for planning and starting panel operations including key milestone dates, consistent with but more detailed than those specified in this document.
    b. Projected targets for the time frame necessary for it to complete a thorough and careful evaluation of all applications. Identification of volumes of applications that can be processed in those timeframes.

8. Costs. The candidate should provide a detailed statement of the proposed fee structure, including any variable provisions that may be based on the number of comparative evaluations conducted, the number of comparative evaluations that involve IDNs, or other factors.

6 Deadline

Interested providers must submit expressions of interest by email to compara-eval-eoi@icann.org by 13 April 2009, 23:59 UTC. A confirmation email will be sent for each submission received within one business day.

Also send queries regarding this request to compara-eval-eoi@icann.org. Questions will be accepted until 3 April 2009, 23:59 UTC. Queries and answers will be posted to a page on the ICANN website dedicated to this purpose.

If selected, the successful candidate is expected to be ready to assist ICANN with the finalization of the Applicant Guidebook, prepare for the evaluation phase, and be ready to begin work within four months after release of the final Applicant Guidebook.

Thanks you for your interest.

crowell moring

Reference Material 18.

ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs)
for a New gTLD Community Priority Evaluation Panel – formerly Comparative Evaluation Panel

31 July, 2009

1 Introduction

Generic top-level domains (gTLDs) are an important part of the structure of the DNS. Examples of existing gTLDs include .BIZ, .COM, .INFO and .JOBS. A complete listing of all gTLDs is available at http://www.iana.org/gtld/gtld.htm. The responsibility for operating each gTLD (including maintaining the authoritative registry of all domain names registered within that gTLD) is delegated to a particular organization. These organizations are referred to as "registry operators" or "sponsors," depending upon the type of agreement they have with ICANN.

Following years of community-driven policy development that recommended the introduction of new gTLDs, ICANN is preparing a process to receive applications to operate new generic top-level domain (gTLD) registries. This new program is described in detail at http://www.icann.org/en/topics/new-gtld-program.htm. ICANN has published a draft Applicant Guidebook at http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm that provides detailed information about the process for applying to operate a new gTLD. The Applicant Guidebook will constitute the request for proposals (RFP) for new gTLDs.

The Applicant Guidebook is still in development and ICANN is seeking public comment on draft versions. Although ICANN has prepared a revised Applicant Guidebook, the information in the Guidebook is not yet settled. While that work goes forward, steps are being taken to assure there will be a robust, effective and timely evaluation process in place to review applications once the round is launched. Retaining competent evaluation panels with sufficient expertise, resources and geographic diversity is key to an effective launch. Therefore, steps such as the publication of this call for expressions of interest are being taken now, even as final decisions regarding the application and evaluation process are still being considered.

ICANN is now seeking expertise to enable the formation of panels to evaluate applications against the criteria published in the Applicant Guidebook. Expressions of Interest (EOIs) in providing management and evaluation services are sought in the following five areas of assessment:

1. Has the applicant demonstrated their technical capability to run a registry for the purpose specified in the application, as measured against the criteria in the Applicant Guidebook?

2. Has the applicant demonstrated their financial and organizational capability, as measured against the criteria in the Applicant Guidebook?

3. In the context of the criteria specified in the Applicant Guidebook, does the gTLD represent a geographical name, and if so, have authenticated support from the relevant government?

4. Will the introduction of the proposed gTLD string likely result in user confusion with (i.e., due to similarity with) (i) a reserved name; (ii) an existing TLD; or (iii) other proposed gTLDs?

5. In the context of resolving contention among two or more applicants for the same or similar gTLD string, does an applicant claim to represent a community and if so, satisfy the criteria for prevailing in a comparative evaluation?

ICANN also seeks information from potential providers regarding estimation of reasonable timeframes for each type of evaluation (e.g., per string or per application) and anticipated costs associated with conducting the evaluation. The cost and time to process an application are critical factors that must be carefully considered in the information provided by the interested parties.

This EOI refers to question 5 above and describes the criteria and requirements for providers that seeking to perform the comparative evaluation of applications for identical (or very similar) strings. The comparative evaluation seeks to award a priority to applications representing communities. Providers should respond by 15 September, 2009 23:59 UTC with the required information that is described below. From the information provided, ICANN will invite respondents to exchange additional information.

Contracts will not be awarded from this EOI, but ICANN expects to use the responses to identify entities capable of providing the various evaluation roles and better refine the costs and time frames for conducting evaluation as part of the new gTLD process.

2 Background

The Internet Corporation for Assigned Names and Numbers (ICANN) is a not-for-profit, multi-stakeholder, international organization that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) top-level domain name system management, and root server system management functions. ICANN's 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 operation of these systems. It coordinates policy development reasonably and appropriately related to these technical functions, consistent with ICANN's core values. Among these values are:

- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet;
- Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment;
- Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; and
- 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.

New gTLDs have previously been established based on proposals that were submitted to ICANN during two specific application periods. Materials from the 2000 application round, which led to the delegation of .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME and .PRO, are available at http://www.icann.org/tlds/app-index.htm. Materials from the 2003 round, which led

to the delegation of .ASIA, .CAT, .JOBS, .MOBI, .TEL and .TRAVEL, are available at http://www.icann.org/tlds/stld-apps-19mar04. Applications received during both of these rounds were evaluated on the basis of instructions and criteria contained in the respective RFPs published by ICANN. Applicants that were successful went on to negotiate and enter gTLD agreements with ICANN.

ICANN is now seeking a provider to supply and enable comparative evaluation of applications in cases of contention involving two or more applications for the same or similar strings, when one of the applicants indicates that it represents a community. (Note: A separate EOI is being issued for experts to assist with the Applicant Evaluation, i.e., assessment of technical and financial criteria; geographic names; and string similarity. It is recommended that potential providers review all drafts of the Applicant Guidebook and other resources on the new gTLD program available at http://www.icann.org/en/topics/new-gtld-program.htm).

The number of applications that will be received is unknown; however it is estimated that there will be several hundred applications (and ICANN is planning for the unlikely circumstance of up to 2000 applications). Comparative evaluations will occur only when:

- there are applications for identical (or very similar) strings, and
- one or more of those contending applications are a self-declared community based applicant, and
- the community based applicant(s) opt for comparative evaluation as a method for resolving the contention.

Therefore, it is anticipated that the number of comparative evaluations is a relatively small fraction of the total number of applications.

It is important that the provider be able to convene – or have the capacity to convene - as many panels of evaluators as is necessary to evaluate the comparative evaluation cases as they come up in a flexible, timely and complete manner. For example, the provider may wish to consider the process it will use to evaluate applications, and how that process will scale depending on the number of applications involved. The provider should also consider how the number of applications may impact evaluation timeframes and costs of evaluations.

It is expected that there will be more than one application round. Therefore, there may be an opportunity for cyclical work in evaluating applications. In the longer term, the work may become continuous with new gTLD applications being submitted and evaluated at any time.

In addition, given the international nature of the ICANN community and the likelihood that applications will be received for both ASCII and non-ASCII new gTLDs, it will be important that the provider can convene – or have the capacity to convene - globally diverse panels familiar with internationalized domain names (IDNs). A non-ASCII domain name, also called an IDN, is one that utilizes characters from the full Unicode set rather than just the “letter-digit-hyphen” characters specified in the original DNS standards. Using IDNs, for example, make it possible to add TLDs in Arabic, Hebrew, Cyrillic and other scripts. For more information on IDNs, please visit http://www.icann.org/en/topics/idn/.

3 Comparative evaluation

If multiple Applicants request the same string, or strings that are determined to be unacceptably similar[1] to one another, a "string contention" process is invoked to determine which Applicant(s) should be permitted to proceed. The new gTLD policy states a claim to support a community by one party will be a reason to award priority to that application. "Comparative evaluation" refers to the process whereby the claims of one or more Applicants to represent defined communities[2] are compared with respect to a set of evaluation criteria to determine if such a priority should be given. The process and the evaluation criteria are specified in Module 4 of the Applicant Guidebook and in the new gTLD program explanatory memorandum "Resolving String Contention." See appendix A, "Applicant Guidebook section describing Comparative Evaluation Process."

Comparative evaluation is used only when a contention set[3] identified during the string contention process contains one or more self-declared community Applicant(s) and at least one of those community Applicants declared a preference for comparative evaluation. When these conditions are met, comparative evaluation applies to all of the community Applicants in a contention set, including those that did not declare a preference for comparative evaluation during the Application Phase.

Community Applicants will be asked to respond to a set of questions during the Application Phase to provide information should a comparative evaluation be necessary. Before a comparative evaluation begins, an Applicant may be asked by the evaluation service provider sought here to furnish additional information to substantiate its claim to represent the designated community.

String contention is resolved only after Applications have been subjected to and passed other evaluations, however, comparative evaluation is an independent analysis which does not consider any other results.[4]

When comparative evaluation is invoked during the string contention resolution process, a comparative evaluation panel will review and score the community Applicants according to four criteria:

- Nexus between proposed string and community
- Dedicated registration policies
- Community establishment
- Community endorsement

These criteria are defined in Module 4 of the Applicant Guidebook, which also defines the way in which the string contention process incorporates the various possible outcomes of comparative evaluation. The scoring process requires that the evaluators exercise considerable subjective judgment concerning the extent to which each community Applicant meets or fails to meet the standards defined for each of the four criteria. (A section of the Guidebook describing the criteria and scoring is attached in Appendix A.)

---

[1] String similarity is determined through a separate process that takes place prior to comparative evaluation.

[2] Comparative evaluation applies only to Applicants claiming to represent different defined communities. Applicants competing to represent the same defined community must resolve their differences outside of the new gTLD program.

[3] The term "contention set" is defined in Module 4 of the Applicant Guidebook.

[4] An Application that fails at any point during IE or EE will, of course, never be involved in string contention.

4 Criteria

ICANN anticipates expressions of interest (i.e., answers to questions posed in section 5 below) from providers to conduct the comparative evaluation of applications in contention must meet the following criteria:

1. The provider will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
2. The provider must be able to convene (either in advance or rapidly on-demand) a linguistically and culturally diverse panel capable (even though the applications will be submitted in English), in the aggregate, of evaluating Applications from a wide variety of different communities, which may:
   - be local or global in scope;
   - be based on geography, political affiliation, common interests, or other factors;
   - involve either commercial or non-commercial interests (or both); and
   - be either objectively defined or self-defining.[5]
3. The provider must propose a structure and plan for the comparative evaluation panel that is viable for a range in number of Applications, as the number of Applications, and the percentage of those that will invoke the comparative evaluation process, will not be known in advance. It is anticipated that the percentage of applications requiring comparative evaluation will be relatively small compared to the total number. Applications requiring comparative evaluation must: be a self-declared community-based TLD; be in contention with other applicants; and elect comparative evaluation.
4. Considering the comparative evaluation criteria defined in Module 4 of the Applicant Guidebook and described in Section 3 of this document, the provider must propose a panel that is capable of:
   - exercising consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)
   - reaching conclusions that are compelling and defensible, and
   - documenting the way in which it has done so in each case.
5. The provider must convene and operate the comparative evaluation panel so as to prevent communication between the panel (or any of its members) and any party with an interest in the Applications being evaluated, except as may be explicitly permitted by the process as defined in the Applicant Guidebook, and to avoid conflicts of interest.
6. The provider should be comfortable that the Applicant Guidebook is comprehensive and satisfactorily expresses all selection criteria, but understand that it is not finalized. It is possible, that the provider will be selected before the Applicant Guidebook is finalized, it will have the opportunity to review the text to ensure that the basis for the evaluation is clear. The criteria must be objective, measurable, publicly available at the outset of the evaluation process, and described fully in the Applicant Guidebook. All applications will be evaluated against these criteria.
7. The evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.

[5] An example of an objectively defined community is “the registered voters in the city of Perth, Australia”; an example of a self-defining community is “people who are interested in dogs.”

5 Response to EOI Requirements

Interested parties should respond to each of the eight subject areas below. Responses will be gauged on the basis of the criteria defined in this document and Applicant Guidebook. Candidates desiring to express their interest to ICANN in the comparative evaluation role in the new gTLD program should provide the following:

1. A Statement of Suitability that includes a detailed description of the candidate's ability to perform the work described in the previous section which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information.

2. Evidence of the candidate's knowledge of and familiarity with ICANN, its role, structure and processes, including the Internet's Domain Name System (DNS) and past gTLD application and evaluation rounds.

3. The *curriculum vitae* for each person proposed by the candidate to manage or lead work on this project, the candidate's selection process for persons being proposed to ICANN, and explanation of the role that each named person would play. Also indicate the experience and availability of proposed panelists. The submission should identify any potential conflicts that would prevent them from making an objective evaluation of any application and how the conflict can be addressed.

4. A warrant that the candidate, if selected, will operate under ICANN's non-disclosure agreement and standard consulting agreement, and that neither the candidate nor any individual who might be engaged to work on this project (whether or not declared pursuant to (4) above) has a known conflict of interest.

5. A statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency.

6. Considering the nature of the expertise necessary for evaluating applications for financial and technical criteria at a global scale, a statement of the candidate's plan for ensuring that the evaluation teams will consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel.

7. Project and operational timelines.

    a. A proposed work schedule for planning and starting panel operations including key milestone dates, consistent with but more detailed than those specified in this document.
    b. Projected targets for the time frame necessary for it to complete a thorough and careful evaluation of all applications. Identification of volumes of applications that can be processed in those timeframes.

8. Costs. The candidate should provide a detailed statement of the proposed fee structure, including any variable provisions that may be based on the number of comparative evaluations conducted, the number of comparative evaluations that involve IDNs, or other factors. See attached, Exhibit A Cost Template.

6 Deadline

Interested providers must submit expressions of interest by email to compara-eval-eoi@icann.org by 15 September, 2009, 23:59 UTC. A confirmation email will be sent for each submission received within one business day.

Also send queries regarding this request to compara-eval-eoi@icann.org. Questions will be accepted until 24 August, 2009, 23:59 UTC. Queries and answers will be posted to a page on the ICANN website dedicated to this purpose.

If selected, the successful candidate is expected to be ready to assist ICANN with the finalization of the Applicant Guidebook, prepare for the evaluation phase, and be ready to begin work within four months after release of the final Applicant Guidebook.

Thanks you for your interest.

EXHIBIT A COST TEMPLATE

	No of Applications to be Reviewed (A)	Cost per Evaluation Panel: Financial (B)	Technical (C)	Community Priority (D)	Geographic Names (E)	String Similarity (F)	Total Cost per Application (G = B+C+D+E+F)	Total Cost (A x G)
Start Up Costs*								
	100							
	300							
	500							
	1,000							
Initial Evalution								
	100							
	300							
	500							
	1,000							

Other Costs

Details of Other Costs and how they might scale based on the number of applications to be reviewed must be included in your response.

** Estimated costs to integrate your resources and processes with ICANN's application processing program. Please provide detail of your Start Up costs within the cost section of your response.*

crowell moring

Reference Material 19.

New Generic Top-Level Domains

Français 日本語

PREPARING EVALUATORS FOR THE NEW GTLD APPLICATION PROCESS

by Michael Salazar | 22 November 2011

The names of the global firms that will serve as the evaluation panels for new generic Top Level Domain (gTLD) applications were recently announced during the ICANN 42 Dakar meeting.

As Program Director for the New gTLD Program (http://newgtlds.icann.org/) responsible for the design and deployment of the New gTLD Application Processing Program and managing the process as it takes flight, I am extremely proud of the selections we have made. All of the organizations chosen are highly qualified, global, and are respected experts in the areas for which they have been selected.

Whom did we select?

We followed a thorough, fair, detailed process to select the evaluation panels. The process, which is described on our website under "Call for Applicant Evaluation Panel Expressions of Interest (http://www.icann.org/en/announcements/announcement-25feb09-en.htm)" began in February of 2009. When I came on board in July 2009 I quickly understood the heightened level of interest in providing services for this relatively new Program. In all, twelve global firms formally submitted responses. Out of that pool, we selected: The Economist Intelligence Unit (http://www.eiu.com), Ernst & Young (http://www.ey.com), InterConnect Communications (http://www.icc-uk.com) (partnering with the University College London (http://www.ucl.ac.uk)), Interisle Consulting Group (http://www.interisle.net), JAS Global Advisors (https://www.jasadvisors.com), and KPMG (http://www.kpmg.com).

These firms will work together in various combinations to evaluate applications during the process as follows:

String Reviews

- **String Similarity** - InterConnect Communications/University College London
- **DNS Stability** - Interisle Consulting Group
- **Geographic Names** - The Economist Intelligence Unit and InterConnect Communications/University College London

Applicant Reviews

- **Technical and Operational** - Ernst & Young, JAS Global Advisors, and KPMG
- **Financial Capability** - Ernst & Young, JAS Global Advisors, and KPMG
- **Registry Services** - Interisle Consulting Group
- **Community Priority** - The Economist Intelligence Unit and InterConnect Communications

Why is there more than one firm for each of the evaluation types? Three reasons:

- To provide sufficient bandwidth to conduct the number of necessary evaluations,
- To provide an alternate channel to avoid conflicts of interest,
- To provide for continued competition among service providers to ensure quality and value going forward.

All of the firms exhibit characteristics that are important to the integrity of this process. For example, KPMG and Ernst & Young both have large global footprints and can effectively scale to ensure timely and culturally sensitive processing of applications. Their strong and long history in providing audit, tax, and advisory services makes them well suited to serve as the panels for financial and technical/operational evaluations. JAS Global Advisors has a decade of experience in due diligence, Internet security, and global IT operations as well as an intimate knowledge of ICANN. The Economist Intelligence Unit, the sister organization of *The Economist*, incorporates a solid understanding of global corporate and government processes. InterConnect Communications, in conjunction with the University College London brings an internationally recognized and diverse linguistics resources offering an abundance of subject matter expertise. And finally, Interisle Consulting Group has a very specific, excellent subject matter expertise in the DNS.

How are we ensuring an effective and efficient evaluation effort?

Ensuring that we have an effective and efficient evaluation effort is one of the most important aspects of building this program - and this starts with how we are preparing the evaluation panels.

The first step begins with simulation exercises. Currently, my team is conducting simulation exercises using mock applications. The simulation exercises have been instrumental in testing the evaluation process, understanding the level of effort to review an application, and equally as important, to calibrate the analysis across the firms.

The next step is building and implementing a robust training program. We are finalizing a training program that all evaluators are required to complete before performing an evaluation. Any individual serving on a panel will need to complete the training program prior to starting. The training program seeks to ensure consistency across all processes and scoring methods so that all applications are evaluated equally.

Finally, we are implementing a Quality Control program to ensure that applications have followed the same evaluation process and have been evaluated consistently. I strongly believe that the Quality Control function is a paramount component of the Program. In addition to performing the critical task of ensuring consistency, Quality Control will enable us to identify areas for improvement. These will in turn create initiatives that will bring enhanced effectiveness to the overall program as well as improvements in costs as we consider future rounds.

How will ICANN address any conflicts of interest?

Conflict of interest is an area that ICANN takes very seriously as it impacts the integrity of the Program. In fact, our processes are built to avoid and adequately deal with potential conflicts of interest. For example, where feasible, we have multiple firms providing services making sure that no evaluators have a conflict with a particular application.

I helped craft applicable language in the Applicant Guidebook and have made the topic the subject of contract negotiations with each firm reinforcing the importance of avoiding conflict of interest (inherent or perceived). There is also a code of conduct that we have asked each firm to abide. Some of the guidelines under the code of conduct restrict the evaluators from speaking at meetings or conferences on the topic of New gTLDs and interacting with entities or individuals that have identified themselves as potential applicants of the New gTLD Program. See Module 2 of the Applicant Guidebook (http://newgtlds.icann.org/applicants/agb) (Section 2.4.3 Code of Conduct Guidelines for Panelists) for more information on the Code of Conduct and Conflict of Interest guidelines.

The New gTLD Application Program is a major undertaking for ICANN and the global Internet community. We are very excited to get this program underway. Stay tuned for additional announcements as we continue to prepare for launch on 12 January 2012.

If you have any questions about the gTLD Program, the evaluation process or the evaluation firms selected, please send your questions to:

newgtld@icann.org (mailto:newgtld@icann.org)

Site Map

crowell moring

Reference Material 20.

New gTLD Program
Community Priority Evaluation Report
Report Date: 17 March 2014

Application ID:	1-1000-62742
Applied-for String:	IMMO
Applicant Name:	Starting Dot

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — 4 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	1	4
#4: Community Endorsement	3	4
Total	4	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 0/4 Point(s)

1-A Delineation — *0/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community is not clearly delineated, organized and pre-existing. The application received 0 out of 2 points under criterion 1-A: Delineation.

Delineation
Two conditions must be met to fulfill the requirements for delineation: there must be a clear straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community defined in the application ("immo") is:

> The .immo gTLD will serve a community restricted to businesses, organizations, associations, and governmental and non-governmental organisations operating in the real estate industry, while targeting in particular German, French, Italian and Catalan speaking countries (e.g. an estimate of 41 states in the world).
>
> Real estate is made up of different business segments, concentrated in two principal markets:
> a. The primary market, mostly dedicated to real estate construction services such as property development and home building, refurbishments, etc.;
> b. The secondary market dedicated to existing properties:
> - Realtors (rental or sale);
> - Property traders (purchase and sale);
> - Property managers.
>
> Accordingly, the scope of activities covered by the .immo gTLD will include real estate segments:
> - Commercial and Residential Real Estate Agents and Brokers;
> - Rental Property Management Services;
> - Real Estate Publishers (Information Media, Classified Media, Management Software);
> - Service Providers for Real Estate Professionals;
> - Real Estate Mortgage services (Loan, Insurance);
> - Homebuilders;
> - Real Estate Developers;
> - Notaries."

This community definition does not demonstrate a clear and straightforward membership. The community is not clearly delineated, because it is broadly defined and may not resonate with all the stakeholders it seeks to represent.

In addition, the community as defined in the application does not have awareness and recognition among its members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core real estate community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application did not satisfy either of the two conditions to fulfill the requirements for Delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Additionally, existing entities do not represent a majority of the community as defined by the applicant. According to the application:

> The real estate (RE) community encompasses over 600,000 entities linked through and structured by national associations corresponding to each business segment. There is no international umbrella organization spanning the entire community. Starting Dot's supporting associations are therefore all national organizations.
>
> Some industry segments however are neither organized nor represented by national associations, notably:
> - Real estate mortgage brokers or issuers;

- Real estate publishers (management software, information media).

Starting Dot has therefore mainly built relationships with segments of the real estate community, which are either structured by national and regional associations or organized by reliable and representative leaders.

The community as defined in the application does not have documented evidence of community activities. As there is no entity that is mainly dedicated to the community as defined in the .Immo application, there is no documented evidence of community activities.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for Organization.

Pre-existence
To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. The community as defined by the applicant is a construed community and therefore could not have been active prior to the above date (although its constituent parts were active).

The Community Priority Evaluation panel determined that the community as defined in the application does not fulfill the requirements for Pre-existence.

1-B Extension *0/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not demonstrate considerable size or longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size
Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .Immo as defined in the application is large both in terms of geographical reach and number of members.

However, the community as defined in the application does not have awareness and recognition among its members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core real estate community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for Size.

Longevity
Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. The pursuits of the .Immo community are not of a lasting, non-transient nature as the community as defined by the applicant is a construed community.

Additionally, the community as defined in the application does not have awareness and recognition among its

members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core real estate community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for Longevity.

Criterion #2: Nexus between Proposed String and Community	**0/4 Point(s)**
2-A Nexus	***0/3 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community.

The applied-for string (.Immo) does not match or identify the name of the community. The application for .Immo defines a core real estate community, as well as peripheral industries and entities. According to the application documentation:

> The words "immobilier" ("real estate "in French), "Immobilie" ("real estate" in German), "immobiliare" ("real estate" in Italian) and "immobile" ("real estate" in Catalan) have all the same Latin root, "immobilis", which is the negative form of the Latin adjective "mobilis" meaning "which cannot be moved or removed".

While the string identifies the name of the core community members (i.e. the primary and secondary real estate market and participants), it does not match or identify the peripheral industries and entities that are included in the definition of the community as described in Criterion 1-A. Therefore, there is a misalignment between the proposed string and community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string does not match or identify the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	***0/1 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string has other significant meaning beyond identifying the community described in the application. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. The Community Priority Evaluation panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies	**1/4 Point(s)**

3-A Eligibility	*1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by requiring registrants to be verifiable participants in the real estate industry, with the applied-for domain name having to be a name to which there is a right that has been established. The applicant also lists the professions that are eligible to apply. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	*0 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as name selection rules are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application does not demonstrate adherence to this requirement. Although there are details of reserved, prohibited and third-level names, the name selection rules overall are too vague to be consistent with the broad purpose of the gTLD. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application does not satisfy the condition to fulfill the requirements for Name Selection.

3-C Content and Use	*0 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the rules for content and use are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application does not demonstrate adherence to this requirement. The rules regarding content and use are very general and refer primarily to anti-abuse policies, rather than specifying what the content should be restricted to. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.

3-D Enforcement	*0 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the application provided specific enforcement measures but did not include appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must

include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlined the conditions that need to be met when registering, along with an ongoing verification process, in addition to mitigation measures, such as investigation and termination of the domain name. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline an appeals process. The Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**3/4 Point(s)**
4-A Support	***1/2 Point(s)***

The Community Priority Evaluation panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as there was documented support from at least one group with relevance The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance.

The Community Priority Evaluation panel determined that the applicant is not the recognized community institution(s) / member organization(s), nor does it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support. While the applicant had support from several groups with relevance, these groups do not constitute the recognized institutions to represent the community, as they are limited in both geographic and thematic scope and do not represent the community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition	***2/2 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received letters of opposition, which were determined to not be relevant, as they were either from groups/individuals of negligible size, or were not from communities which were not mentioned in the application but which have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 21.

New gTLD Program
Community Priority Evaluation Report
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — **10 Point(s)**

Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — **4/4 Point(s)**

1-A Delineation — ***2/2 Point(s)***

The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community defined in the application (".GAY[1]") is drawn from:

> …individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA[2]. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however "Gay".

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

> The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is "determined through formal membership with any of dotgay LLC's [the applicant's] Authentication Partners (AP) from the community", a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

> As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as "hubs" and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:
>
> 1. Have an active and reputable presence in the Gay Community
> 2. Have a mission statement that incorporates a focus specific to the Gay Community
> 3. Have an established policy that affirms community status for member enrolment
> 4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

[1] In this report the community as defined by the application is referred to as the ".GAY community" instead of the "gay community" or the "LGBTQIA community". The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community. This use is consistent with the references to these groups in the application.

[2] The Applicant notes with regard to its use of the term LGBTQIA that "LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community." This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

> The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

> …in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension **2/2 Point(s)**

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

> Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community[3]", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community[4] are of a lasting, non-transient nature. According to the application materials:

> …one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.[5] While socio-political obstacles to community

[3] "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

[4] The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

[5] Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,[6] the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	**0/4 Point(s)**
2-A Nexus	***0/3 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, "'Identify' means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community."

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

> The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that "the world at large" understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the "Gay community" to be both those individuals who have "come out" as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

[6] http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries

Moreover, while the applied-for string refers to many individuals not included in the application's definition of membership (i.e., it "substantially over-reaches" based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application's community definition are transgender and intersex individuals as well as "allies" (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)[7]. However, "gay" does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.[8] Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy[9]; such individuals are not necessarily "gay"[10]. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by "gay" at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but "gay" nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string ".GAY".

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness ***0/1 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the "string has no other significant meaning *beyond identifying the community described in the application*," according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above,). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies **4/4 Point(s)**

3-A Eligibility ***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

> .gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC's Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

[7] This prevailing understanding of "ally" is supported by GLAAD and others: http://www.glaad.org/resources/ally
[8] http://www.glaad.org/reference/transgender
[9] http://www.isna.org/faq/what_is_intersex
[10] "Gay" is defined by the Oxford dictionaries as "A homosexual, especially a man." The applicant defines the community as "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society."

3-B Name Selection	***1/1 Point(s)***
The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection. To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring "[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech." The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.	
3-C Content and Use	***1/1 Point(s)***
The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use. To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes "efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression." The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.	
3-D Enforcement	***1/1 Point(s)***
The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement. Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.	

Criterion #4: Community Endorsement	**2/4 Point(s)**
4-A Support	***1/2 Point(s)***
The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support. To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, "recognized" refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed by the application's defined community.	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition ***1/2 Point(s)***

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 22.

New gTLD Program
Community Priority Evaluation Report
Report Date: 10 September 2014

Application ID:	1-1097-20833
Applied-for String:	ART
Applicant Name:	Dadotart Inc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — 7 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	3	4
Total	7	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 0/4 Point(s)

1-A Delineation — ***0/2 Point(s)***

The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community is defined in the application as follows:

> How the community is delineated from Internet users generally.
>
> The global arts community has hallmarks of identification and commonality that set it apart from these Internet users. These hallmarks include:
> (1) Identification through production, support and affinity
> (2) Continued participation
> (3) Shared action and participation around numerous traditions, genres and styles.
>
> The first question any community faces is, can its members be identified? The most common way to identify a community is to look at the actions of its potential members. The arts community is one of these natural communities. It is not defined by holding a license or by creation by a regulatory body or necessarily by membership in an established association or organization. It is a community of participation.
>
> The term "art" describes a diverse range of creative human activities and the products of those activities, but is most often understood to refer to painting, film, photography, sculpture, and other visual media. Music, theatre, dance, literature, and interactive media are included in a broader definition of "art" or "the arts". In our formulation, the arts community is comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities.
>
> Dadotart and its PAB [Policy Advisory Board] will have no trouble identifying its members. The definition we have formulated is that the Art community is comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities.

This community definition does not delineate a clear and straightforward membership as the AGB requires. Membership in the community as defined by the applicant is unverifiable, given the absence of a requirement for any formal relationship between individuals and membership organizations, associations, or other such structures by which membership could be clearly demonstrated. In the absence of such membership structures, the application depends on individuals' and entities' "participation" in and "support" of art activities, but this definition is dispersed and broad. The application's reference to those who "support Art activities or the organization of Art activities" is unclear, since "support" of the arts may include activities such as attending a concert, paying admission at a museum, or making regular membership contributions. Given the lack of clarity around these membership parameters, the Panel has determined that the membership definition provided in the application is unbound and dispersed.

In addition, according to the AGB, "community" implies "more of cohesion than a mere commonality of interest" and there should be "an awareness and recognition of a community among its members." The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls "cohesion" – that is, that the various members of the community as defined by the application are "united or form a whole" (Oxford Dictionaries). For example, the American Photography Association (APA) is a membership-based organization created to serve the various legal and artistic interests of photographers. The APA is open to members in and outside the US and falls within one of the articulated parts of the application's proposed community. Based on the Panel's research, however, the APA does not show an awareness or recognition of the several other parts of the applicant's proposed community, whether by way of interaction or an explicit statement of cohesion[1]. The same lack of awareness, recognition, and/or cohesion is evident across a range of similar arts-related organizations, which have neither mentioned their perception of cohesion with other disparate groups nor demonstrated it through records of their activities or objectives.

[1] The Panel acknowledges that an exhaustive review of all proposed community member organizations is not possible and has used the APA as a representative example of the review carried out to determine awareness and recognition of the proposed community.

Additionally, the application materials and the Panel's research reveal a lack of cohesion among the individuals referenced in the application who "support the Arts." Several museums that would fall in the application's defined community, for example, see millions of visitors annually, most of whom support the arts with their patronage and ticket fees. These millions of individuals – and the innumerable others who support other arts organizations included in the application's defined community – cannot be said to cohere with one another by virtue of this support of the Arts, though they may share an interest in the arts.

The Panel acknowledges that some of the individuals in the community as defined by the application may have a commonality of interest and, as the application states, "identify themselves with the arts." However, this (1) is too broad a delineating measure and (2) does not ensure that such groups cohere in any way with one another, though they may share an interest in the arts. Therefore, based on the Panel's research the applied-for community does not demonstrate the cohesion as a community intended in the AGB.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is geographically disperse and exists across a wide array of fields of the arts. There is no entity mainly dedicated to the entire community as defined by the applicant, as the application itself concedes. Research showed that those organizations that do exist represent members of the defined community only in limited geographic scope, only certain fields within the community, or in the case of some supporters, not at all. According to the application:

> The arts community is very loosely structured and organized for the most part simply around participation - - and by virtue of participation. Certainly, there are organized groups within the arts community but the vast majority of artists and participants in the arts are not structured and are not formally organized in a hierarchical manner of local/regional, national and international legal entities. In many ways the strength of the art community lies in its natural openness. The .ART gTLD will provide a globally available locus of communication and identification for the many millions of arts participants who are not organized as well as for those who are….
>
> By the very nature of art, there is no hierarchical system of legal bodies to officially represent the arts community, nor an alliance of groups that might claim this authority. Dadotart is owned and directed by deviantArt, an innovator in creating an Arts community online which has proven its commitment to support the Arts community online with more than 20 million members and 60 million monthly unique visitors.

According to the AGB, "organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." As described above, there is no entity(ies) that represents all of the types of "art" member categories outlined by the applicant. The application states that the applied for gTLD might provide a seed for such organization, but this does not meet the AGB's requirement that the defined community currently be organized. Moreover, an "organized" community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes "individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities." The application references the applicant's parent company, deviantArt, but the Panel has determined that the community it serves is also limited in scope and does not encompass the proposed community. Based on information provided in the application materials and the Panel's research, there is no entity that organizes the community defined in the application, in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence
To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a obtain a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application). The Panel determined that this application refers to a "community" construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the various groups mentioned in the documentation through a gTLD. The proposed community therefore could not have been active prior to the above date (although its constituent parts were active).

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension ***0/2 Point(s)***

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size
Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The community for .ART as defined in the application is large both in terms of geographical reach and number of members. According to the applicant:

> The global arts community at large is constantly growing and embraces the majority of the world's population in one way or another. As production and enjoyment of art lie within the human nature, the arts community has a global presence in every culture.

However, as previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing such qualities, the community cannot be said to have the "cohesion" required by the AGB.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity
Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a get a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. Moreover the applicant is attempting to use the gTLD to organize the various groups noted in the application documentation. Additionally, as previously stated, the community as defined in the application does not have awareness and recognition among its members. Therefore, the Panel has determined that the proposed community's lack of cohesion does not meet the requirements for receiving credit for longevity. That is, a construed community is not a community according to the AGB and precludes the possibility of it having longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community **0/4 Point(s)**

2-A Nexus ***0/3 Point(s)***

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.ART) does not match or identify the name of the community. The application for .ART defines the community of participants and supporters of art-related activities who identify themselves with the arts. According to the application documentation:

> The .ART gTLD serves the Art community. The TLD string "art" matches the name of the community, Art, in the generally accepted sense of the word, in French and English and in many other internationally-used languages it is seen as "arte", a form to which the string "Art" is readily identified. Membership to sub-communities within the arts, e.g. the music or actors' community, does in no way affect their identification with the art community at large.

While the string identifies the name of the core community members (i.e. artists and organized members of the arts community) it does not match or identify the art supporters that are included in the definition of the community as described in Criterion 1-A. The definition of "supporters" in the application materials, as addressed above, is unbound and unclear, conceivably including audiences, consumers, and donors. They may be associated with art, but they are not identified by the word art as are artists and art organizations. Given the range of individuals and entities potentially included in the "support" category, it is also of considerable size. Such individual supporters are not likely to be known by any commonly shared community name or identifier, and therefore the application over-reaches in its use of "Art" to refer to the "support" category of its membership definition.

The Panel determined that the applied-for string does not match or identify the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness ***0/1 Point(s)***

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel's determination that the applied-for string ".Art" does not identify the whole breadth of the community as defined in the application. Therefore, since the string does not identify the community, it cannot be said to "have no other significant meaning *beyond identifying the community*" (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies	**4/4 Point(s)**
3-A Eligibility	***1/1 Point(s)***

The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting eligibility to artists and those who have an identifiable engagement with the arts, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	***1/1 Point(s)***

The Panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining restrictions on reserved names as well as a sunrise and landrush program that will provide special provision of trademarks, amongst other rules. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use	***1/1 Point(s)***

The Panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by noting that a registrant's use of a domain name must be accepted as legitimate, demonstrate membership in the art community, and be conducted in good faith. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.

3-D Enforcement	***1/1 Point(s)***

The Panel determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the application provided specific enforcement

measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, which will be managed by the registry service provider. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**3/4 Point(s)**
4-A Support	***1/2 Point(s)***

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support. This entity does not, however, represent a majority of the community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition	***2/2 Point(s)***

The Panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received letters of opposition, which were determined to not be relevant, as they were either from individuals or groups of negligible size, or were from entities/communities that do not have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 23.

New gTLD Program
Community Priority Evaluation Report
Report Date: 10 September 2014

Application ID:	1-1675-51302
Applied-for String:	ART
Applicant Name:	EFLUX.ART, LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — **7 Point(s)**

Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	1	4
#4: Community Endorsement	3	4
Total	7	16

Minimum Required Total Score to Pass: 14

Criterion #1: Community Establishment — **0/4 Point(s)**

1-A Delineation — ***0/2 Point(s)***

The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.

Delineation
According to the Applicant Guidebook, two conditions must be met to fulfill the requirements for delineation: there must be "a clear and straight-forward membership definition" and there must be "an

awareness and recognition of a community among its members." The AGB additionally states that a community as defined in the application should show "more of cohesion than a mere commonality of interest."

The community is defined in the application (".ART") as follows:

> Both the production and the study of art have been transformed by the rise of the Internet, which has exponentially expanded access to the media, analysis, audiences, and materials necessary for artists, art galleries, collectors, museums, and scholars… This expanded access now allows us to understand the art community in its broadest sense, and e-flux consequently intends to cater to individuals, organizations and companies who are actively involved, on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics. Any individual, organization or company that already belongs to one of the art community categories that have been established by e-flux, referred to in our response to Question 20 (b) below, is considered a member of the art community.

This community definition does not delineate a clear and straightforward membership as the AGB requires. Membership in the community as defined by the applicant is unverifiable, given the absence of a requirement for any formal relationship between individuals and membership organizations, associations, or other such structures by which membership could be clearly demonstrated. Indeed, the applicant "understand[s] the art community in *its broadest sense*" (emphasis added) and acknowledges "the diverse nature of what is considered 'art'" and "the subjective affiliations with this term are manifold." The AGB nevertheless requires a clear definition of membership regardless of the diffuse nature inherent in a given string. Ultimately, the membership as defined in the application is overly dispersed and unbound. The applicant includes a broad range of individuals and entities involved in a wide array of both professional and semi-professional arts-related activities globally in the proposed community. The proposed community, therefore, lacks the clarity and delineation required of a community under the AGB.

In addition, according to the AGB, "community" implies "more of cohesion than a mere commonality of interest" and there should be "an awareness and recognition of a community among its members." The community as defined in the application does not demonstrate an awareness and recognition among its members. Based on the community definition provided in the application materials, the community may include a Japanese poet, a German architect, and a network of Brazilian comic book illustrators. Based on the Panel's research and materials provided in the application, there is insufficient evidence to suggest that the disperse membership as defined in the application would cohere as a clearly delineated community (as required by the AGB), even if many of the disparate entities defined share a commonality of interest in the arts.

The application materials and the endorsing organizations, to which the applicant refers throughout the application and whose letters of support the Panel has reviewed, indicate that there is a commonality of interest among some, but not all, of the entities and individuals defined by the application as members of the proposed community. However, the application materials and further research provide no substantive evidence of what the AGB calls "cohesion" – that is, that the various members of the community as defined by the application are "united or form a whole" (Oxford Dictionaries).

For example, the Architects' Council of Europe (ACE) is a federation of organizations in Europe devoted to advancing architectural best practices and the interests of their member architects. ACE falls within one of the articulated parts of the proposed community. Based on Panel's review, however, ACE does not show an awareness or recognition of the numerous other parts of the proposed community[1], whether by way of interaction or an explicit statement of cohesion. This is the case with most other such organizations researched, including the majority of organizations from which the applicant has submitted letters of support.

[1] The Panel acknowledges that an exhaustive review of all proposed community member organizations is not possible and has used ACE as a representative example of the review carried out to determine awareness and recognition of the proposed community.

These endorsing entities have neither mentioned their perception of cohesion with other disparate groups nor demonstrated it through records of their activities or objectives.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

The community as defined in the application does not have at least one entity mainly dedicated to the community as defined by the applicant. Research showed that existing entities do not represent a majority of the community as defined by the applicant, as they are limited in geographic scope or only represent parts of the community. The application itself acknowledges the lack of an entity representing the community that it defines. According to the application:

> Given the diverse nature of what is considered "art," and given the fact that the subjective affiliations with this term are manifold, there is no national or international group or organization that caters for the needs and interests of the members of the art community. For this reason, as is evidenced by the many letters of endorsement and support received by the Applicant, there is a clear need and demand from the art community to have a TLD that is specifically destined for and operated by members of the art community.

According to the AGB, "organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." As described above, there is no entity(ies) that represents all of the types of "art" member categories outlined by the applicant. The application's intent (expressed above) is to use the gTLD to foster such organization, but this does not meet the AGB's requirement that the defined community currently be organized. Moreover, an "organized" community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes "individuals, organizations and companies who are actively involved, on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics." Based on information provided in the application materials and the Panel's research, there is no entity that organizes the community defined in the application, in all the breadth of categories explicitly defined.

Regarding the second requirement for organization – documented evidence of community activities – the Panel has concluded that no such evidence can exist because there is no entity that is mainly dedicated to the community as defined in the application.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a obtain a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application). The Panel determined that this application refers to a "community" construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the various groups

mentioned in the documentation through a gTLD. The proposed community therefore could not have been active prior to the above date (although its constituent parts were active).

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension ***0/2 Point(s)***

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not fulfill the requirements for size, nor demonstrate longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The community for .ART as defined in the application is large both in terms of geographical reach and number of members. According to the applicant:

> e-flux consequently intends to cater to individuals, organizations and companies who are actively involved, on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics. Any individual, organization or company that already belongs to one of the art community categories that have been established by e-flux, referred to … below, is considered a member of the art community.
>
> Museums such as: The Museum of Modern Art, New York; The Guggenheim, New York;...
> - Biennials such as: Sao Paulo Biennial; Istanbul Biennial…
> - Art fairs such as: Art Basel, Frieze Art Fair (London)…
> - Magazines such as: Artforum, Parkett, Frieze…
> - Art book publishers and distributors such as: Phaidon, Great Britain…

However, as previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing such qualities, the community cannot be said to have the "cohesion" required by the AGB.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a obtain a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD, and that the applicant is attempting to organize the various groups mentioned in the documentation through a gTLD. Therefore, the Panel has determined that the transient nature of this purpose, as well as the proposed community's lack of cohesion, does not meet the requirements for receiving credit for longevity.

Additionally, as previously stated, the community as defined in the application does not have awareness and recognition among its members. As such, the proposed community cannot demonstrate longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	**3/4 Point(s)**
2-A Nexus	***2/3 Point(s)***

The Panel determined that the application partially met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the name of the community, without over-reaching substantially beyond the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.ART) identifies the name of the proposed community but does not match it. The string closely describes the community and does not over-reach substantially, as the general public will associate the string with the community as defined by the applicant. The community encompasses individuals and institutions involved in the creation and promotion of art and artistic works. This community definition is broad and encompasses all areas that are typically considered as art[2]. However, given the subjective nature and meaning of what constitutes art, the general public may not necessarily associate all of the members of the defined community with the string. Hence, the string cannot be seen as a "match" for the defined community, as required by the AGB. Partial credit is therefore given for Nexus.

The Panel determined that the applied-for string identifies the name of the community as defined in the application. It therefore partially meets the requirements for Nexus.

2-B Uniqueness	***1/1 Point(s)***

The Panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string .ART must have no other significant meaning beyond identifying the community described in the application. The community described encompasses individuals and institutions involved in the creation and promotion of art and artistic works, which the Panel has determined would be understood by the general public as constituting an art community[3]. The Panel determined that the applied-for string fulfills the requirements for Uniqueness.

[2] According to Oxford Dictionaries, "art" refers to the expression of human creativity, typically through visual forms such as painting and sculpture, but also including music, dance, and others described in the application. While other uses of the word "art" exists, they are not as common and are typically used in construction with other words or phrases, such as "liberal arts" or "the art of communication." There are no other communities more commonly referred to by the word "art" than to the community of those who produce it, i.e. the individuals included in the applicant's defined community.

[3] Ibid.

Criterion #3: Registration Policies	**1/4 Point(s)**
3-A Eligibility	***1/1 Point(s)***

The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting eligibility to art-related institutions and entities, and professionals or semi-professional members of the art community, with a comprehensive verification system outlined to confirm affiliation with the community, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	***0/1 Point(s)***

The Panel determined that the application did not meet the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application does not demonstrate adherence to this requirement, as it does not outline comprehensive name selection rules. (Please refer to Section 20e of the applicant documentation). The Panel determined that the application did not satisfy the condition to fulfill the requirements for Name Selection.

3-C Content and Use	***0/1 Point(s)***

The Panel determined that the application did not meet the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application did not demonstrate adherence to this requirement, as it does not outline comprehensive rules for content and use, apart from barring the display of abusive content on a website. (Please refer to Section 20e of the applicant documentation). The Panel determined that the application did not satisfy the condition to fulfill the requirements for Content and Use.

3-D Enforcement	***0/1 Point(s)***

The Panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not provide specific enforcement measures or appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant did not outline policies that include specific enforcement measures constituting a coherent set. The application documentation states that the applicant reserves the right to delete content, or temporarily or permanently suspend the registration of domain names, but does not outline specific enforcement processes. However, the applicant mentions a general appeals process that allows a registrant to challenge a decision from the applicant to revoke or suspend the registration of a domain name. (Please refer

to Section 20e of the applicant documentation). The Panel determined that the application did not satisfy one of the two conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**3/4 Point(s)**
4-A Support	***1/2 Point(s)***

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community as defined by the applicant, or documented support from the recognized community institution(s)/member organization(s). Numerous letters of support were received from a variety of entities. The panel determined that the applicant possesses documented support from multiple groups with relevance, and this documentation contained a description of the process and rationale used in arriving at the expression of support. While the applicant had support from more than one group with relevance, these groups do not constitute support from the majority of the recognized institutions that represent the community, as they are limited in geographic or thematic scope and do not represent the entire community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition	***2/2 Point(s)***

The Panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received letters of opposition, which were determined to not be relevant, as they were either from individuals or groups of negligible size, or were from entities/communities that do not have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 24.

New gTLD Program
Community Priority Evaluation Report
Report Date: 17 March 2014

Application ID:	1-1025-18840
Applied-for String:	TAXI
Applicant Name:	Taxi Pay GmbH

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — 6 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	3	4
Total	6	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 0/4 Point(s)

1-A Delineation — *0/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community demonstrates insufficient delineation, organization and pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community defined in the application ("taxi") is:

> The global taxi community, including its four main community groups: Firstly, the core taxi industry with taxi drivers, taxi offices, and individual taxi entrepreneurs, all of which can be clearly identified based on their taxi licenses, as well as a certificate of registration, i.e. a trade register excerpt. Secondly, the taxi community includes the members of the immediate surrounding industry, such as hardware and software suppliers, recruiting and training companies, auto shops, automotive suppliers, insurances and pertinent press all with a very strong if not exclusive focus on the just described core taxi industry. This particular community group is identified through trade register excerpts. Thirdly, the community includes superordinate organizations, such as governmental organizations, public authorities and institutions and committees with the purpose of establishing relevant policies for the core taxi industry, as well as non-governmental organizations with the purpose of advocating taxi-related issues towards the public sector, the general public and relevant taxi industry representatives on a municipal, regional, national and international level. This group verifies its affiliation to the taxi community through a written, official and verified statement by its superordinate authority or a certificate of a verified register of associations. Fourthly, the taxi community includes affiliated businesses, such as owners of trademarks with a special interest in the products and services of the core taxi industry, such as major places of public interest (i.e. hospitals) or major events of public interest (i.e. Oscar Academy Awards).

This community definition shows a clear and straightforward membership. While broad, the community is clearly delineated, as membership is dependent on having appropriate documentation (licenses, certificate of registration, etc.).

However, the community as defined in the application does not have awareness and recognition among its members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core taxi community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Additionally, existing entities do not represent a majority of the community as defined by the applicant. According to the application:

> The taxi community currently lacks a single and overarching international umbrella organization. Even though there are a handful of organizations with a global claim, none of those comes close to even covering the majority of all community organizations….. It is the strong interest of TaxiPay GmbH to establish long term and sustainable relationships with stakeholders, thus creating a network based on all four major constituent parts of the taxi community.

The community as defined in the application does not have documented evidence of community activities. As there is no entity that is mainly dedicated to the community as defined in the .Taxi application, there is no documented evidence of community activities.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. The community as defined by the applicant is a construed community and therefore could not have been active prior to the above date (although its constituent parts were active).

The Community Priority Evaluation panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension	*0/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not demonstrate considerable size or longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .Taxi as defined in the application is large both in terms of geographical reach and number of members.

However, the community as defined in the application does not have awareness and recognition among its members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core taxi community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. The pursuits of the .Taxi community are not of a lasting, non-transient nature as the community as defined by the applicant is a construed community.

Additionally, the community as defined in the application does not have awareness and recognition among its members. This is because the many affiliated businesses and sectors would have only a tangential relationship with the core taxi community, and therefore would not associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	**0/4 Point(s)**
2-A Nexus	*0/3 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook.

The string does not identify or match the name of the community, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community.

The applied-for string (.Taxi) does not match or identify the name of the community. The application for .Taxi defines a core community of taxi companies and drivers, as well as peripheral industries and entities. According to the application documentation:

> The word "taxi" describes the center of the taxi community, which is the taxi service and vehicle itself – the very object that all community groups, namely entrepreneurs and companies of the core taxi industry, members of the immediate surrounding industry (i.e. suppliers), superordinate organizations and affiliated businesses, as well as its beneficiaries, namely current and potential taxi customers, have in common.

While the string identifies the name of the core community members (i.e. taxis), it does not match or identify the peripheral industries and entities that are included in the definition of the community as described in Criterion 1-A. Therefore, there is a misalignment between the proposed string and community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string does not match or identify the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for nexus.

2-B Uniqueness ***0/1 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string has other significant meaning beyond identifying the community described in the application. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. The Community Priority Evaluation panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies **3/4 Point(s)**

3-A Eligibility ***1/1 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by requiring proof off affiliation through licenses, certificates of registration, official statements from superordinate authorities, or owners of trademarks, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the

condition to fulfill the requirements for Eligibility.

3-B Name Selection *1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining a comprehensive list of name selection rules, such as requirements that second level domain names should not violate others' trademarks, that they should fulfill technical and lexical requirements, and also demonstrate a connection to the name or occupation of the registrant, amongst other requirements. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use *1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by noting four relevant rules for content and use, which include restricting content to taxi-related issues or indicating a strong connection to it, amongst other rules. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.

3-D Enforcement *0 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the application provided specific enforcement measures but did not include appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant will commission a Registry Service Provider to validate a registrant's eligibility for a domain and to act upon requests/complaints on the basis of its registration policies. The applicant will also provide an in-house validation agent in order to respond to cases of abuse and/or arising disputes. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline an appeals process. The Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**3/4 Point(s)**
4-A Support	***1/2 Point(s)***

The Community Priority Evaluation panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as there was documented support from at least one group with relevance The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance.

The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s) / member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support. While the applicant had support from several groups with relevance, these groups do not constitute the recognized institutions to represent the community, as they are limited in geographic scope and do not represent the global community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition	***2/2 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received letters of opposition, which were determined to not be relevant, as they were either from groups/individuals of negligible size, or were not from communities which were not mentioned in the application but which have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 25.

New gTLD Program
Community Priority Evaluation Report
Report Date: 6 October 2014

Application ID:	1-959-51046
Applied-for String:	MUSIC
Applicant Name:	.MUSIC LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — 3 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	1	4
#4: Community Endorsement	2	4
Total	3	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 0/4 Point(s)

1-A Delineation — ***0/2 Point(s)***

The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community is defined in the application as follows:

.MUSIC LLC was created with the express intent and purpose of serving a community established and known worldwide, which despite location, culture or genre, is identified and united by a single word: "music"…

The Global Music Community (GMC) is comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy, promotion, distribution, education, preservation and or nurturing of the art of music...

The differentiation between general Internet users and members of the music community are clearly delineated by two well defined-criteria. They are:

1. Active participation in the creation and development of music, its advocacy and promotion, its professional support, the protection and preservation of the music community's creative rights, as well as the nurturing of the art through music education.

2. Current registration and verifiable membership in a global music community organization that was organized and in existence prior to 2007 (as per ICANN guidelines) who are active participants in the support and representation of the creation and development of music, its advocacy and promotion, its professional support, the protection and preservation of the music community's creative rights, as well as the nurturing of the art through music education.

The application's defined community delineates a clear and straightforward membership, due to the requirement for members to have current and verifiable registration in a "global music community organization" (i.e. membership organization). The membership mechanism is therefore clear, and the groups of possible members must be active in creating, supporting, representing, protecting and/or nurturing music. This is a transparent and verifiable membership structure that adequately meets the AGB's first criterion for Delineation.

However, according to the AGB, "community" implies "more of cohesion than a mere commonality of interest" and there should be "an awareness and recognition of a community among its members." The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls "cohesion" – that is, that the various members of the community as defined by the application are "united or form a whole" (Oxford Dictionaries).

For example, the Guitar Foundation of America (GFA) falls within one of the articulated segments of the application's proposed community.[1] Based on the Panel's research, however, the GFA does not show an awareness or recognition of the several other segments of the applicant's proposed community, whether by way of interaction or an explicit statement of cohesion.[2] The same lack of awareness, recognition, and/or cohesion is evident across a range of similar music-related organizations, which have neither mentioned their perception of cohesion with other disparate groups nor demonstrated it through records of their activities or objectives. While the Panel acknowledges that many of the members in the proposed community share an interest in music, the AGB specifies that a "commonality of interest" is not sufficient to demonstrate the requisite awareness and recognition of a community among its members.

Another example relates to members of the musician category, in particular amateur musicians, who do not, in most cases[3], demonstrate the requisite recognition and awareness of a community with other member

[1] The group falls firmly within the membership structures defined by the applicant and has submitted a letter of support.
[2] The Panel acknowledges that an exhaustive review of all proposed community member organizations is not possible and has used the GFA as a representative example of the review carried out to determine awareness and recognition of the proposed community.
[3] While an exhaustive review of such organizations is impossible, the Panel's representative survey included member organizations catering exclusively to amateur musicians, defined in some cases as individuals with an interest in music

categories. The application does not refer to professional or amateur musicians specifically, but rather refers to "music creators", which would include both types of musicians. The Panel reviewed the websites and other publicly available information for a number of organizations that specifically cater to amateur musicians[4]. These member organizations do not (a) demonstrate cohesion with other organizations for amateur musicians, nor do they (b) demonstrate cohesion with music industry professionals. The Panel's review found that:

a. The representative activities and stated objectives of amateur organizations do not typically indicate any demonstrable association or cohesion with organizations and their members.[5] This reflects the broad array of musical interests to which such organizations cater, as well as the wide geographic dispersion of these organizations.
b. There is insufficient evidence of awareness and recognition between amateur musicians and music industry professionals,[6] such as promoters, distributors, and attorneys. Many of the amateur musicians' organizations are explicitly restricted to members who have no business ties to the music industry.[7] The representative activities and stated objectives of amateur organizations do not typically indicate any demonstrable association or cohesion with music industry professionals.

With respect to the member categories, particularly those discussed above, the Panel determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB. While the Panel acknowledges that some of the individuals in the community as defined by the applicant have a commonality of interest in music, and even that some member categories cohere, the defined community as a whole, in all its member categories, does not meet the AGB's requirement for community awareness and recognition.

Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and thereby does not receive credit for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is disperse geographically and across a wide array of music-related activities, ranging from production to legal advocacy. Based on the Panel's research, there is no entity mainly dedicated to the entire community as defined by the applicant, nor does the application include reference to such an organization in its sample list of member organizations. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community. According to the application:

> To date, there are forty-two (42) clearly delineated, organized and pre-existing music community organizations that have provided individual written statements of support. This unparalleled level of global music community representation is referred to as the Charter Member Organizations of the Global Music Community (GMC). Collectively they represent over 4 million individual members within more than 1,000 associations in over 150 countries. Although these Charter Member Organizations are not the exhaustive list of every possible organizational member of the GMC, they do represent the largest, most well known, credible, and diverse membership of the GMC.

---

but who receive no payment for their performances or who have no contract or other formal link to a record label or management company.

[4] These organizations clearly meet the proposed community's eligibility requirements (including a verifiable membership structure).

[5] See, as an example, the Japan Amateur Orchestras and amateur choruses in UK and New York: http://www.piertownchorus.com/home.html, http://www.lowereastsidesing.vocis.com/, http://www.jao.or.jp/e/

[6] For instance, the industry community members classified by NAICS codes 512210 and 711410. http://www.naics.com/free-code-search/naicsdescription.php?code=512210

[7] See e.g. http://www.nycclassical.com/aboutacma1.html and restrictions on professional musicians

According to the AGB, "organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." In the excerpt above, the application refers to 42 entities that, in and of themselves, are clearly delineated and organized. These organizations, however, represent only segments of the defined community, and the list does not include an organization that represents the entire proposed community. An "organized" community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in the fields of creation, development, publishing, recording, advocacy, promotion, distribution, education, preservation and or nurturing of the art of music, and that entity must have documented evidence of activities. Based on information provided in the application materials and the Panel's research, there is no entity that organizes the community defined in the application, in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a obtain a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application). The Panel determined that this application refers to a "community" construed to obtain a sought-after generic word as a gTLD string.

The application makes reference to the list of organizations that have supported its application, which it says are representative of the community as a whole. The organizations listed were active prior to 2007. However, the fact that each organization was active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines. That is, since those organizations and their members do not themselves form a cohesive community as defined in the AGB, they cannot be considered to be a community that was active as such prior to 2007.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension ***0/2 Point(s)***

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The community for .MUSIC as defined in the application is large both in terms of geographical reach and number of members. According to the applicant:

> The Global Music Community (GMC) is comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy, promotion, distribution, education,

preservation and or nurturing of the art of music… To date, there are forty-two (42) clearly delineated, organized and pre-existing music community organizations that have provided individual written statements of support. This unparalleled level of global music community representation is referred to as the Charter Member Organizations of the Global Music Community (GMC). Collectively they represent over 4 million individual members within more than 1,000 associations in over 150 countries.

However, as previously noted, the community as defined in the application does not show evidence of "cohesion" among its members, as required by the AGB.[8] Therefore, it fails the second criterion for Size.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to a get a sought-after generic word as a gTLD string) and "false negatives" (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. Moreover the applicant appears to be attempting to use the gTLD to organize the various groups noted in the application documentation, as opposed to applying on behalf of an already organized and cohesive community. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of "cohesion," the community defined by the application does not meet the AGB's standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB's requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	**0/4 Point(s)**
2-A Nexus	***0/3 Point(s)***

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.MUSIC) does not match or identify the name of the community. The applicant limits the proposed community to individuals and entities that have a "current registration and verifiable membership in a global music community organization". The string MUSIC, however, identifies all individuals and entities involved in the creation of music, regardless of whether or not they have verifiable membership in a music-related organization. The application itself does not provide an estimate for the

[8]As stated previously, according to the AGB, "community" implies "more of cohesion than a mere commonality of interest…There should be: (a) an awareness and recognition of a community among its members…" Failing such qualities, the AGB's requirements for community establishment are not met.

number of musicians who have registered with one of the proposed community's organizations (of which it lists 42 examples), but one of the largest musician's membership organizations in the US, the American Society of Composers, Authors, and Publishers (ASCAP) has about 500,000 members[9]. The Indian equivalent of ASCAP (also a supporter of the application) has fewer than 3,000 members[10]. The number of amateur musicians worldwide is unknown but is estimated to be about 200 million[11] – far surpassing the application's estimate of 4 million individuals registered with musical organizations. Therefore, there are many individual musicians identified by the applied-for string who do not fall within the membership of the proposed community. This difference between the proposed community and those identified by the string is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

The Panel determined that the applied-for string does not match or identify the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness ***0/1 Point(s)***

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel's determination that the applied-for string ".MUSIC" reaches substantially beyond the community as defined in the application so does not identify it by AGB standards. Therefore, since the string does not identify the community, it cannot be said to "have no other significant meaning *beyond identifying the community*" (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies **1/4 Point(s)**

3-A Eligibility ***1/1 Point(s)***

The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting domain registration to individuals who are "members of or affiliated with at least one Member Organizations of the Global Music Community." The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection ***0/1 Point(s)***

The Panel determined that the application does not meet the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application does not provide evidence that the name selection rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 0 points under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The Panel determined that the application did not satisfy the condition of consistency with the articulated community-based purpose of the applied-for string. There was no evidence in the application of restrictions or guidelines

[9] http://www.ascap.com/about/
[10] http://www.iprs.org/cms/IPRS/AnnualReport/DirectorsReport20112012.aspx
[11] http://thenextweb.com/apps/2012/06/06/sezion-lets-anyone-collaborate-on-a-song-could-be-the-instagram-for-amateur-musicians/

for name selection that arose out of the community-based purpose of the application, nor was it articulated that the other name selection rules (not related to the community-based purpose) were otherwise sufficient and in accordance with the community-based purpose of the application. In section 20(c) on its community-based purpose, the applicant states,

> "Registration policies will safeguard the exclusive nature of the community by requiring potential registrants to have a bona fide membership with an at least one Organization Member of Global Music Community, before they can acquire a .music address."

This, however, is sufficient only to guarantee the CPE Eligibility requirements as in 3-A above. The application does not refer to its community-based purpose in discussion of name selection rules, despite its articulation of several community values that could come to bear on name selection.

3-C Content and Use ***0/1 Point(s)***

The Panel determined that the application does not meet the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application does not provide evidence that the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 0 points under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. (Comprehensive details are provided in Section 20e of the applicant documentation). The Panel determined that the application did not satisfy the condition of consistency with the articulated community-based purpose of the applied-for string. There was no evidence in the application of requirements, restrictions or guidelines for content and use that arose out of the community-based purpose of the application, nor does the application articulate that the other content and use rules (not related to the community-based purpose) were otherwise sufficient and in accordance with the community-based purpose of the application. In section 20(c) on its community-based purpose, the applicant states,

> "Registration policies will safeguard the exclusive nature of the community by requiring potential registrants to have a bona fide membership with an at least one Organization Member of Global Music Community, before they can acquire a .music address."

This, however, is sufficient only to guarantee the CPE Eligibility requirements as in 3-A above. The application does not refer to its community-based purpose in discussion of content and use rules, despite its articulation of several community values that could come to bear on content and use.

3-D Enforcement ***0/1 Point(s)***

The Panel determined that the application does not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures but does not include a coherent and appropriate appeals mechanisms. The application received a score of 0 points under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application makes reference to an appeals process that will be overseen by its Policy Advisory Board, but it does not provide a clear description of an appeals process. The Panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement and therefore scores 0 points.

Criterion #4: Community Endorsement **2/4 Point(s)**

4-A Support ***1/2 Point(s)***

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application (in all its breadth of categories as described in Delineation), but is also (2) recognized by the same community as its representative. No such organization among the applicant's supporters demonstrates the kind of structure required to be a "recognized" organization, as per AGB guidelines. However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition ***1/2 Point(s)***

The Community Priority Evaluation panel determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received opposition from one relevant organization of non-negligible size. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel determined that there is opposition to the application from a group of non-negligible size and from an organization within the communities explicitly addressed by the application, making it relevant. The entity has a strong reputation in the music representation and marketing fields, and a subsidiary company that is involved in distribution and promotion. These activities fall within the applicant's proposed membership segments. The entity was founded in 2006, has several full-time employees, and has an impact in the music community that reaches thousands of people, in addition to partnerships with major international brands. The grounds of the entity's objection do not fall under any of those excluded by the AGB (such as claims that are "spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction"), but rather relate to how the community is delineated and the rules for name selection. Therefore, the Panel determined that the applicant satisfied the requirements for Opposition partially.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 26.

New gTLD Program
Community Priority Evaluation Report
Report Date: 17 March 2014

Application ID:	1-1723-69677
Applied-for String:	TENNIS
Applicant Name:	Tennis Australia Ltd

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	**Did Not Prevail**

Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Overall Scoring — 11 Point(s)

Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	4	4
Total	11	16

Minimum Required Total Score to Pass 14

Criterion #1: Community Establishment — 4/4 Point(s)

1-A Delineation — *2/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.

Delineation
Two conditions must be met to fulfill the requirements for delineation: there must be a clear straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.

The community defined in the application ("tennis") is:

> Through the .tennis TLD, Tennis Australia commits to serve the Australian tennis community, which is comprised of the eight Australian state-and territory-based Member Associations: Tennis Victoria, Tennis New South Wales, Tennis Queensland, Tennis South Australia, Tennis Western Australia, Tennis Tasmania, Tennis Australian Capital Territory and Tennis Northern Territory. These Member Associations are represented by and shareholders of Tennis Australia. They are the representative body of all affiliated clubs, centres, associations, regions and their members in their respective State or Territory. As the central administrative body of tennis within a State or Territory, Member Associations are responsible for implementing Tennis Australia's objectives and initiatives in order to manage, co-ordinate, promote, and unify the diverse facets of the sport of tennis within Australia.

This community definition shows a clear and straightforward membership. The community is clearly delineated, owing to the clear and straightforward membership definition and association with the game of tennis.

In addition, the community as defined in the application has awareness and recognition among its members. This is because of the membership structure of Tennis Australia, which is comprised of the eight Australian state-and territory-based Member Associations. These Member Associations are represented by and shareholders of Tennis Australia. They are the representative body of all affiliated clubs, centres, associations, regions and their members in their respective State or Territory.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Delineation.

Organization

Two conditions need to be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application has at least one entity mainly dedicated to the community, which is the applicant, Tennis Australia. According to the application,

> Tennis Australia is the governing body of tennis in Australia and has a core mission to simply 'make Australia the greatest tennis nation on the planet'.

The community as defined in the application has documented evidence of community activities. This is confirmed by detailed information on the website of Tennis Australia. According to the application,

> Each year Tennis Australia invests millions in tennis infrastructure, player development, participation programs, coach development, competitions and tournaments, and promotion of the game. This occurs at a local and national level, but also at the international level in particular through the Australian Open, one of four Grand Slams and the largest sporting event in the world each January. Member Associations are also directly responsible for implementing such activities within the framework of policies set by Tennis Australia.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the

application,

> The Victorian, New South Wales, Queensland, West Australian, South Australian, and Tasmanian Tennis Associations were all founding members of Tennis Australia in 1904…. The Australasian Lawn Tennis Association was formed, at that time embracing New Zealand interests as well. Today, Member Associations are strictly limited to a single representative governing body in each of the Australian States and Territories.

The Community Priority Evaluation panel determined that the community as defined in the application fulfills the requirements for Pre-existence.

1-B Extension *2 / 2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates considerable size and longevity for the community. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .Tennis as defined in the application is large in terms of the number of members. According to the applicant,

> Through these State- and Territory-based Member Associations, Tennis Australia maintains a direct link with the 2,176 affiliated tennis clubs, 3,198 member coaches, and 1.8 million tennis participants and players throughout Australia.

In addition, the community as defined in the application has awareness and recognition among its members due to the membership structure of Tennis Australia, which is comprised of the eight Australian state-and territory-based Member Associations. These Member Associations are represented by and shareholders of Tennis Australia. They are the representative body of all affiliated clubs, centres, associations, regions and their members in their respective State or Territory.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .Tennis community are of a lasting, non-transient nature.

Additionally, the community as defined in the application has awareness and recognition among its members due to the membership structure of Tennis Australia, which is comprised of the eight Australian state-and territory-based Member Associations. These Member Associations are represented by and shareholders of Tennis Australia. They are the representative body of all affiliated clubs, centres, associations, regions and their members in their respective State or Territory.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Longevity.

Criterion #2: Nexus between Proposed String and Community	**0/4 Point(s)**
2-A Nexus	***0/3 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.Tennis) identifies a wider or related community of which the applicant, Tennis Australia, is a part, but is not specific to the applicant's community (the Australian tennis community). As such, the string captures a wider geographic/thematic remit than the community (as defined by the applicant) has, despite the fact that Tennis Australia has "changed its brand to 'Tennis' (rather than Tennis Australia) and encouraged members of the Australian tennis community to do likewise in order to promote the game, rather than individual entities". Tennis refers to the sport and the global community of people/groups associated with it, and therefore does not refer specifically to the Tennis Australia community. Therefore, there is substantial over-reach between the proposed string and the definition of the community as described in Criterion 1-A.

The Community Priority Evaluation panel determined that the applied-for string does not match or identify the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The applied-for string over-reaches substantially beyond the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	***0/1 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string has other significant meaning beyond identifying the community described in the application. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. The Community Priority Evaluation panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies	**3/4 Point(s)**
3-A Eligibility	***1/1 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective

registrants to community members. The application demonstrates adherence to this requirement by requiring registrants to be linked to the Australian tennis community, and detailing ten categories of eligibility. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection ***1 / 1 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that naming restrictions be specifically tailored to meet the needs of registrants while maintaining the integrity of the registry, and ensuring that domain names meet certain technical requirements, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use ***1 / 1 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that the second-level domain names do not provide content that is inconsistent with the mission/purpose of the gTLD, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.

3-D Enforcement ***0 / 1 Point(s)***

The Community Priority Evaluation panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the application provided specific enforcement measures but did not include appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines the conditions that need to be met when registering, along with mitigation measures, such as investigation and termination of the domain name. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline an appeals process. The Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement	**4/4 Point(s)**
4-A Support	***2/2 Point(s)***

The Community Priority Evaluation panel determined that the application fully met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant GuideBook as the applicant is the recognized community institution. The application received a maximum score of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance.

The Community Priority Evaluation panel determined that the applicant is the recognized community institution/member organization. The applicant also possesses document support from its member organizations, and this documentation contained a description of the process and rationale used in arriving at the expression of support. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.

4-B Opposition	***2/2 Point(s)***

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received letters of opposition, which were determined to not be relevant, as they were either from groups/individuals of negligible size, or were not from communities which were not mentioned in the application but which have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

crowell moring

Reference Material 27.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

PART ONE: INTRODUCTION

1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers ("ICANN").

2. ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law "in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization..." ICANN is charged with

> "promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of

policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system…" (Claimant's Exhibits, hereafter "C", at C-4.)

ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN's headquarters.

3. ICANN, Article 4 of its Articles of Incorporation provides,

> "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

4. ICANN's Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment

> "of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as "DNS", (b) ...Internet protocol ("IP") addresses and autonomous system ("AS") numbers and (c) Protocol port and parameter numbers". ICANN "coordinates the operation and evolution of the DNS root server system" as well as "policy development reasonably and appropriately related to these technical functions." (C-5.)

5. Section 2 of ICANN's Bylaws provides that, in performing its mission, core values shall apply, among them:

> "1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
>
> "2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

"3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.

"4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

...

"6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

...

"8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

...

"11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." (C-5.)

6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director". They specify that "ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN is to operate in an open and transparent manner "and consistent with procedures designed to ensure fairness" (Article III, Section 1.) In those cases "where the policy action affects public policy concerns," ICANN shall "request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request" (Article III, Section 6).

7. Article IV of the Bylaws, Section 3, provides that: "ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." Any person materially affected by a decision or action of the Board that he or she asserts "is inconsistent" with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel ("IRP"). That Panel "shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws". "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." The IRP shall have the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws" and "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall "specifically designate the prevailing party." The Section concludes by providing that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

8. The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.

9. Article XI of ICANN's Bylaws provides, *inter alia,* for a Governmental Advisory Committee ("GAC") to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues". It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually

acceptable solution." If no such solution can be found, the Board will state in its final decision the reasons why the GAC's advice was not followed.

PART TWO: FACTUAL BACKGROUND OF THE DISPUTE

10. The Domain Name System ("DNS"), a hierarchical name system, is at the heart of the Internet. At its summit is the so-called "root", managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The "root zone file" is the list of top-level domains. Top-level domains ("TLDs"), are identified by readable, comprehensible, "user-friendly" addresses, such as ".com", ".org", and ".net". There are "country-code TLDs" (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs ("gTLDs), which are subdivided into sponsored TLDs ("sTLDs") and unsponsored TLDs ("gTLDs"). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world –- a string of numbers – with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.

11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org. and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int. Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a "proof of concept" in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.

12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,

which would responsibly present "adult" entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the "proof of concept" round because "it did not appear to meet unmet needs", there was "controversy" surrounding the application, and the definition of benefits of .XXX was "poor". It observed that, "at this early 'proof of concept' stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs." (C-127, p. 230.) In the event, the ICANN Board authorized ICANN's President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were "subject to further Board approval or ratification." (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that "upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated." (C-78.) It posted a "Request for Proposals" ("RFP"), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP's explanatory notes provided that the sponsorship criteria required "the proposed sTLD [to] address the needs and interest of a 'clearly defined community'...which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate." Applicants had to show that the Sponsored TLD Community was (a) "Precisely defined, so it can readily be determined which persons or entities make up that community" and (b) "Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community". (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization's policy-formulation procedures. They additionally required the applicant to demonstrate "broad-based support" from the sponsored TLD community. None of the criteria explicitly addressed "morality" issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM's application was posted on ICANN's website. Its application stated that it was to [redacted]

[redacted] and who are interested in the [redacted]" (C-Confidential Exh. B.) The International Foundation for Online Responsibility ("IFFOR"), a Canadian organization whose creation by ICM was in process, was proposed to be ICM's sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

> "significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of ".XXX" in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices." (Lawley Witness Statement, para. 15.)

15. ICANN constituted an independent panel of experts (the "Evaluation Panel") to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant's proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented "a clearly defined community"; it found that "the extreme variability of definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of the community". The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and "did not agree that the application added new value to the Internet name space". Its critical evaluation of ICM's application concluded that it fell into the category of those "whose deficiencies cannot be remedied with the applicant's proposed framework" (C-110.)

16. Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, the Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.

17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)

18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)

19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:

> "Resolved...the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant."
>
> "Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD." (C-120.)

20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that

> "the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space."

In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board "for approval and authorization to enter into an agreement relating to the delegation of the sTLD".

21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:

"The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the *.xxx* TLD.

"On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.

"Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.

"Denmark commented on the fact that the issue of the creation of the *.xxx* extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on *.xxx* that had concluded negatively.

"France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.

"USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.

"The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board." (C-139, p. 3.)

22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:

"Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.

"Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding *.xxx.*

"Dr. Cerf added, taking the example of *.xxx* that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.

"France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.

"Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.

"Chile and Denmark asked about the availability of the evaluation Report for *.xxx* and wondered if the process was in compliance with the ICANN Bylaws.

"Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.

"Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public

comments process. Spain suggested that ICANN should formally request GAC advice in such cases.

"The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for." (C-139, P. 5.)

23. When it came to drafting the GAC Communique, the following further exchanges were summarized:

"Brazil referred to the decision taken for the creation of *.xxx* and asked if anything could be done at this stage...

"On *.xxx,* USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...

"Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.

"Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...

"Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.

"Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.

"France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest."

"The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique." (C-139, p. 7.)

24. Finally, in respect of "New Top Level Domains"

"...the Chair recalled that members had made comments during the consultation period regarding the *.tel* and *.mobi* proposals, but not regarding other sTLD proposals.

"The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for *.xxx* was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.

"The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique." (C-139, p. 13.)

25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of "New Top Level Domains", the Communique stated:

"The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process." (C-159, p. 1.)

26. Negotiations on commercial and technical terms for a contract between ICANN's General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board's resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.

27. This expectation was overturned by ICANN's receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for

Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:

> "I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.
>
> "Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.
>
> "It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain..." (C-162, p. 1.)

28. On August 12, 2005, Mohamed Sharil Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:

> "As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...
>
> "You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential

introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

"I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communique that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

"In this regard, I would like to bring to the Board's attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

"Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD."

29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN's approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called "religious right", such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, "Web Neutrality vs. Morality" which said: "The flap over .xxx has put ICANN

in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. 'The politics of this are amazing,' said Cerf. 'We're damned if we do and damned if we don't.' (C-284.)

30. Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM's application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia's "strong opposition to the creation of a .XXX sTLD"), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM's monitoring all .XXX content from "day one", C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:

> "Moreover, while the *.xxx* TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.
>
> "I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report." (C-172, p. 1.)

31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:

> "I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) *.xxx.* I appreciate that the Board has deferred further discussions on the

subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.

"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.

"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.

"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.

"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on *.xxx* , expressed in 2000, would stand.

"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..

"Therefore we would ask ICANN to postpone conclusive discussions on *.xxx* until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that *.xxx* fulfils the criteria set in advance..." (C-168, p. 1.)

32. At its meeting by teleconference of September 15, 2005, the Board, "after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement," adopted a resolution providing that:

> " ...
>
> "Whereas the ICANN Board has expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership)...
>
> "Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,
>
> "Resolved...that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." (C-119, p. 1.)

33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board's resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:

> "Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel's recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

"Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.

...

"It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

...

"Extensive Review of ICM Application

...

"On 3 May 2005, the Board held a 'broad discussion...regarding whether or not there was a 'sponsored community' . The Board agreed that it would discuss this issue again at the next Board Meeting.'

"Based on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization..." (C-175.)

34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be "in addition to the obligation to comply with all applicable law[s] and regulation[s]". (Claimant's Memorial on the Merits, pp. 128-129.)

35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the

ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC

> "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.
>
> "...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC's knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.`
>
> "The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:
>
> -Take appropriate measures to restrict access to illegal and offensive content;
>
> - Support the development of tools and programs to protect vulnerable members of the community;
>
> -Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and
>
> "Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry's commitments, and such information on the proposed contract being made available to member countries through the GAC.
>
> "Nevertheless without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD."

36. At the Board's meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:

"Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies." (C-184, p. 1.)

37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC's request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams. The following extracts are of interest:

"It is important to note that the Board decision as to the .XXX application is still pending. The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. ...the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board's decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.

...

In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement." (C-188, pp. 1, 2.)

38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM's by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those

who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)

39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available. (Claimant's Memorial on the Merits,

pp. 138-139.) The proposed agreement was revised to include, *inter alia,* provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.,* p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

> "We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the *.xxx* application has overcome the deficiencies relating to the proposed sponsorship community.
>
> "In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed *.xxx* agreement would include enforceable provisions covering all of ICM Registry's commitments...
>
> "...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proferred by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers "she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board." (*Id.,* pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted "that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal." Rita Rodin agreed; "there seems to be a 'splintering of support in the adult on-line community." She was also concerned "that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN's technical decision-making remit..." *(Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, "and whether ICM had demonstrated to the Board's satisfaction that it had met criteria against the RFP for sTLDs." Dr. Cerf agreed that "the sponsorship grouping for a new TLD was difficult to define."

44. Susan Crawford expressed the view that "no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant....if that test was applied to any sponsor group for a new sTLD, none would ever be approved."

45. The Acting Chair conducted a "straw poll" of the Board as to whether members held "serious concerns" about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that "it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain". (*Id.)* The following resolution was unanimously adopted:

"Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;

"Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.

"Resolved that:

I. The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and
II. ICANN staff consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is [sic] met for the creation of a new .XXX sTLD." (*Id.,* p. 4.)

46. The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued "formal advice to the Board". It reaffirmed the Wellington Communique as "a valid and important expression of the GAC's views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria." It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, "the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate." (C-200, pp. 4, 5.) It also adopted "Principles Regarding New TLDs" which contain the following provision in respect of delegation of new gTLDs:

> "2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process." *(Id.,* p. 12.)

47. The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:

"...the board has determined that

"ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

"Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.

"Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.

"The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.

"The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied."

48. Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.

"Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral

patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain." (C-201, p. 6.)

49. Rita Rodin said that she did not believe

> "that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet..." *(id.,* p. 7.)

50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,

> "there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the

board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (*Id.,* pp. 7-8.)

51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." *(Id.,* p. 8.)

52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".

"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the

fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that's an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia's letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws." (*Id.,* pp. 9-11.)

53. Demi Getschko declared that her vote in favor of the resolution was her own decision "without any kind of pressure". (*Id.,* p. 12.) Alejandro Pisanty denied that "the board has been swayed by political pressure of any kind" and affirmed that, "ICANN has acted carefully and strictly within the rules." He accepted "that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself." (*Id.*

PART THREE: THE ARGUMENTS OF THE PARTIES

The Contentions of ICM Registry

54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a "deferential standard of review"; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.,* California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN's Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN's lack of accountability. It recalls that ICANN's then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to "strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators..." (Claimant's Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, "ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration." *(Id.,* p. 163.) Article IV, Section 3, of ICANN's Bylaws provides that: "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association as the international arbitration provider

(which in turn appointed the members of the instant Independent Review Panel). The term "arbitration" imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term "arbitration" connotes a binding award. *(Id.,* pp. 168-169.) Article 27(1) of the ICDR Rules provides that "[a]wards...shall be final and binding on the parties. The parties undertake to carry out any such award without delay." (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that "the ICDR's International Arbitration Rules...will govern the Process in combination with these Supplementary Procedures." They provide that the "Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented." "The Declaration shall specifically designate the prevailing party." (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

The Standard of Review is Not Deferential

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN's assertion that the Panel must afford the ICANN Board "a deferential standard of review" has no support in the instruments governing this proceeding. The term "independent review" connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant's Memorial on the Merits, with citations, pp. 173-174.) ICANN's reliance on the "business judgment rule" and the related doctrine of "judicial deference" under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As California courts have explicitly stated, "the rule of judicial deference to board decision-making can be limited ... by the association's governing documents." The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a "final method of accountability."

The notion now advanced on behalf of ICANN, that this Panel should afford the Board "a deferential standard of review" and only "question" the Board's actions upon "a showing of bad faith" is at odds with that purpose as well as with the plain meaning of "independent review". (*Id.,* pp. 176-177.)

The Applicable Law of this Proceeding

57. Article 4 of ICANN's Articles of Incorporation provides that, "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law..." (C-4). The prior version of the draft Articles had provided for ICANN's "carrying out its activities with due regard for applicable local and international law". This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, "to mak[e] it clear that ICANN will comply with relevant and applicable international and local law". *(Id.,* p. 180.) As ICANN's President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could "be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law." (*Id.,* p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:

> "...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with 'relevant principles of international law' and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN's Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way." (*Id.,* p. 11.)

In ICM's view, Article 4 of ICANN's Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that "the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute." (C-11.) It points out that the choice of a concurrent law clause – as in ICANN's Articles providing for the application of relevant principles of both

international and domestic law – is not unusual, especially in transactions involving a public resource.

58. Professor Goldsmith observes that: "... "principles of international law and applicable international conventions and local law" refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. "The term 'principles of international law' includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and "the general principles of law recognized by civilized nations", the reference to "principles of international law" in ICANN's Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the "principles of commercial and international law" to include the general principles of law. ICSID tribunals similarly have interpreted "the rules of international law" to include general principles of law.

> "It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The 'international' nature of this arbitration – ... is evidenced by the global impact of ICANN's decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the 'general principles' standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding." *(Id.,* pp. 15-16.)

59. Professor Goldsmith continues: "The general principle of good faith is 'the foundation of all law and all conventions'" (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and*

Tribunals, p. 105). "As the International Court of Justice has noted, 'the principle of good faith is a well established principle of international law'". (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 296, with many citations.) Applications of the principle are "the requirement of good faith in complying with legal restrictions" and "the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights..." as well as the requirement of good faith in contractual negotiations. (*Id.,* pp. 17-18.) The principle is "equally applicable to relations between individuals and to relations between nations." (Cheng, *loc. cit.).*

60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is

> "most obvious is the clearly fictitious basis ICANN gave for denying ICM's application...the concern about 'law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application' applies to many top-level domains besides .XXX. The website 'pornography.com' would be no less subject to various differing laws around the world than the website 'pornography.xxx.' ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right..."

61. Professor Goldsmith further argues that "similarly pretextual is ICANN's claim that 'there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.'" He contends that the scenario is "unlikely", but, more importantly, *"the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM..."

ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws

62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.

63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, "upon the successful completion of the sTLD process" (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra.*) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied "based on principles of objectivity, non-discrimination and transparency". (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship – and authorized ICANN's President and General Counsel to enter into negotiations over the "commercial and technical terms" of a registry agreement with ICM. "The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria – including, specifically, sponsorship." (Claimant's Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board's resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:

- (a) recalls that ICANN's written announcement of applications received provided: "The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs." (C-82.)

- (b) emphasizes that ICANN's Chairman of the Board, Dr. Cerf, is recorded in the GAC's Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx "this time met the three main criteria, financial, technical and sponsorship". Sponsorship was

extensively discussed “and the Board reached a positive decision considering that ICANN should not be involved in content matters.” (C-139; *supra,* para. 22.)

- (c) notes that a letter of ICANN’s President of February 11, 2006. states that: “...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant’s readiness to proceed to technical and commercial negotiations...rests with the Board.” *(Supra,* paragraph 33.)

- (d) notes that the GAC’s Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN’s President, that the GAC “does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination” that ICM’s application “had overcome the deficiencies noted in the Evaluation Report”. (*Supra,* paragraph 35.)

- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: “If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval.” (C-88.)

- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the “applicants that have been found to satisfy the baseline criteria and they’re presently in negotiation for the designation of registries...” (C-140, p. 28).

- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, “ICANN’s board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN.” (C-221.)

- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, “Internet Group OKs New Suffix for Porn Sites,” which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a $12 billion industry, “could begin buying .xxx addresses as early as fall or winter depending on ICM’s plans.” (C-283.)

- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief." (Burr Exhibit 35.)

ICM argues that ICANN's witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

> "At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met..." (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf's testimony "is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg..." (Claimant's Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf's recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into "if" the parties were able to negotiate "commercial and technical terms"; therefore ICM should have known that all other issues also remained open. But, responds ICM, "Complete silence on an issue -- when other issues are specifically mentioned – does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue." *(Id.,* pp. 15-16.)

67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were "quick" and "straightforward". (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.

68. But then came the intervention of the U.S. Department of Commerce described *supra,* paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. "What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government's intervention." ICM contends that: "The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it." (Claimant's Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey's having "suggested" to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra,* paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and s*upra,* paragraphs 21-25.)

69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:

> "The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no

> reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee 'woke up' to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN's credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN's process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN's authority, competence, and entire reason for existence." (Witness Statement of Elizabeth Williams, pp. 26-28.)

70. ICM points out that the Wellington Communique of the GAC *(supra,* paragraph 35) referred to "the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report." ICM maintains that, at ICANN's staff prompting, ICM responded to all of the concerns raised in the GAC's Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).

71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net". It counters that ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net". "The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia,* to submit to technological tools to help tag and filter their sites; allow their sites to be 'crawled' for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited

promotional email, the 'capture' of visitors to their sites, *etc.)."* (Claimant's Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique "in order to impose an impossible burden on ICM." According to ICM, Dr. Twomey asserted that "the GAC was now insisting that ICM be responsible for 'enforcing restrictions' around the world on access to illegal and offensive content." (*Id.,* pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was

> "not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered 'illegal and offensive' in many countries. Some of its content is considered 'illegal and offensive' in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board's determination that ICM had met the RFP criteria: 'to the extent that governments do have concerns they relate to the issues across TLDs.' ICANN has never suggested that the registries for those other TLDs must 'enforce' restrictions on access to illegal or offensive content for sites on their TLDs." (*Id.,* pp. 43-44.)

72. ICM adds that if "the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so." The GAC is no more than an advisory body supposed to provide "advice" on a "timely" basis. "ICANN is by no means under any obligation to do whatever the GAC tells it to do." Indeed, ICANN's Bylaws specifically contemplate that the Board may decide not to follow the GAC's advice. *(Id.,* p. 44.)

73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:

> "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state

in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities." (C-5, and *supra,* paragraph 9.)

74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that "ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content..." (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for "enforcing" the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites" (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or "representation to enforce the laws of the world on pornography" (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, "The TLD system is neutral, although filtering systems could be solutions promoted by governments." (C-139, p. 5.) "In other words," ICM argues, "the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided 'appropriate measures to restrict access to illegal and offensive content.'" (Claimant's Post-Hearing Submission, p. 47.)

76. ICM alleges that, "Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would 'ensure enforcement of these contractual terms' as they relate to various countries' individual laws

'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place." (*Id.,* p. 48.)

77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:

> "The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...
>
> "Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liase with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.
>
> "This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decision, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)

78. Dr. Twomey said this about Mr. Boyle's position:

> "...the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law', would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract. The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position." (C-189, p. 6.)

79. ICM contends that "it is impossible to reconcile the points made in Mr. Boyle's letter – *i.e.,* that ICANN should ensure that ICM delivered from "day one" on the 'benefits and safeguards' promised in its contract, and that ICM should liase with the IWF – as a requirement 'to ensure enforcement of the contractual terms as they each individually interpret them against their own law concerning pornographic content'. And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mandate to impose it on ICM, and would have imposed a requirement on ICM that it has never imposed on any other registry." (Claimant's Post-Hearing Submission, p. 50.)

80. ICM however acknowledges that other members of the Board shared Dr. Twomey's analysis. It concludes that:

> "...the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; and that – had it been included in the RFP – would have kept any applicant from applying for an sTLD dealing with adult content." *(Id.,* p. 51.)

81. ICM observes that, following the ICANN Board's rejection of the ICM registry agreement on May 10, 2006, and then its renewed consideration of it after ICM withdrew its request for reconsideration (*supra,* paragraph 39), ICM responded to further requests of ICANN staff. It agreed to conclude a contract with what is now known as the Family Online Safety Institute ("FOSI") specifying that FOSI was "to use an automated tool to scan" the .XXX domain and develop other ways to monitor ICM's compliance with its

commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.

82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately --- as described above (*supra,* paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of "broad-based support from the community". 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.

83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra,* paragraph 47), ICM makes the following allegations of inconsistency.

84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then "reapplied" the sponsorship criteria to ICM was "incoherent, discriminatory and pretextual". (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: "broad-based support from the community".

85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, "(m)embers of both .TEL and .MOBI communities are self-identified". Both sTLDs are now in the root.

86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.

87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.

88. In sum "ICANN's reopening of the sponsorship criteria – which it did *only* for ICM – was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause." *(Id.,* p. 65.)

89. Reason 2: based on the extensive comment and from the GAC's Communiques, ICM's agreement raises public policy issues. ICANN never precisely identified the "public policy" issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world's various and different laws and standards concerning pornography. That interpretation "was sufficiently absurd as to have been made in bad faith"; in any event it holds ICM to an "impossible standard", and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.,* that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate. ICANN's imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM's application on grounds that were not applied neutrally and objectively, which were suggestive of a "pretextual basis to 'cover' the real reason for rejecting .XXX, *i.e.,* that the U.S. government and several other powerful governments objected to its proposed content." *(Id.,* pp. 66-67.)

90. Reason 3: the ICM application and revised agreement do not resolve GAC's issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be

credibly resolved with the mechanisms proposed by the applicant. ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.

91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.

92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate. ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet – a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfil it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.

93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.

94. The "Relief Requested" by ICM Registry consists, *inter alia,* of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:

> "i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;
>
> "ii. Rejecting ICM's proposed agreement to serve as registry operator...
>
> "iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;
>
> "iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...
>
> "v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations..." (Claimant's Memorial on the Merits, pp. 265-267.)

The Contentions of ICANN

95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, "Independent Review of Board Actions". Article IV, Section 3, provides that:

> "1. ...ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
>
> "2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action.

"3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles and Bylaws.

"4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators ...nominated by that provider.

"5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

...

"8. The IRP shall have the authority to:

...

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

...

"12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

"13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.

...

"15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." (C-5.)

97. ICANN contends that the foregoing terms make it clear that the IRP's declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to "consider" the declaration. "The direction to 'consider' the Panel's declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement." (ICANN's Response to Claimant's Memorial on the Merits, p. 32.) ICANN's Board is specifically directed to "review" the Panel's declarations, not to implement them. Moreover, the Board is "not even required to review or consider the declaration immediately, or at any particular time," but is encouraged to do so at the next Board meeting, where "feasible", reinforcing the fact that the Board's review and consideration of the Panel's declaration does not require its acceptance. The Panel may "recommend", but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. *(Id.,* p. 33.)

98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP's authority would be persuasive, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions". But "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations". (*Id.,* p. 34.) The primary pertinent document, "ICANN: A Blueprint for Reform," calls for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws". ICM Registry's counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing

the independent review process, observed that "decisions will be nonbinding, because the Board will retain final decision-making authority". *(Ibid.,* p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a "Supreme Court" for ICANN, the Board changed the reference to "decisions" of the IRP to "declarations" precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.,* p. 38.)

99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association's International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.

The Standard of Review is Deferential

100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra,* paragraph 5). Article 1, Section 2 of the Bylaws provides that, "In performing its mission, the following core values should guide the decisions and actions of ICANN"; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:

> "These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and to determine, if necessary, an appropriate and defensible balance among competing values." (C-5.)

101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board "shall exercise its judgment" in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, "the deference expressly

accorded to the Board in implementing the core values applies..." ICANN continues:

> "Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto,* not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably 'exercise[s] its judgment' in determining that other relevant principles outweighed that value in the particular circumstances at hand."

While in the instant case, in ICANN's view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, "...because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct." (ICANN's Response to Claimant's Memorial on the Merits, pp. 45-47.)

102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, "strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner 'inconsistent with' the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN's conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse...independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board." (*Ibid.,* p. 48.)

103. ICANN contends, moreover, that,

> "Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that 'there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation'...In California...these principles require deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests' of the corporation and 'exercised discretion within the scope of its authority'". This includes the boards of not-for-profit corporations." (*Ibid.,* pp. 49-50.)

The Applicable Law of This Proceeding

104. ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).

105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.

106. Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra,* paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.)* Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the

same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California -- governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.

107. Moreover, the specification of "relevant" principles of international law in Article 4 "must mean principles of international law that apply to a private entity such as ICANN" (*id.,* p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.

108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.

ICANN Acted Consistently with its Articles of Incorporation and Bylaws

109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were "difficult", ICANN's Board addressed them with "great care", and devoted "an enormous amount of time trying to determine the right course of action". ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, "with no hint whatsoever of the 'bad faith' ICM alleges." (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)

110. ICM's claims "begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications

proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application." But the RFP refutes this contention. It does not suggest that the Board's "allowance for an application to proceed to contract negotiations confirms the close of the evaluation process." ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: "Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they'll authorize staff to complete or execute the agreements with the sponsoring organizations..." *(Ibid.,* pp. 81-82.) It observes that Dr. Cerf affirmed that: "ICANN never intended that this would be a formal, 'two-step' process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship." (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were "two overlapping phases in the evaluation of the sTLDS" and the Board always retained the right "to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole". (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM's application did not argue that the Board had already approved the .XXX sTLD. The following exchange with Dr. Cerf took place in the course of the hearing:

> "Q. Now, ICM's position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?
>
> "A. Not, it's not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met." (Tr. 601:4:13.)

111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." *(Ibid.,* p. 84.)

112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra,* paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.,* p. 86.)

113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.

114. The ICANN Board also permitted other applicants for sTLDs -- .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." *(Ibid.,* p. 87.)

115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship

shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.

116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed "some concerns about whether the [ICM] proposal met the criteria set forth in the RFP..." She said that she did not want to re-open issues if they had already been decided by the Board (*supra,* paragraphs 42-43). In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN'S Response to Claimant's Memorial on the Merits, p. 90.)

117. ICANN also draws attention to Dr. Twomey's letter of May 4, 2006 (*supra,* paragraph 37) in which he wrote that the Board's decision of June 1, 2005, was without prejudice to the Board's right to decide whether the contract reached with ICM meets all the criteria before the Board.

118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC's "diverse and wide-ranging concerns" with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that "some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography." (*Ibid.,* p. 102.)

119. ICANN points out that:

> "In revising its proposed registry agreement to address the GAC's concerns...ICM took the position that it would install 'appropriate measures to restrict access to illegal and offensive content,' including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM's 'monitoring' would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) 'content-based' objections to Internet sites." (*Ibid.,* pp. 103-104.)

120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra,* paragraph 38) and February 12, 2007, (*supra,* paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were

or were not incorrect is "irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM's application." *(Ibid.,* p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.).*

121. The Board's May 10, 2006 vote (*supra,* paragraph 38) rejected ICM's then current draft, but provided ICM "yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board's decision to allow ICM to continue to work the problem is directly at odds with ICM's position that the Board decided 'for political reasons' to reject ICM's application; if so, it would have been much easier for the Board to reject ICM's application in its entirety in 2006." *(Ibid.,* p. 106.)

122. At its meeting of February 12, 2007, (*supra,* paragraphs 41-45), concerns in the Board about whether ICM's application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM's application and agreement were definitively rejected, the majority was, first, concerned by ICM's definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM's application.

> "Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM's sTLD application." *(Ibid.,* pp. 108-109.)

124. Second, ICM's proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, "a uTLD, disguised as an sTLD, just as ICM had proposed in 2000." *(Ibid.,* p. 209.)

125. Third, whatever community support ICM may have had at one time, it had "fallen apart by early 2007" (*ibid.).* During the final public comment period in 2007, "a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM's .XXX sTLD..." (p. 110). "Broad-based support" was lacking. (P. 111.) 75,000 pre-registrations for .XXX... "Out of

the over 4.2 million adult content websites in operation" hardly represents broad-based support. (P. 115.)

126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. "In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD." (P. 112.)

127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation". But such measures "diluted the possibility that their policies would be 'primarily in the interests of the Sponsored TLD Community' as required by the sponsorship selection criteria." (Pp. 112-113.)

128. ICANN concludes that, "despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP." Reasonable people might disagree – as did a minority of the Board – "but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation." (P. 113.)

129. The treatment of ICM's application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC. ICANN did not reject ICM's application only for reasons of public policy (although they were important). ICM's application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM's application for "many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel." (*Ibid.,* p. 124.) It also rejected the application because ICM's proposed registry agreement "would have required ICANN to manage the content of the .XXX sTLD" (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. "Had the ICANN Board taken the view that the GAC's views must in every case be followed without independent judgment, the Board presumably would have rejected ICM's application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed." *(Ibid.)*

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

> "...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs." (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to "independent arbitration" (*supra,* paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider". The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which "shall be final and binding on the parties. The parties undertake to carry out any such award without delay." The Rules of the ICDR "govern the arbitration" (Article 1). It is unquestioned that the term, "arbitration" imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's "International Arbitration Rules...will govern the process in combination with these Supplementary Procedures". (C-12.) They specify

that the Independent Review Panel refers to the neutrals "appointed to decide the issue(s) presented" and further specify that, "DECLARATION refers to the decisions/opinions of the IRP". "The DECLARATION shall specifically designate the prevailing party." All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is "to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" – to "declare", not to "decide" or to "determine". Section 3(8) of the Bylaws continues that the IRP shall have the authority to "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". The IRP cannot "order" interim measures but do no more than "recommend" them, and this until the Board "reviews" and "acts upon the opinion" of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." This relaxed temporal proviso to do no more than "consider" the IRP declaration, and to do so at the next meeting of the Board "where feasible", emphasizes that it is not binding. If the IRP's Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on "Form and Effect of an IRP Declaration", significantly omit the provision of Article 27 of the ICDR Rules specifying that award "shall be final and binding on the parties". (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel's Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

136. The Internet Corporation for Assigned Names and Numbers is a not-for-profit corporation established under the law of the State of California. That law embodies the "business judgment rule". Section 309 of the California Corporations Code provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders..." and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization" – including ICANN -- ICANN is charged with "promoting the global public interest in the operational stability of the Internet..." ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law..." Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and non-profit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.

The Applicable Law of this Proceeding

137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the "local law" referred to in the provision of Article 4 of the Articles of Incorporation – "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law" – is the law of California. But they differ on what are "relevant principles of international law" and their applicability to the instant dispute.

138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra,* paragraphs 53-54.) Principles of international law in ICM's analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM's expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.

139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are "relevant" in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra,* paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN's Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.

140. In the view of the Panel, ICANN, in carrying out its activities "in conformity with the relevant principles of international law," is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.

That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.

The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws

142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application's request for delegation of the .XXX sTLD was or was not consistent with ICANN's Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).

143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.

144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN's President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.

145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.

146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.

147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.

148. Support on that aspect of the matter consists of the following:

- (a) The resolutions of June 1, 2005 (*supra,* paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.

- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to

the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.

- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair "confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so." (*Supra,* paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM's application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra,* paragraphs 21-25, 40).

- (d) At its teleconference of September 15, 2005, there was "lengthy discussion involving nearly all of the directors regarding the sponsorship criteria..." *(supra,* paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.

- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting

> "that the Board decision as to the .XXX application is still pending...the Board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be

addressed by contractual obligations to be stated in a registry agreement." (C-188, and *supra,* paragraph 37.)

- (f) At a Board teleconference of February 12, 2007, ICANN's General Counsel asked the Board to consider "how ICM measures up against the RFP criteria," a request that implies that questions about whether such criteria had been met were not foreclosed. *(Supra,* paragraph 41.)

- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board's June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It Is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.

- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM's meeting of sponsorship criteria at the Board's teleconference of February 12, 2007, she said that she did "not wish to reopen issues if they have already been decided by the Board" and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board's debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM's application was not sufficient "to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.") *(Supra,* paragraph 52.)

149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM's application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue "applied documented policies, neutrally and objectively, with integrity and

fairness" (Bylaws, Section 2(8), the Panel finds instructive the documented policy stated in the Board's Carthage resolution of October 31, 2003 on "Finalization of New sTLD RFP," namely, that an agreement "reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process." (C-78, p. 4.) In the Panel's view, the sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC's proposals for new TLDs generally exclude consideration of new criteria (*supra,* paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board's disposition of the ICM Registry application, still less that of any of the Board's members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed. Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to "duly take into account" the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM's application because of governmental pressure. Certainly there are those, including Board members,

who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.

151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra,* paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra,* paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place *(supra,* paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.

PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL

152. The Panel concludes, for the reasons stated above, that:

First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.

Second, the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.

Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.

Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.

Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.

Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling $4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling $473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of $241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.

Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.

Stephen M. Schwebel

Date: February 19, 2010

Jan Paulsson

Date: 16 February 2010

Dickran Tevrizian

Date: February 18, 2010

CONCURRING AND DISSENTING OPINION

I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.

However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.

I

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.

ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.

Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.

Article 4 of ICANN's Articles of Incorporation specifically provide:

> "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.

The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.

ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).

As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.

In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Blacks Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between

directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.

Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2nd 828, 852. *See also,* Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.

The "business judgment rule" is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. *See* Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. *See* Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. *See* Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director "rationally believes that the business judgment is in the best interests of the corporation." *See* Lee v. Interinsurance Exch., (1996) 50 CA4th 694.

The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Cal. Corp. Code § 309(a); *see also* Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: "A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." Cal. Corp. Code § 309 (c).

II

THE ACTIONS OF THE ICANN BOARD OF DIRECTORS
ARE ENTITLED TO SUBSTANTIAL DEFERENCE
FROM THE INDEPENDENT REVIEW PANEL

ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:

> "These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new

> situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."

The By-Laws make it clear that the core values must not be construed in a "narrowly prescriptive"manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.

III

PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY

Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a "choice-of-law provision" importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter "IRP").

Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.

IV

THE ICANN BOARD OF DIRECTORS DID NOT ACT INCONSISTENTLY WITH ICANN'S ARTICLES OF INCORPORATION AND BY-LAWS IN CONSIDERING AND ULTIMATELY DENYING ICM REGISTRY, LLC'S APPLICATION FOR A SPONSORED TOP LEVEL DOMAIN NAME

On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter "ICM"), failed to satisfy the

Request For Proposal (“hereinafter “RFP”) posted June 24, 2003, in the following manner:

> “1. ICM’s definition of its sponsored TLD community was not capable of precise or clear definition;
> 2. ICM’s policies were not primarily in the interests of the sponsored TLD community;
> 3. ICM’s proposed community did not have needs and interests which are differentiated from those of the general global Internet community;
> 4. ICM could not demonstrate that it had the requisite community support; and,
> 5. ICM was not adding new and valuable space to the Internet name space.”

On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter “STLD”). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.

ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.

Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.

The fact that most ICANN Board members expressed significant concerns about ICM’s sponsorship shortcomings after the June 1, 2005,

resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.

The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.

Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.

By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.

Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.

The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.

Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and

numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

V

CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

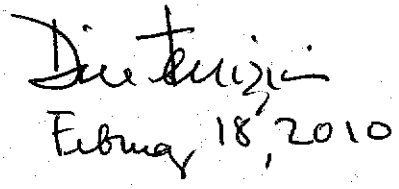
The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.

Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.

JUDGE DICKRAN TEVRIZIAN (Retired)



crowell moring

Reference Material 28.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NUCLEAR TESTS CASE

(AUSTRALIA *v.* FRANCE)

JUDGMENT OF 20 DECEMBER 1974

1974

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES

(AUSTRALIE c. FRANCE)

ARRÊT DU 20 DÉCEMBRE 1974

Official citation:

Nuclear Tests (Australia v. *France), Judgment,*
I.C.J. Reports 1974, p. 253.

Mode officiel de citation:

Essais nucléaires (Australie c. France), arrêt,
C.I.J. Recueil 1974, p. 253.

Sales number:
N° de vente: **400**

20 DECEMBER 1974

JUDGMENT

NUCLEAR TESTS CASE
(AUSTRALIA *v.* FRANCE)

AFFAIRE DES ESSAIS NUCLÉAIRES
(AUSTRALIE c. FRANCE)

20 DÉCEMBRE 1974

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 1974

1974
20 December
General List
No. 58

20 December 1974

NUCLEAR TESTS CASE

(AUSTRALIA *v.* FRANCE)

Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.

Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings.

Unilateral acts creative of legal obligations—Principle of good faith.

Resolution of dispute by unilateral declaration giving rise to legal obligation —Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGMENT

Present: *President* LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

In the Nuclear Tests case,

between

Australia,

represented by

Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General's Department,

as Agent,

COUR INTERNATIONALE DE JUSTICE

ANNÉE 1974

20 décembre 1974

1974
20 décembre
Rôle général
no 58

AFFAIRE DES ESSAIS NUCLÉAIRES

(AUSTRALIE c. FRANCE)

Questions de compétence et de recevabilité — Nécessité d'un examen préalable portant sur la question essentiellement préliminaire de l'existence d'un différend — Exercice d'un pouvoir inhérent de la Cour.

Analyse de la demande formulée dans la requête et détermination de son objet — Portée des conclusions et déclarations du demandeur pour la définition de la demande — Pouvoir de la Cour d'interpréter les conclusions — Déclarations publiques faites au nom du défendeur avant et après la clôture de l'instance.

Les actes unilatéraux comme sources d'obligations juridiques — Principe de la bonne foi.

Règlement du différend par l'effet d'une déclaration unilatérale créant une obligation juridique — Le fait que le demandeur n'exerce pas son droit de se désister n'empêche pas la Cour de parvenir à sa propre conclusion — La disparition du différend entraîne celle de l'objet de la demande — La Cour ne peut exercer sa compétence que s'il existe réellement un différend entre les Parties.

ARRÊT

Présents: M. LACHS, *Président*; MM. FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, sir Humphrey WALDOCK, MM. NAGENDRA SINGH, RUDA, *juges*; sir Garfield BARWICK, *juge* ad hoc: M. AQUARONE, *Greffier*.

En l'affaire des essais nucléaires,

entre

l'Australie,

représentée par

M. P. Brazil, membre du barreau d'Australie, membre du service de l'*Attorney-General* d'Australie,

comme agent,

assisted by

H.E. Mr. F. J. Blakeney, C.B.E., Ambassador of Australia,

as Co-Agent,

Senator the Honourable Lionel Murphy, Q.C., Attorney-General of Australia,
Mr. M. H. Byers, Q.C., Solicitor-General of Australia,
Mr. E. Lauterpacht, Q.C., of the English Bar, Lecturer in the University of Cambridge,
Professor D. P. O'Connell, of the English, Australian and New Zealand Bars, Chichele Professor of Public International Law in the University of Oxford,

as Counsel,

and by

Professor H. Messel, Head of School of Physics, University of Sydney,
Mr. D. J. Stevens, Director, Australian Radiation Laboratory,
Mr. H. Burmester, of the Australian Bar, Officer of the Attorney-General's Department,
Mr. F. M. Douglas, of the Australian Bar, Officer of the Attorney-General's Department,
Mr. J. F. Browne, of the Australian Bar, Officer of the Department of Foreign Affairs,
Mr. C. D. Mackenzie, of the Australian Bar, Third Secretary, Australian Embassy, The Hague,

as Advisers,

and

the French Republic,

THE COURT,

composed as above,

delivers the following Judgment:

1. By a letter of 9 May 1973, received in the Registry of the Court the same day, the Ambassador of Australia to the Netherlands transmitted to the Registrar an Application instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. In order to found to the jurisdiction of the Court, the Application relied on Article 17 of the General Act for the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court, and alternatively on Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the French Government. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

assisté par

S. Exc. M. F. J. Blakeney, C.B.E., ambassadeur d'Australie aux Pays-Bas,

comme coagent,

l'honorable Lionel Murphy, Q.C., sénateur, *Attorney-General* d'Australie,

M. M. H. Byers, Q.C., *Solicitor-General* d'Australie,
M. E. Lauterpacht, Q.C., membre du barreau d'Angleterre, *lecturer* à l'Université de Cambridge,
M. D. P. O'Connell, membre des barreaux d'Angleterre, d'Australie et de Nouvelle-Zélande, professeur de droit international public à l'Université d'Oxford (chaire Chichele),

comme conseils,

et par

M. H. Messel, directeur de l'école de physique de l'Université de Sydney,
M. D. J. Stevens, directeur du laboratoire australien des radiations,
M. H. Burmester, membre du barreau d'Australie, membre du service de l'*Attorney-General*,
M. F. M. Douglas, membre du barreau d'Australie, membre du service de l'*Attorney-General*,
M. J. F. Browne, membre du barreau d'Australie, fonctionnaire du département des affaires étrangères,
M. C. D. Mackenzie, membre du barreau d'Australie, troisième secrétaire à l'ambassade d'Australie aux Pays-Bas,

comme conseillers,

et

la République française,

LA COUR,

ainsi composée,

rend l'arrêt suivant:

1. Par lettre du 9 mai 1973 reçue au Greffe de la Cour le même jour l'ambassadeur d'Australie aux Pays-Bas a transmis au Greffier une requête introduisant une instance contre la France au sujet d'un différend portant sur des essais d'armes nucléaires dans l'atmosphère auxquels le Gouvernement français procéderait dans l'océan Pacifique. Pour établir la compétence de la Cour, la requête invoque l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, rapproché de l'article 36, paragraphe 1, et de l'article 37 du Statut de la Cour, et subsidiairement l'article 36, paragraphe 2, du Statut de la Cour.

2. Conformément à l'article 40, paragraphe 2, du Statut, la requête a été immédiatement communiquée au Gouvernement français. Conformément au paragraphe 3 du même article, les autres Etats admis à ester devant la Cour ont été informés de la requête.

3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the Government of Australia chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge *ad hoc* in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case, and that it could not accept the Court's jurisdiction; and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. Nor has an agent been appointed by the French Government.

5. On 9 May 1973, the date of filing of the Application instituting proceedings, the Agent of Australia also filed in the Registry of the Court a request for the indication of interim measures of protection under Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes and Article 41 of the Statute and Article 66 of the Rules of Court. By an Order dated 22 June 1973 the Court indicated, on the basis of Article 41 of the Statute, certain interim measures of protection in the case.

6. By the same Order of 22 June 1973, the Court, considering that it was necessary to resolve as soon as possible the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application, and fixed 21 September 1973 as the time-limit for the filing of a Memorial by the Government of Australia and 21 December 1973 as the time-limit for a Counter-Memorial by the French Government. The Co-Agent of Australia having requested an extension to 23 November 1973 of the time-limit fixed for the filing of the Memorial, the time-limits fixed by the Order of 22 June 1973 were extended, by an Order dated 28 August 1973, to 23 November 1973 for the Memorial and 19 April 1974 for the Counter-Memorial. The Memorial of the Government of Australia was filed within the extended time-limit fixed therefor, and was communicated to the French Government. No Counter-Memorial was filed by the French Government and, the written proceedings being thus closed, the case was ready for hearing on 20 April 1974, the day following the expiration of the time-limit fixed for the Counter-Memorial of the French Government.

7. On 16 May 1973 the Government of Fiji filed in the Registry of the Court a request under Article 62 of the Statute to be permitted to intervene in these proceedings. By an Order of 12 July 1973 the Court, having regard to its Order of 22 June 1973 by which the written proceedings were first to be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application, decided to defer its consideration of the application of the Government of Fiji for permission to intervene until the Court should have pronounced upon these questions.

8. On 24 July 1973, the Registrar addressed the notification provided for in Article 63 of the Statute to the States, other than the Parties to the case, which were still in existence and were listed in the relevant documents of the League of Nations as parties to the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928, which was invoked in the Application as a basis of jurisdiction.

9. The Governments of Argentina, Fiji, New Zealand and Peru requested that the pleadings and annexed documents should be made available to them

3. En application de l'article 31, paragraphe 2, du Statut, le Gouvernement australien a désigné le très honorable sir Garfield Barwick, *Chief Justice* d'Australie, pour siéger comme juge *ad hoc* en l'affaire.

4. Dans une lettre de l'ambassadeur de France aux Pays-Bas datée du 16 mai 1973 et remise par celui-ci au Greffier le même jour, le Gouvernement français a fait savoir que, pour les motifs exposés dans la lettre et dans une annexe jointe à celle-ci, il estime que la Cour n'a manifestement pas compétence en l'espèce, qu'il ne peut accepter sa juridiction, et qu'en conséquence le Gouvernement français n'a pas l'intention de désigner un agent et demande à la Cour d'ordonner que l'affaire soit rayée de son rôle. Le Gouvernement français n'a pas désigné d'agent.

5. En même temps que la requête introductive d'instance, l'agent de l'Australie a déposé au Greffe le 9 mai 1973 une demande en indication de mesures conservatoires fondée sur l'article 33 de l'Acte général de 1928 pour le règlement pacifique des différends internationaux, l'article 41 du Statut et l'article 66 du Règlement de la Cour. Par ordonnance du 22 juin 1973, la Cour a indiqué, sur la base de l'article 41 du Statut, certaines mesures conservatoires en l'espèce.

6. Par la même ordonnance du 22 juin 1973, la Cour, considérant qu'il était nécessaire de régler aussi rapidement que possible les questions relatives à sa compétence et à la recevabilité de la requête, a décidé que les pièces écrites porteraient d'abord sur ces questions et a fixé la date d'expiration des délais au 21 septembre 1973 pour le dépôt du mémoire du Gouvernement australien et au 21 décembre 1973 pour le dépôt du contre-mémoire du Gouvernement français. Le coagent de l'Australie ayant demandé que soit prorogé au 23 novembre 1973 le délai dans lequel le mémoire devait être déposé, la date d'expiration des délais fixés par l'ordonnance du 22 juin 1973 a été reportée par ordonnance du 28 août 1973 au 23 novembre 1973 pour le mémoire du Gouvernement australien et au 19 avril 1974 pour le contre-mémoire du Gouvernement français. Le mémoire du Gouvernement australien a été déposé dans le délai ainsi prorogé et il a été communiqué au Gouvernement français. Le Gouvernement français n'a pas déposé de contre-mémoire et, la procédure écrite étant ainsi terminée, l'affaire s'est trouvée en état le 20 avril 1974, c'est-à-dire le lendemain du jour où expirait le délai fixé pour le dépôt du contre-mémoire du Gouvernement français.

7. Le 16 mai 1973, le Gouvernement fidjien a déposé au Greffe, conformément à l'article 62 du Statut, une requête à fin d'intervention dans l'instance. Par ordonnance du 12 juillet 1973, la Cour, eu égard à son ordonnance du 22 juin 1973 prescrivant que les pièces écrites porteraient d'abord sur les questions relatives à sa compétence et à la recevabilité de la requête, a décidé de surseoir à l'examen de la requête par laquelle le Gouvernement fidjien demandait à intervenir jusqu'à ce qu'elle eût statué sur ces questions.

8. Le 24 juillet 1973, le Greffier a adressé la notification prévue à l'article 63 du Statut aux Etats, autres que les Parties à l'instance, qui existaient encore et étaient indiqués dans les documents pertinents de la Société des Nations comme parties à l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, qui était invoqué dans la requête comme l'un des fondements de la compétence de la Cour.

9. Les Gouvernements de l'Argentine, de Fidji, de la Nouvelle-Zélande et du Pérou ont demandé que les pièces de la procédure écrite soient tenues à

in accordance with Article 48, paragraph 2, of the Rules of Court. The Parties were consulted on each occasion, and the French Government having maintained the position stated in the letter of 16 May 1973, and thus declined to express an opinion, the Court or the President decided to accede to these requests.

10. On 4-6, 8-9 and 11 July 1974, after due notice to the Parties, public hearings were held, in the course of which the Court heard the oral argument, on the questions of the Court's jurisdiction and of the admissibility of the Application, advanced by Mr. P. Brazil, Agent of Australia and Senator the Honourable Lionel Murphy, Q.C., Mr. M. H. Byers, Q.C., Mr. E. Lauterpacht, Q.C., and Professor D. P. O'Connell, counsel, on behalf of the Government of Australia. The French Government was not represented at the hearings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Australia:

in the Application:

> "*The Government of Australia asks the Court to adjudge and declare* that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.
>
> *And to Order*
>
> that the French Republic shall not carry out any further such tests."

in the Memorial:

> "The Government of Australia submits to the Court that it is entitled to a declaration and judgment that:
>
> *(a)* the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and
>
> *(b)* the Application is admissible."

12. During the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of Australia:

> "The final submissions of the Government of Australia are that:
>
> *(a)* the Court has jurisdiction to entertain the dispute the subject of the Application filed by the Government of Australia on 9 May 1973; and
>
> *(b)* the Application is admissible
>
> and that accordingly the Government of Australia is entitled to a declaration and judgment that the Court has full competence to proceed to entertain the Application by Australia on the Merits of the dispute."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the

leur disposition conformément à l'article 48, paragraphe 2, du Règlement. Les Parties ont été consultées dans chaque cas et, le Gouvernement français maintenant la position prise dans la lettre du 16 mai 1973 pour refuser de donner un avis, la Cour, ou le Président, a décidé de faire droit à ces demandes.

10. Les Parties ayant été dûment averties, des audiences publiques ont eu lieu les 4, 5, 6, 8, 9 et 11 juillet 1974, durant lesquelles la Cour a entendu M. P. Brazil, agent de l'Australie, et l'honorable Lionel Murphy, Q.C., sénateur, M. M. H. Byers, Q.C., M. E. Lauterpacht, Q.C., et M. D. P. O'Connell, conseils, plaider pour le Gouvernement australien sur les questions relatives à la compétence de la Cour et à la recevabilité de la requête. Le Gouvernement français n'était pas représenté aux audiences.

11. Dans la procédure écrite, les conclusions ci-après ont été déposées au nom du Gouvernement australien:

dans la requête:

> «*Le Gouvernement australien prie la Cour de dire et juger* que, pour l'un quelconque ou l'ensemble des motifs exposés ci-dessus ou pour tout autre motif jugé pertinent par la Cour, la poursuite des essais atmosphériques d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international et
>
> *Ordonner*
>
> à la République française de ne plus faire de tels essais.»

dans le mémoire:

> «Le Gouvernement australien s'estime fondé à ce que la Cour dise et juge que:
>
> *a)* la Cour a compétence pour connaître du différend qui fait l'objet de la requête déposé par le Gouvernement australien le 9 mai 1973;
>
> *b)* la requête est recevable. »

12. A l'issue de la procédure orale, les conclusions écrites ci-après ont été déposées au Greffe au nom du Gouvernement australien:

> «Les conclusions finales du Gouvernement australien sont les suivantes:
>
> *a)* la Cour a compétence pour connaître du différend qui fait l'objet de la requête déposée par le Gouvernement australien le 9 mai 1973;
>
> *b)* la requête est recevable;
>
> Et en conséquence le Gouvernement australien s'estime fondé à ce que la Cour dise et juge qu'elle a pleine compétence pour connaître de la requête de l'Australie sur le fond du différend.»

13. Aucune pièce écrite n'ayant été déposée par le Gouvernement français, et celui-ci ne s'étant pas fait représenter à la procédure orale, aucune conclusion n'a été prise formellement par ce gouvernement. Toutefois l'attitude du Gouvernement français en ce qui concerne la question de la compétence de la Cour a été définie dans la lettre précitée de l'ambassadeur de France aux

Netherlands, and the document annexed thereto. The said letter stated in particular that:

> ". . . the Government of the [French] Republic, as it has notified the Australian Government, considers that the Court is manifestly not competent in this case and that it cannot accept its juridiction".

*
* *

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list". At the opening of the public hearing concerning the request for interim measures of protection, held on 21 May 1973, the President announced that "this request . . . has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court". In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

*
* *

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

*
* *

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric tests of nuclear weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the *Fisheries Jurisdiction* cases, as follows:

Pays-Bas en date du 16 mai 1973, et dans le document qui y était joint en annexe. La lettre de l'ambassadeur contenait notamment ce passage:

> « ainsi qu'il en a averti le Gouvernement australien, le Gouvernement de la République estime que la Cour n'a manifestement pas compétence dans cette affaire et qu'il ne peut accepter sa juridiction ».

*
* *

14. Comme il a été indiqué (paragraphe 4), l'ambassadeur de France déclarait aussi dans sa lettre du 16 mai 1973 que le Gouvernement français « demande respectueusement à la Cour de bien vouloir ordonner que cette affaire soit rayée de son rôle ». Au début de l'audience publique consacrée à la demande en indication de mesures conservatoires qui s'est tenue le 21 mai 1973, le Président a annoncé: « Il a été dûment pris acte de cette demande ... et la Cour l'examinera le moment venu, conformément à l'article 36, paragraphe 6, de son Statut.» Dans son ordonnance du 22 juin 1973, la Cour a dit que, pour les raisons énoncées dans cette ordonnance, elle ne pouvait « faire droit, au stade actuel de la procédure, » à la demande du Gouvernement français. Ayant eu depuis lors la possibilité d'examiner cette demande compte tenu de la suite de la procédure, la Cour estime que la présente affaire n'est pas de celles auxquelles il conviendrait d'appliquer la procédure sommaire de radiation du rôle.

*
* *

15. Il est regrettable que le Gouvernement français ne se soit pas présenté pour développer ses arguments sur les questions qui se posent en la phase actuelle de la procédure et qu'ainsi la Cour n'ait pas eu l'aide que l'exposé de ces arguments et toute preuve fournie à l'appui auraient pu lui apporter. La Cour doit cependant poursuivre l'affaire pour aboutir à une conclusion et, ce faisant, doit tenir compte non seulement des preuves et des arguments qui lui sont présentés par le demandeur, mais aussi de toute documentation ou preuve pertinente. Elle doit sur cette base s'assurer en premier lieu qu'il n'existe aucun obstacle à l'exercice de sa fonction judiciaire et en second lieu, s'il n'existe aucun obstacle de ce genre, que la requête est fondée en fait et en droit.

*
* *

16. La présente affaire concerne un différend entre le Gouvernement australien et le Gouvernement français au sujet d'essais d'armes nucléaires effectués en atmosphère par ce dernier dans l'océan Pacifique Sud. Attendu que, dans la phase actuelle de l'instance, la Cour ne doit traiter que de questions préliminaires, il convient de rappeler que, dans une phase de cette nature, elle doit se placer dans l'optique qu'elle a définie en ces termes dans les affaires de la *Compétence en matière de pêcheries*:

> "The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits." (*I.C.J. Reports 1973*, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique, in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururoa atoll some 6,000 kilometres to the east of the Australian mainland. The French Government has created "Prohibited Zones" for aircraft and "Dangerous Zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these "zones" have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequent dissipation in varying degrees throughout the world, of measurable quantities of radio-active matter. It is asserted by Australia that the French atmospheric tests have caused some fall-out of this kind to be deposited on Australian territory; France has maintained in particular that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible, and that such fall-out on Australian territory does not constitute a danger to the health of the Australian population. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

*
* *

19. By letters of 19 September 1973, 29 August and 11 November 1974, the Government of Australia informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute *(inter alia)* that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on Australian territory which, according to the Australian Government, was clearly attributable to these tests,

« La question étant ainsi limitée, la Cour s'abstiendra non seulement d'exprimer une opinion sur des points de fond, mais aussi de se prononcer d'une manière qui pourrait préjuger ou paraître préjuger toute décision qu'elle pourrait rendre sur le fond.» (*C.I.J. Recueil 1973*, p. 7 et 54.)

Il y a lieu cependant de résumer les principaux faits qui sont à l'origine de l'affaire.

17. Avant le dépôt de la requête introductive d'instance en l'espèce, le Gouvernement français avait procédé à des essais atmosphériques d'engins nucléaires à son centre d'expérimentations du Pacifique, dans le territoire de la Polynésie française, en 1966, 1967, 1968, 1970, 1971 et 1972. Le lieu utilisé pour les explosions a été principalement l'atoll de Mururoa, situé à quelque 6000 kilomètres à l'est du continent australien. Le Gouvernement français a institué des « zones interdites » aux aéronefs et des « zones dangereuses » pour la navigation aérienne et maritime, afin d'empêcher les avions et les navires d'approcher du centre d'expérimentations; ces zones ont été établies chacune des années où des essais ont eu lieu, pour la durée de ces essais.

18. Comme le Comité scientifique des Nations Unies pour l'étude des effets des rayonnements ionisants l'a indiqué dans ses rapports successifs à l'Assemblée générale, les essais d'engins nucléaires effectués dans l'atmosphère ont libéré dans celle-ci et disséminé ensuite dans le monde entier à des degrés variables des quantités mesurables de matières radioactives. L'Australie affirme que les essais atmosphériques français ont provoqué des retombées de cette nature en territoire australien. La France soutient entre autres que les éléments radioactifs produits par ses expériences sont si minimes qu'ils ne peuvent être considérés que comme négligeables et que les retombées sur le territoire australien qui en résultent ne constituent pas un danger pour la santé de la population australienne. Ces points litigieux intéressant manifestement le fond de l'affaire, la Cour doit s'abstenir, pour les raisons précédemment indiquées, d'exprimer une opinion à leur sujet.

*
* *

19. Par lettres du 19 septembre 1973 et des 29 août et 11 novembre 1974, le Gouvernement australien a informé la Cour que, après l'ordonnance du 22 juin 1973 qui, à titre de mesures conservatoires prises en vertu de l'article 41 du Statut, indiquait notamment que le Gouvernement français devait s'abstenir de procéder à des essais nucléaires provoquant le dépôt de retombées radioactives sur le territoire de l'Australie, deux nouvelles séries d'essais atmosphériques ont eu lieu au centre d'expérimentations du Pacifique en juillet et août 1973 et de juin à septembre 1974. Ces lettres indiquaient aussi que l'on avait enregistré sur le territoire australien des retombées qui, selon le Gouvernement australien,

and that "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973".

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

*
* *

21. The Application founds the jurisdiction of the Court on the following basis:

> "(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931 . . .
>
> (ii) Alternatively, Article 36 (2) of the Statute of the Court. Australia and the French Republic have both made declarations thereunder."

22. The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial

étaient manifestement attribuables à ces essais, et que, « de l'avis du Gouvernement australien, l'attitude du Gouvernement français constitue une violation claire et délibérée de l'ordonnance rendue par la Cour le 22 juin 1973 ».

20. Un certain nombre de déclarations autorisées ont été récemment faites au nom du Gouvernement français, concernant les intentions de celui-ci au sujet de ses futures expériences nucléaires dans l'océan Pacifique Sud. La portée de ces déclarations et leur incidence sur la présente instance seront examinées en détail dans la suite de l'arrêt.

*
* *

21. La requête invoque, comme base de la compétence de la Cour:

« i) l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux (1928) rapproché de l'article 36, paragraphe 1, et de l'article 37 du Statut de la Cour. L'Australie et la République française ont toutes deux adhéré à l'Acte général le 21 mai 1931...

ii) subsidiairement, l'article 36, paragraphe 2, du Statut de la Cour. L'Australie et la République française ont toutes deux déposé des déclarations aux termes de cet article. »

22. La portée de la présente phase de la procédure a été définie dans l'ordonnance rendue par la Cour le 22 juin 1973, qui demandait aux Parties de traiter d'abord des questions relatives à la compétence de la Cour et à la recevabilité de la requête. Pour cette raison, ainsi qu'il a été indiqué, non seulement les Parties mais la Cour elle-même doivent s'abstenir d'aborder la demande au fond. Cependant, quand elle examine ces questions de caractère préliminaire, la Cour a le droit et, dans certaines circonstances, peut avoir l'obligation de prendre en considération d'autres questions qui, sans qu'on puisse les classer peut-être à strictement parler parmi les problèmes de compétence ou de recevabilité, appellent par leur nature une étude préalable à celle de ces problèmes.

23. A cet égard, il convient de souligner que la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue, d'une part pour faire en sorte que, si sa compétence au fond est établie, l'exercice de cette compétence ne se révèle pas vain, d'autre part pour assurer le règlement régulier de tous les points en litige ainsi que le respect des « limitations inhérentes à l'exercice de la fonction judiciaire » de la Cour et pour « conserver son caractère judiciaire » (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p. 29). Un pouvoir inhérent de ce genre, sur la base duquel la Cour est pleinement habilitée à adopter toute conclusion éventuellement nécessaire aux fins qui viennent d'être indiquées, découle de l'existence même de la Cour, organe judiciaire établi par le consente-

organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of Australia. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law"—the Application having specified in what respect further tests were alleged to be in violation of international law—and should order "that the French Republic shall not carry out any further such tests".

26. The diplomatic correspondence of recent years between Australia and France reveals Australia's preoccupation with French nuclear atmospheric tests in the South Pacific region, and indicates that its objective has been to bring about their termination. Thus in a Note dated 3 January 1973 the Australian Government made it clear that it was inviting the French Government "to refrain from any further atmospheric nuclear tests in the Pacific area and formally to assure the Australian Government that no more such tests will be held in the Pacific area". In the Application, the Government of Australia observed in connection with this Note (and the French reply of 7 February 1973) that:

> "It is at these Notes, of 3 January and 7 February 1973, that the Court is respectfully invited to look most closely; for it is in them that the shape and dimensions of the dispute which now so sadly divides the parties appear so clearly. The Government of Australia claimed that the continuance of testing by France is illegal and called for the cessation of tests. The Government of France asserted the legality of its conduct and gave no indication that the tests would stop." (Para. 15 of the Application.)

That this was the object of the claim also clearly emerges from the request for the indication of interim measures of protection, submitted to the Court by the Applicant on 9 May 1973, in which it was observed:

> "As is stated in the Application, Australia has sought to obtain from the French Republic a permanent undertaking to refrain from

ment des Etats, et lui est conféré afin que sa fonction judiciaire fondamentale puisse être sauvegardée.

24. Eu égard à ces considérations, la Cour doit examiner d'abord une question qu'elle estime essentiellement préliminaire, à savoir l'existence d'un différend, car que la Cour ait ou non compétence en l'espèce la solution de cette question pourrait exercer une influence décisive sur la suite de l'instance. Il lui incombe donc d'analyser de façon précise la demande que l'Australie lui adresse dans sa requête. La présente phase de l'instance n'ayant été consacrée qu'à des questions préliminaires, le demandeur n'a pas eu l'occasion de développer complètement ses thèses sur le fond. Il reste que c'est par rapport à la requête, laquelle doit, d'après l'article 40 du Statut, indiquer « l'objet du différend », que la Cour doit examiner la nature et l'existence du différend porté devant elle.

25. La Cour rappelle que la demande présentée dans la requête (paragraphe 11 ci-dessus) tend à ce que la Cour dise et juge que « la poursuite des essais atmosphériques d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international » — la requête spécifiant en quoi de nouveaux essais violeraient le droit international — et ordonne « à la République française de ne plus faire de tels essais ».

26. La correspondance diplomatique échangée ces dernières années entre l'Australie et la France montre les préoccupations que les expériences nucléaires françaises effectuées en atmosphère dans la région du Pacifique Sud suscitent en Australie et indique que celle-ci a eu pour objectif la cessation des essais. Ainsi, dans une note du 3 janvier 1973, le Gouvernement australien priait le Gouvernement français « de s'abstenir de tous nouveaux essais nucléaires en atmosphère dans la région du Pacifique et de lui donner l'assurance formelle qu'il n'y sera procédé à aucun nouvel essai de ce genre ». Dans la requête, le Gouvernement australien a dit à propos de cette note et de la réponse du Gouvernement français en date du 7 février 1973:

> « Ce sont ces notes, des 3 janvier et 7 février 1973, que la Cour est respectueusement invitée à examiner avec la plus grande attention car ce sont elles qui mettent en pleine lumière la nature et l'ampleur du différend qui oppose maintenant les Parties de façon si regrettable. Le Gouvernement australien soutenait que la poursuite des essais par la France était illégale et demandait leur cessation. Le Gouvernement français affirmait la légalité de son comportement et ne laissait pas entrevoir l'arrêt des essais » (par. 15).

Que tel ait été l'objet de la demande, c'est ce que confirme avec netteté la demande en indication de mesures conservatoires que le requérant a présentée à la Cour le 9 mai 1973 et où figure cette remarque:

> « Ainsi qu'il est indiqué dans la requête, l'Australie a cherché à obtenir de la République française qu'elle s'engage en permanence à

> further atmospheric nuclear tests in the Pacific. However, the French Republic has expressly refused to give any such undertaking. It was made clear in a statement in the French Parliament on 2 May 1973 by the French Secretary of State for the Armies that the French Government, regardless of the protests made by Australia and other countries, does not envisage any cancellation or modification of the programme of nuclear testing as originally planned." (Para. 69.)

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific Ocean. In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General's comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that "Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted ... but no such assurance was given". The Attorney-General continued, with reference to the communiqué of 8 June:

> "The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." (Hearing of 4 July 1974.)

It is clear from these statements that if the French Government had given what could have been construed by Australia as "a firm, explicit and binding undertaking to refrain from further atmospheric tests", the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 26 September 1974, the Attorney-General of Australia, replying to a question put in the Australian Senate with regard to reports that France had announced that it had finished atmospheric nuclear testing, said:

> "From the reports I have received it appears that what the French Foreign Minister actually said was 'We have now reached a stage in

ne plus procéder dans le Pacifique à de nouveaux essais nucléaires dans l'atmosphère. La République française a expressément refusé de prendre un tel engagement. Il ressort clairement d'une déclaration du ministre des armées faite devant le Parlement français le 2 mai 1973 que le Gouvernement français, passant outre aux protestations de l'Australie et d'autres pays, n'envisage pas d'annuler ni de modifier le programme d'expérimentation nucléaire prévu. » (Par. 69.)

27. La nature de la demande australienne se trouve précisée encore par la manière dont l'Australie, par l'intermédiaire de son *Attorney-General*, a réagi aux déclarations mentionnées au paragraphe 20 qui ont été faites au nom du Gouvernement français en ce qui concerne les expériences nucléaires dans l'océan Pacifique Sud. Lors de la procédure orale, l'*Attorney-General* d'Australie a esquissé l'historique du différend depuis l'ordonnance du 22 juin 1973 et rappelé un communiqué de la présidence de la République française en date du 8 juin 1974. Dans les observations qu'il a formulées sur ce document, l'*Attorney-General* a indiqué qu'on pouvait peut-être à l'analyse y voir la preuve d'une certaine évolution de la controverse entre les Parties, tout en soulignant que, de l'avis de son gouvernement, cette évolution n'était pas de nature à résoudre le différend à sa satisfaction. Plus particulièrement, il a rappelé à la Cour que « l'Australie a maintes fois répété qu'elle souhaite obtenir de la France l'assurance qu'il ne sera pas procédé à de nouvelles explosions nucléaires dans l'atmosphère ... mais cette assurance n'a pas été donnée ». L'*Attorney-General* a poursuivi en ces termes à propos du communiqué du 8 juin:

« Le but du Gouvernement australien est d'exclure complètement les expériences atmosphériques. Il a maintes fois demandé l'assurance que les essais dans l'atmosphère prendraient fin. Il n'a pas obtenu cette assurance. On ne saurait voir dans la récente déclaration présidentielle française un engagement ferme, explicite et de caractère obligatoire de s'abstenir de procéder à de nouveaux essais dans l'atmosphère. Le Gouvernement français se réserve donc toujours le droit d'effectuer des essais nucléaires en atmosphère. » (Audience du 4 juillet 1974.)

Il ressort de ces déclarations que, si le Gouvernement français avait pris ce que l'Australie aurait pu interpréter comme « un engagement ferme, explicite et de caractère obligatoire de s'abstenir de procéder à de nouveaux essais dans l'atmosphère », le Gouvernement demandeur aurait considéré qu'il avait atteint son objectif.

28. Plus tard, le 26 septembre 1974, répondant à une question posée au Sénat australien sur les informations d'après lesquelles la France avait annoncé qu'elle avait terminé ses essais nucléaires dans l'atmosphère, l'*Attorney-General* d'Australie a dit:

« D'après les renseignements en ma possession, il semble que le ministre des Affaires étrangères de France ait dit en fait: « Parvenus

> our nuclear technology that makes it possible for us to continue our program by underground testing, and we have taken steps to do so as early as next year' ... this statement falls far short of a commitment or undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre ... There is a basic distinction between an assertion that steps are being taken to continue the testing program by underground testing as early as next year and an assurance that no further atmospheric tests will take place. It seems that the Government of France, while apparently taking a step in the right direction, is still reserving to itself the right to carry out atmospheric nuclear tests. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests should the French Government subsequently decide to hold them."

Without commenting for the moment on the Attorney-General's interpretation of the French statements brought to his notice, the Court would observe that it is clear that the Australian Government contemplated the possibility of "an assurance that no further atmospheric tests will take place" being sufficient to protect Australia.

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (*P.C.I.J., Series A, No. 7*, p. 35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision"

désormais, dans la technologie nucléaire, à un degré où il nous devient possible de poursuivre nos programmes par des essais souterrains, nous avons pris nos dispositions pour nous engager dans cette voie dès l'année prochaine » ... cette déclaration est fort loin de représenter un engagement suivant lequel le Gouvernement français n'effectuerait plus d'essais dans l'atmosphère à son centre d'expérimentations du Pacifique... Il existe une différence fondamentale entre une affirmation selon laquelle des dispositions sont prises pour poursuivre le programme d'expérimentation par des essais souterrains dès l'année prochaine et l'assurance qu'il n'y aura plus d'essais dans l'atmosphère. Il semble que, bien qu'il fasse apparemment un pas dans la bonne direction, le Gouvernement français continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère. D'un point de vue juridique, l'Australie n'a rien obtenu du Gouvernement français qui la protège contre de nouveaux essais atmosphériques au cas où le Gouvernement français déciderait par la suite d'y procéder. »

Sans commenter pour le moment l'interprétation que l'*Attorney-General* a donnée des déclarations françaises portées à sa connaissance, la Cour voudrait faire observer qu'il est clair que, selon le Gouvernement australien, « l'assurance qu'il n'y aura plus d'essais dans l'atmosphère » pourrait suffire à protéger l'Australie.

29. Compte tenu de ces déclarations, il est essentiel d'examiner si le Gouvernement australien sollicite de la Cour un jugement qui ne ferait que préciser le lien juridique entre le demandeur et le défendeur par rapport aux questions en litige, ou un jugement conçu de façon telle que son libellé obligerait l'une des Parties ou les deux à prendre ou à s'abstenir de prendre certaines mesures. C'est donc le devoir de la Cour de circonscrire le véritable problème en cause et de préciser l'objet de la demande. Il n'a jamais été contesté que la Cour est en droit et qu'elle a même le devoir d'interpréter les conclusions des parties; c'est l'un des attributs de sa fonction judiciaire. Assurément, quand la demande n'est pas formulée comme il convient parce que les conclusions des parties sont inadéquates, la Cour n'a pas le pouvoir de « se substituer [aux Parties] pour en formuler de nouvelles sur la base des seules thèses avancées et faits allégués » (*C.P.J.I. série A n° 7*, p. 35), mais tel n'est pas le cas en l'espèce et la question d'une formulation nouvelle des conclusions par la Cour ne se pose pas non plus. En revanche, la Cour a exercé à maintes reprises le pouvoir qu'elle possède d'écarter, s'il est nécessaire, certaines thèses ou certains arguments avancés par une partie comme élément de ses conclusions quand elle les considère, non pas comme des indications de ce que la partie lui demande de décider, mais comme des motifs invoqués pour qu'elle se prononce dans le sens désiré. C'est ainsi que, dans l'affaire des *Pêcheries*, la Cour a dit de neuf des treize points que comportaient les conclusions du demandeur: « Ce sont là des éléments qui, le cas échéant, pourraient fournir les motifs de l'arrêt et non en constituer l'objet »

(*I.C.J. Reports 1951*, p. 126). Similarly in the *Minquiers and Ecrehos* case, the Court observed that:

> "The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (*I.C.J. Reports 1953*, p. 52; see also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

30. In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court "to adjudge and declare" (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government. If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected. In the present case, it is evident that the *fons et origo* of the case was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment. While the judgment of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court on questions of law, such finding would be only a means to an end, and not an end in itself. The Court is of course aware of the role of declaratory judgments, but the present case is not one in which such a judgment is requested.

31. In view of the object of the Applicant's claim, namely to prevent further tests, the Court has to take account of any developments, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

32. At the hearing of 4 July 1974, in the course of a review of developments in relation to the proceedings since counsel for Australia had

(*C.I.J. Recueil 1951*, p. 126). De même, dans l'affaire des *Minquiers et Ecréhous*, la Cour a relevé que:

> « Les conclusions du Gouvernement du Royaume-Uni, reproduites ci-dessus, consistent en trois paragraphes, les deux derniers étant les motifs à l'appui de la première proposition qui doit être considérée comme la conclusion finale de ce gouvernement. Les conclusions du Gouvernement français se composent de dix paragraphes, les premiers neuf étant les motifs qui conduisent à la dixième proposition, qui doit être considérée comme la conclusion finale de ce gouvernement.» (*C.I.J. Recueil 1953*, p. 52; voir aussi *Nottebohm, deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 16.)

30. Dans les circonstances de l'espèce, et bien que dans sa requête le demandeur ait employé la formule traditionnelle consistant à prier la Cour de « dire et juger » (et des termes analogues étaient employés dans les affaires citées au paragraphe précédent), c'est à la Cour qu'il appartient de s'assurer du but et de l'objet véritable de la demande et elle ne saurait, pour ce faire, s'en tenir au sens ordinaire des termes utilisés; elle doit considérer l'ensemble de la requête, les arguments développés devant la Cour par le demandeur, les échanges diplomatiques qui ont été portés à son attention et les déclarations publiques faites au nom du gouvernement demandeur. Si ces éléments délimitent nettement l'objet de la demande, ils ne peuvent manquer d'influer sur l'interprétation des conclusions. En l'espèce, il apparaît nettement que l'affaire trouve son origine dans les essais nucléaires atmosphériques effectués par la France dans la région du Pacifique Sud et que le demandeur a eu pour objectif initial et conserve pour objectif ultime la cessation de ces essais; dans ces conditions, on ne saurait considérer que sa demande tende à obtenir un jugement déclaratoire. Dès lors que l'arrêt dont l'Australie sollicite le prononcé devrait se fonder d'après elle sur une constatation de la Cour relative aux questions de droit, une telle constatation ne serait qu'un moyen utilisé en vue d'une fin et non une fin en soi. La Cour a bien entendu conscience du rôle joué par les jugements déclaratoires mais la présente affaire n'est pas de celles où un tel jugement est demandé.

31. Etant donné l'objet de la demande, à savoir empêcher de nouveaux essais, la Cour a l'obligation de tenir compte de tout fait intéressant le comportement du défendeur survenu depuis le dépôt de la requête. De plus, ainsi qu'il a été mentionné, le demandeur lui-même a implicitement admis que des événements postérieurs à la requête pouvaient être pertinents quand il a appelé l'attention de la Cour sur le communiqué du 8 juin 1974 et présenté des observations à son sujet. Dans ces conditions la Cour est tenue de prendre en considération des faits nouveaux survenus tant avant qu'après la clôture de la procédure orale. Etant donné la non-comparution du défendeur, il incombe tout particulièrement à la Cour de s'assurer qu'elle est bien en possession de tous les faits disponibles.

32. A l'audience du 4 juillet 1974, alors qu'il énumérait les faits nouveaux intéressant l'instance qui s'étaient produits depuis que les conseils

previously addressed the Court in May 1973, the Attorney-General of Australia made the following statement:

> "You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given.
>
> I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans."

He devoted considerable attention to a communiqué dated 8 June 1974 from the Office of the President of the French Republic, and submitted to the Court the Australian Government's interpretation of that document. Since that time, certain French authorities have made a number of consistent public statements concerning future tests, which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court's attention in July 1974 and those subsequently made.

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before

de l'Australie s'étaient adressés à la Cour en mai 1973, l'*Attorney-General* d'Australie a fait la déclaration suivante:

> « Vous vous rappellerez que l'Australie a maintes fois répété qu'elle souhaite obtenir de la France l'assurance qu'il ne sera pas procédé à de nouvelles explosions nucléaires dans l'atmosphère. De fait, la Cour s'en souvient, cette assurance a été demandée au Gouvernement français par le Gouvernement australien dans une note du 3 janvier 1973, mais elle n'a pas été donnée.
>
> Je rappelle à la Cour qu'au paragraphe 427 de son mémoire le Gouvernement australien a fait une déclaration, alors absolument exacte, selon laquelle le Gouvernement français n'avait pas manifesté la moindre intention d'interrompre le programme d'expériences prévu pour 1974 et 1975. Il faut désormais envisager cette déclaration dans la perspective des problèmes que je vais maintenant aborder et qui portent sur les communications officielles du Gouvernement français relatives à ses plans actuels.»

L'*Attorney-General* a évoqué longuement un communiqué de la présidence de la République française en date du 8 juin 1974 et il a exposé à la Cour l'interprétation que le Gouvernement australien en donnait. Depuis lors, des autorités françaises ont fait au sujet des expériences futures un certain nombre de déclarations publiques allant toutes dans le même sens, qui sont autant d'éléments propres à aider la Cour à évaluer l'interprétation des documents antérieurs présentée par le demandeur et qu'il importe d'examiner pour déterminer si elles consacrent un changement dans les intentions de la France relatives à son comportement futur. Il est vrai que ces déclarations n'ont pas été faites devant la Cour mais elles sont du domaine public, sont connues du Gouvernement australien et l'une d'elles a été commentée par l'*Attorney-General* le 26 septembre 1974 devant le Sénat australien. Il est bien entendu nécessaire d'examiner toutes ces déclarations, celle qui a été portée à l'attention de la Cour en juillet 1974 comme celles qui ont été faites ultérieurement.

33. Si la Cour avait estimé que l'intérêt de la justice l'exigeait, elle aurait certes pu donner aux Parties la possibilité de lui présenter leurs observations sur les déclarations postérieures à la clôture de la procédure orale, par exemple en rouvrant celle-ci. Cette façon de procéder n'aurait cependant été pleinement justifiée que si le sujet de ces déclarations avait été entièrement nouveau, n'avait pas été évoqué en cours d'instance, ou était inconnu des Parties. Manifestement, tel n'est pas le cas. Les éléments essentiels que la Cour doit examiner ont été introduits dans la procédure par le demandeur lui-même pendant les audiences, et d'une façon qui n'était pas seulement incidente, quand il a appelé l'attention de la Cour sur une déclaration antérieure des autorités françaises, produit les documents où elle figurait et présenté une interprétation de son caractère, en particulier sur le point de savoir si elle renfermait une assurance ferme. C'est donc à l'initiative du demandeur que la déclaration et l'interprétation qu'en donne l'Australie se trouvent soumises à la Cour. De plus, le

the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

> "The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.
>
> The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned, the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July 1974 in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June 1974, mentioned above, stated that on 10 June 1974 the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:

demandeur a publiquement formulé des observations par la suite (paragraphe 28 ci-dessus) sur des déclarations faites par les autorités françaises après la clôture de la procédure orale. La Cour est donc en possession non seulement des déclarations des autorités françaises concernant la cessation des essais nucléaires dans l'atmosphère, mais aussi des vues exprimées par le demandeur à leur sujet. Bien que la Cour, en tant qu'organe judiciaire, ait conscience de l'importance du principe que traduit la maxime *audi alteram partem*, elle ne pense pas que ce principe l'empêche de prendre en considération des déclarations postérieures à la procédure orale et qui se bornent à compléter et à renforcer des points déjà discutés pendant cette procédure — déclarations que le demandeur ne peut pas ignorer. C'est pourquoi le demandeur ayant présenté des observations sur les déclarations faites par les autorités françaises aussi bien avant qu'après la procédure orale, il pouvait raisonnablement escompter que la Cour traite de ce sujet et aboutisse à ses propres conclusions sur le sens et les effets de ces déclarations. La Cour, ayant pris note des observations du demandeur et ne s'estimant pas tenue de consulter les Parties sur la base de sa décision, considère qu'il ne servirait à rien de rouvrir la procédure orale.

34. Il convient d'examiner les déclarations mentionnées plus haut dans l'ordre chronologique. La première est celle que contient le communiqué publié par la présidence de la République française le 8 juin 1974, peu avant le début de la campagne d'essais nucléaires lancée par la France en 1974:

> « Le *Journal Officiel* du 8 juin 1974 publie l'arrêté remettant en vigueur les mesures de sécurité de la zone d'expérimentation nucléaire du Pacifique Sud.
>
> La présidence de la République précise, à cette occasion, qu'au point où en est parvenue l'exécution de son programme de défense en moyens nucléaires la France sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée.»

Copie du communiqué a été transmise au département des affaires étrangères d'Australie sous le couvert d'une note du 11 juin 1974 de l'ambassade de France à Canberra et, ainsi qu'on l'a vu, le texte du communiqué a été porté à l'attention de la Cour pendant la procédure orale.

35. La Cour ne peut manquer de relever en outre que mention d'un document a été faite en audience publique par un conseil dans l'instance parallèle introduite le 9 mai 1973 par la Nouvelle-Zélande contre la France. A l'audience du 10 juillet 1974, l'*Attorney-General* de Nouvelle-Zélande, après avoir évoqué le communiqué précité du 8 juin 1974, a indiqué que, le 10 juin 1974, l'ambassade de France à Wellington avait adressé au ministère des affaires étrangères de Nouvelle-Zélande une note dont il a lu le passage suivant:

"France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

". . . on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . ."

38. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

39. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

"We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."

40. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events", he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric tests contemplated "will, in the normal course of events, be the last of this type". The Minister also mentioned that, whether or not other governments had been officially advised of the

«la France, au point où en est parvenue l'exécution de son programme de défense en moyens nucléaires, sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée.

Ainsi, les essais atmosphériques qui seront prochainement effectués seront normalement les derniers de ce type. »

36. La Cour doit examiner aussi les déclarations faites en la matière par les autorités françaises après la procédure orale, à savoir le 25 juillet 1974 par le président de la République, le 16 août 1974 par le ministre de la défense, le 25 septembre 1974 par le ministre des affaires étrangères devant l'Assemblée générale des Nations Unies et le 11 octobre 1974 par le ministre de la défense.

37. La déclaration qu'il convient d'examiner d'abord est celle que le président de la République a faite le 25 juillet 1974 lors d'une réunion de presse dans les termes suivants:

«sur cette question des essais nucléaires, vous savez que le premier ministre s'était exprimé publiquement à l'Assemblée nationale, lors du discours de présentation du programme du Gouvernement. Il avait indiqué que les expériences nucléaires françaises seraient poursuivies. J'avais moi-même précisé que cette campagne d'expériences atmosphériques serait la dernière, et donc les membres du gouvernement étaient complètement informés de nos intentions à cet égard... »

38. Le 16 août 1974, au cours d'une interview donnée à la télévision française, le ministre de la défense a dit que le Gouvernement français avait tout mis en œuvre pour que les essais nucléaires de 1974 soient les derniers à se dérouler dans l'atmosphère.

39. Le 25 septembre 1974, le ministre des affaires étrangères a dit, s'adressant à l'Assemblée générale des Nations Unies:

« Parvenus désormais, dans la technologie nucléaire, à un degré où il devient possible de poursuivre nos programmes par des essais souterrains, nous avons pris nos dispositions pour nous engager dans cette voie dès l'année prochaine. »

40. Le 11 octobre 1974, le ministre de la défense a tenu une conférence de presse au cours de laquelle il a dit par deux fois en termes presque identiques qu'il n'y aurait pas d'essai aérien en 1975 et que la France était prête à procéder à des essais souterrains. La remarque ayant été faite qu'il n'avait pas ajouté « normalement », il en a convenu. Cette indication est intéressante eu égard au passage de la note de l'ambassade de France à Wellington au ministère des affaires étrangères de Nouvelle-Zélande en date du 10 juin 1974, cité au paragraphe 35 ci-dessus, où il est précisé que les essais atmosphériques envisagés «seront normalement les derniers de ce type». Le ministre a mentionné aussi que d'autres gouvernements, qu'ils aient été officiellement avisés ou non de la décision,

decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court must in particular take into consideration the President's statement of 25 July 1974 (paragraph 37 above) followed by the Defence Minister's statement on 11 October 1974 (paragraph 40). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events *[normalement]*".

*
* *

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the ques-

ont pu la connaître à la lecture des journaux et des communiqués de la présidence de la République.

41. Vu ce qui précède, la Cour estime que la France a rendu publique son intention de cesser de procéder à des expériences nucléaires en atmosphère, une fois terminée la campagne d'essais de 1974. La Cour doit en particulier tenir compte de la déclaration du président de la République en date du 25 juillet 1974 (paragraphe 37 ci-dessus) suivie de la déclaration du ministre de la défense en date du 11 octobre 1974 (paragraphe 40 ci-dessus). L'une et l'autre révèlent que les déclarations officielles faites au nom de la France sur la question des futures expériences nucléaires ne sont pas subordonnées à ce que pouvait éventuellement impliquer l'indication contenue dans le terme «normalement».

*
* *

42. Avant d'examiner si les déclarations des autorités françaises répondent à l'objet de la demande australienne tendant à ce qu'il soit mis fin aux essais nucléaires en atmosphère dans le Pacifique Sud, il faut d'abord déterminer la nature de ces déclarations ainsi que leur portée sur le plan international.

43. Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques. Des déclarations de cette nature peuvent avoir et ont souvent un objet très précis. Quand l'Etat auteur de la déclaration entend être lié conformément à ses termes, cette intention confère à sa prise de position le caractère d'un engagement juridique, l'Etat intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration. Un engagement de cette nature, exprimé publiquement et dans l'intention de se lier, même hors du cadre de négociations internationales, a un effet obligatoire. Dans ces conditions, aucune contrepartie n'est nécessaire pour que la déclaration prenne effet, non plus qu'une acceptation ultérieure ni même une réplique ou une réaction d'autres Etats, car cela serait incompatible avec la nature strictement unilatérale de l'acte juridique par lequel l'Etat s'est prononcé.

44. Bien entendu, tout acte unilatéral n'entraîne pas des obligations mais un Etat peut choisir d'adopter une certaine position sur un sujet donné dans l'intention de se lier — ce qui devra être déterminé en interprétant l'acte. Lorsque des Etats font des déclarations qui limitent leur liberté d'action future, une interprétation restrictive s'impose.

45. Pour ce qui est de la forme, il convient de noter que ce n'est pas là un domaine dans lequel le droit international impose des règles strictes ou spéciales. Qu'une déclaration soit verbale ou écrite, cela n'entraîne aucune différence essentielle, car de tels énoncés faits dans des circonstances particulières peuvent constituer des engagements en droit international sans avoir nécessairement à être consignés par écrit. La forme n'est donc pas

tion of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

> "Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*I.C.J. Reports 1961*, p. 31.)

The Court further stated in the same case: ". . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention . . ." (*ibid.*, p. 32).

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

*
* *

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September 1974 (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric nuclear testing, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) "falls far short of an undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre" and that France was "still reserving to itself the right to carry out atmospheric nuclear tests" so that "In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests".

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no "commitment" or "firm, explicit and binding undertaking" had been given is based on the view that the assurance is not absolute in its terms,

décisive. Comme la Cour l'a dit dans son arrêt sur les exceptions préliminaires en l'affaire du *Temple de Préah Vihéar*:

> « [comme] c'est généralement le cas en droit international qui insiste particulièrement sur les intentions des parties, lorsque la loi ne prescrit pas de forme particulière, les parties sont libres de choisir celle qui leur plaît, pourvu que leur intention en ressorte clairement » (*C.I.J. Recueil 1961*, p. 31).

La Cour a ajouté dans la même affaire: « la seule question pertinente est de savoir si la rédaction employée dans une déclaration donnée révèle clairement l'intention... » (*ibid.*, p. 32).

46. L'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale, surtout à une époque où, dans bien des domaines, cette coopération est de plus en plus indispensable. Tout comme la règle du droit des traités *pacta sunt servanda* elle-même, le caractère obligatoire d'un engagement international assumé par déclaration unilatérale repose sur la bonne foi. Les Etats intéressés peuvent donc tenir compte des déclarations unilatérales et tabler sur elles; ils sont fondés à exiger que l'obligation ainsi créée soit respectée.

*
* *

47. Ayant examiné les principes juridiques en jeu, la Cour en vient plus précisément aux déclarations du Gouvernement français. Le Gouvernement australien a indiqué à la Cour pendant la procédure orale comment il interprétait la première de ces déclarations (paragraphe 27 ci-dessus). Au sujet de celles qui ont suivi, on peut se référer à ce qu'a dit l'*Attorney-General* devant le Sénat australien le 26 septembre 1974 (paragraphe 28 ci-dessus). En réponse à une question relative à des informations d'après lesquelles la France avait annoncé qu'elle avait terminé ses essais nucléaires en atmosphère, il a dit que la déclaration du ministre des affaires étrangères de France en date du 25 septembre 1974 (paragraphe 39 ci-dessus) « est fort loin de représenter un engagement suivant lequel le Gouvernement français n'effectuerait plus d'essais dans l'atmosphère à son centre d'expérimentations du Pacifique » et que la France « continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère » de sorte que « D'un point de vue juridique, l'Australie n'a rien obtenu du Gouvernement français qui la protège contre de nouveaux essais atmosphériques ».

48. On notera que l'Australie a admis que le différend pourrait être résolu par une déclaration unilatérale, de la nature précisée plus haut, qui serait donnée par la France et sa conclusion qu'en fait aucun « engagement ferme, explicite et de caractère obligatoire » n'a été pris procède de l'idée que l'assurance ne revêt pas une forme absolue, qu'il faut « dis-

that there is a "distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place", that "the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded" and that thus "the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests". The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers

tinguer l'affirmation selon laquelle les essais seront désormais souterrains de l'assurance qu'il n'y aura plus de nouveaux essais dans l'atmosphère », que « la possibilité d'une reprise des essais en atmosphère après le début des tirs souterrains ne saurait être exclue » et qu'ainsi « le Gouvernement français continue de se réserver le droit de se livrer à des essais nucléaires dans l'atmosphère ». Il appartient cependant à la Cour de se faire sa propre opinion sur le sens et la portée que l'auteur a entendu donner à une déclaration unilatérale d'où peut naître une obligation juridique, et à cet égard elle ne peut être liée par les thèses d'un autre Etat qui n'est en rien partie au texte.

49. Parmi les déclarations du Gouvernement français en possession desquelles la Cour se trouve, il est clair que les plus importantes sont celles du président de la République. Etant donné ses fonctions, il n'est pas douteux que les communications ou déclarations publiques, verbales ou écrites, qui émanent de lui en tant que chef de l'Etat, représentent dans le domaine des relations internationales des actes de l'Etat français. Ses déclarations et celles des membres du Gouvernement français agissant sous son autorité, jusques et y compris la dernière déclaration du ministre de la défense, en date du 11 octobre 1974, doivent être envisagées comme un tout. Ainsi, quelle qu'ait pu en être la forme, il convient de les considérer comme constituant un engagement de l'Etat, étant donné leur intention et les circonstances dans lesquelles elles sont intervenues.

50. Les déclarations unilatérales des autorités françaises ont été faites publiquement en dehors de la Cour et *erga omnes*, même si la première a été communiquée au Gouvernement australien. Ainsi qu'on l'a vu plus haut, pour que ces déclarations eussent un effet juridique, il n'était pas nécessaire qu'elles fussent adressées à un Etat particulier, ni qu'un Etat quelconque signifiât son acceptation. Les caractères généraux de ces déclarations et leur nature sont les éléments décisifs quand il s'agit d'en apprécier les effets juridiques; c'est à leur interprétation que la Cour doit procéder maintenant. La Cour est en droit de partir de la présomption que ces déclarations n'ont pas été faites *in vacuo* mais à propos des essais qui forment l'objet même de l'instance, bien que la France ne se soit pas présentée en l'espèce.

51. Quand il a annoncé que la série d'essais atmosphériques de 1974 serait la dernière, le Gouvernement français a signifié par là à tous les Etats du monde, y compris le demandeur, son intention de mettre effectivement fin à ces essais. Il ne pouvait manquer de supposer que d'autres Etats pourraient prendre acte de cette déclaration et compter sur son effectivité. La validité de telles déclarations et leurs conséquences juridiques doivent être envisagées dans le cadre général de la sécurité des relations internationales et de la confiance mutuelle si indispensable dans les rapports entre Etats. C'est du contenu réel de ces déclarations et des circonstances dans lesquelles elles ont été faites que la portée juridique de l'acte unilatéral doit être déduite. L'objet des déclarations étant clair et celles-ci étant adressées à la communauté internationale dans son ensemble, la Cour tient qu'elles constituent un engagement comportant des

that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule of international law", nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of Applicant has been to seek protection "against any further atmospheric test" (see paragraph 28 above).

54. It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (*Factory at Chorzów (Merits), P.C.I.J., Series A, No. 17*, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary

effets juridiques. La Cour estime que le président de la République, en décidant la cessation effective des essais atmosphériques, a pris un engagement vis-à-vis de la communauté internationale à qui il s'adressait. Certes le Gouvernement français a constamment soutenu, en particulier dans la note que l'ambassadeur de France à Canberra a adressée le 7 février 1973 au premier ministre et ministre des affaires étrangères d'Australie, qu'« il est convaincu que ses expériences nucléaires n'ont violé aucune règle du droit international » et il n'a pas reconnu non plus qu'il était tenu de mettre fin à ses expériences par une règle de droit international mais cela ne change rien aux conséquences juridiques des déclarations étudiées plus haut. La Cour estime que l'engagement unilatéral résultant de ces déclarations ne saurait être interprété comme ayant comporté l'invocation d'un pouvoir arbitraire de revision. La Cour constate en outre que le Gouvernement français a assumé une obligation dont il convient de comprendre l'objet précis et les limites dans les termes mêmes où ils sont exprimés publiquement.

52. La Cour est donc en présence d'une situation où l'objectif du demandeur a été effectivement atteint, du fait que la Cour constate que la France a pris l'engagement de ne plus procéder à des essais nucléaires en atmosphère dans le Pacifique Sud.

53. La Cour constate qu'aucune question de dédommagement ne se pose en l'espèce, puisque le demandeur n'a présenté aucune demande à cet effet, ni avant ni pendant la procédure, et que son objectif initial et son but ultime étaient d'obtenir une protection «contre de nouveaux essais atmosphériques» (voir paragraphe 28 ci-dessus).

54. Bien entendu, il aurait été loisible à l'Australie, si elle avait considéré l'affaire comme effectivement close, de se désister conformément au Règlement. Si elle ne l'a pas fait, cela n'empêche pas la Cour d'arriver à sa propre conclusion sur la question. Il est vrai que « la Cour ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours de négociations directes qui ont eu lieu entre elles, lorsque ces négociations n'ont pas abouti à un accord complet » (*Usine de Chorzów (fond), C.P.J.I. série A n° 17*, p. 51). Mais telle n'est pas en l'espèce la situation qui se présente à la Cour. Le demandeur a clairement indiqué ce qui lui donnerait satisfaction et le défendeur a agi indépendamment; la question qui se pose à la Cour est donc celle de l'interprétation du comportement des deux Parties. La conclusion à laquelle cette interprétation a amené la Cour ne signifie pas qu'elle opère elle-même un retrait de la demande; elle se borne à établir l'objet de cette demande et l'effet des actes du défendeur, comme elle est tenue de le faire. En prétendant que des déclarations faites au nom de la France ne sauraient mettre fin au différend, on irait à l'encontre des vues exprimées sans équivoque par le demandeur aussi bien devant la Cour qu'en dehors.

55. La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la

condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific Ocean, a judgment of the Court on this subject might still be of value because, if the judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être*.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

58. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required

condition première de l'exercice de sa fonction judiciaire; on ne peut se contenter à cet égard des affirmations d'une partie car « l'existence d'un différend international demande à être établie objectivement » par la Cour (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74). Le différend dont la Cour a été saisie doit donc persister au moment où elle statue. Elle doit tenir compte de toute situation dans laquelle le différend a disparu parce que l'objet de la demande a été atteint d'une autre manière. Si les déclarations de la France concernant la cessation effective des expériences nucléaires ont la portée que la Cour a décrite, autrement dit si elles ont éliminé le différend, il faut en tirer les conséquences qui s'imposent.

56. On pourrait soutenir que, bien que la France se soit obligée, par déclaration unilatérale, à ne pas effectuer d'essais nucléaires en atmosphère dans l'océan Pacifique Sud, un arrêt de la Cour sur ce point pourrait encore présenter de l'intérêt car, s'il adoptait les thèses du demandeur il renforcerait la position de celui-ci en constatant l'obligation du défendeur. Cependant, la Cour ayant conclu que le défendeur a assumé une obligation de comportement sur la cessation effective des expériences nucléaires, aucune autre action judiciaire n'est nécessaire. Le demandeur a cherché à maintes reprises à obtenir du défendeur l'assurance que les essais prendraient fin et celui-ci a, de sa propre initiative, fait une série de déclarations d'où il résulte qu'ils prendront fin. C'est pourquoi la Cour conclut que, le différend ayant disparu, la demande présentée par l'Australie ne comporte plus d'objet. Il en résulte qu'aucune autre constatation n'aurait de raison d'être.

57. Cela n'est pas à dire que la Cour ait la faculté de choisir parmi les affaires qui lui sont soumises celles qui lui paraissent se prêter à une décision et de refuser de statuer sur les autres. L'article 38 du Statut dispose que la mission de la Cour est «de régler conformément au droit international les différends qui lui sont soumis »; en dehors de l'article 38 lui-même, d'autres dispositions du Statut et du Règlement indiquent aussi que la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties. En n'allant pas plus loin en l'espèce la Cour ne fait qu'agir conformément à une interprétation correcte de sa fonction judiciaire.

58. La Cour a indiqué dans le passé des considérations qui pouvaient l'amener à ne pas statuer. La présente affaire est l'une de celles dans lesquelles «les circonstances qui se sont produites ... rendent toute décision judiciaire sans objet » (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p. 38). La Cour ne voit donc pas de raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile. Si le règlement judiciaire peut ouvrir la voie de l'harmonie internationale lorsqu'il existe un conflit, il n'est pas moins vrai que la vaine poursuite d'un procès compromet cette harmonie.

59. La Cour conclut donc qu'aucun autre prononcé n'est nécessaire

in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

*
* *

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

*
* *

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France". It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

*
* *

62. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

en l'espèce. Il n'entre pas dans la fonction juridictionnelle de la Cour de traiter des questions dans l'abstrait, une fois qu'elle est parvenue à la conclusion qu'il n'y a plus lieu de statuer au fond. La demande ayant manifestement perdu son objet, il n'y a rien à juger.

*
* *

60. Dès lors que la Cour a constaté qu'un Etat a pris un engagement quant à son comportement futur, il n'entre pas dans sa fonction d'envisager que cet Etat ne le respecte pas. La Cour fait observer que, si le fondement du présent arrêt était remis en cause, le requérant pourrait demander un examen de la situation conformément aux dispositions du Statut; la dénonciation par la France, dans une lettre du 2 janvier 1974, de l'Acte général pour le règlement pacifique des différends internationaux, qui est invoqué comme l'un des fondements de la compétence de la Cour en l'espèce, ne saurait en soi faire obstacle à la présentation d'une telle demande.

*
* *

61. Dans l'ordonnance déjà mentionnée du 22 juin 1973, la Cour a précisé que les mesures conservatoires indiquées l'étaient «en attendant son arrêt définitif dans l'instance introduite le 9 mai 1973 par l'Australie contre la France». L'ordonnance cesse donc de produire ses effets dès le prononcé du présent arrêt et les mesures conservatoires prennent fin en même temps.

*
* *

62. Par ces motifs,

LA COUR,

par neuf voix contre six,
dit que la demande de l'Australie est désormais sans objet et qu'il n'y a dès lors pas lieu à statuer.

Fait en anglais et en français, le texte anglais faisant foi, au palais de la Paix, à La Haye, le vingt décembre mil neuf cent soixante-quatorze, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis respectivement au Gouvernement australien et au Gouvernement de la République française.

Le Président,
(Signé) Manfred LACHS.
Le Greffier,
(Signé) S. AQUARONE.

23

President LACHS makes the following declaration:

Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court's Order of 22 June 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case *sub judice*.

The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.

The Court concluded, by a resolution of 21 March 1974, that its investigations had not enabled it to identify any specific source of the statements and reports published.

I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all the seriousness for which it called.

Judges BENGZON, ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK make the following joint declaration:

Certain criticisms have been made of the Court's handling of the matter to which the President alludes in the preceding declaration. We wish by our declaration to make it clear that we do not consider those criticisms to be in any way justified.

The Court undertook a lengthy examination of the matter by the several means at its disposal: through its services, by convoking the Agent for Australia and having him questioned, and by its own investigations and enquiries. Any suggestion that the Court failed to treat the matter with all the seriousness and care which it required is, in our opinion, without foundation. The seriousness with which the Court regarded the matter is indeed reflected and emphasized in the communiqués which it issued, first on 8 August 1973 and subsequently on 26 March 1974.

The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.

M. LACHS, Président, fait la déclaration suivante:

[Traduction]

La bonne administration de la justice et le respect dû à la Cour exigent que l'issue de ses délibérations reste strictement secrète et que ses décisions ne soient diffusées en aucun de leurs éléments avant d'être officiellement rendues. Il est donc regrettable qu'en l'espèce, avant la lecture publique de l'ordonnance de la Cour en date du 22 juin 1973, une déclaration ait été faite et des nouvelles de presse aient paru, qui dépassaient ce qui est juridiquement admissible s'agissant d'une affaire *sub judice.*

La Cour a été très sérieusement préoccupée par cette question et une enquête a été ordonnée pendant laquelle toutes les voies qui pouvaient lui être ouvertes ont été explorées.

La Cour a conclu, dans sa résolution du 21 mars 1974, que ses recherches ne lui avaient pas permis d'identifier une source exacte pour les déclarations et les informations publiées.

J'ai la certitude que la Cour a fait tout ce qui était en son pouvoir à cet égard et qu'elle a traité de la question avec tout le sérieux que celle-ci méritait.

MM. BENGZON, ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA et sir Humphrey WALDOCK, juges, font la déclaration commune suivante:

[Traduction]

Certaines critiques ont été émises sur la manière dont la Cour a traité de la question visée par le Président dans la déclaration qui précède. Nous tenons à préciser par la présente déclaration que nous ne considérons pas ces critiques comme justifiées en quoi que ce soit.

La Cour a procédé à un examen détaillé de la question grâce aux divers moyens dont elle dispose: elle a eu recours à ses services, convoqué l'agent de l'Australie pour qu'il soit interrogé, effectué ses recherches et ses enquêtes propres. Suggérer que la Cour n'aurait pas traité de la question avec tout le sérieux et le soin nécessaires serait selon nous sans fondement. Les communiqués qu'elle a publiés le 8 août 1973 d'abord, le 26 mars 1974 ensuite, traduisent et soulignent d'ailleurs le sérieux avec lequel la Cour a envisagé cette question.

L'examen que la Cour a fait de la question ne lui a pas permis d'identifier une source d'information exacte sur laquelle se fondaient les déclarations et les nouvelles de presse mentionnées par le Président. Quand la Cour a décidé, par onze voix contre trois, de clore son examen, elle l'a fait pour la raison sérieuse que la poursuite des recherches et des enquêtes avait très peu de chance, d'après elle, de fournir davantage d'informations utiles.

Judges FORSTER, GROS, PETRÉN and IGNACIO-PINTO append separate opinions to the Judgment of the Court.

Judges ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK append a joint dissenting opinion, and Judge DE CASTRO and Judge *ad hoc* Sir Garfield BARWICK append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.
(Initialled) S.A.

MM. FORSTER, GROS, PETRÉN et IGNACIO-PINTO, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA et sir Humphrey WALDOCK, juges, joignent à l'arrêt une opinion dissidente commune. M. DE CASTRO, juge, et sir Garfield BARWICK, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) M.L.
(Paraphé) S.A.

crowell moring

Reference Material 29.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA FRONTIÈRE TERRESTRE ET MARITIME ENTRE LE CAMEROUN ET LE NIGÉRIA

(CAMEROUN c. NIGÉRIA)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 11 JUIN 1998

1998

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA

(CAMEROON *v.* NIGERIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 11 JUNE 1998

Mode officiel de citation:
Frontière terrestre et maritime entre le Cameroun et le Nigéria, exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 275

Official citation:
Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275

ISSN 0074-4441
ISBN 92-1-070772-9

N° de vente:
Sales number **708**

COUR INTERNATIONALE DE JUSTICE

1998
11 juin
Rôle général
n° 94

ANNÉE 1998

11 juin 1998

AFFAIRE DE LA FRONTIÈRE TERRESTRE ET MARITIME ENTRE LE CAMEROUN ET LE NIGÉRIA

(CAMEROUN c. NIGÉRIA)

EXCEPTIONS PRÉLIMINAIRES

1) Clause facultative (paragraphe 2 de l'article 36 du Statut) — Remise de la déclaration au Secrétaire général des Nations Unies (paragraphe 4 de l'article 36 du Statut) — Transmission par le Secrétaire général d'une copie aux Etats parties au Statut — Intervalle entre la remise de la déclaration et le dépôt de la requête — Abus allégué du système de la clause facultative — Date à laquelle est établi le lien consensuel en vertu du paragraphe 2 de l'article 36 du Statut — Autorité de la chose jugée — Article 59 du Statut.

Articles 16, 24 et 78 de la convention de Vienne sur le droit des traités.

Retrait des déclarations d'acceptation de la juridiction obligatoire — Délai raisonnable — Question de savoir si un tel délai est requis dans le cas de remise des déclarations.

Question de savoir si un Etat ayant souscrit à la clause facultative et déposé peu de temps après une requête a l'obligation d'informer l'Etat défendeur potentiel — Principe de la bonne foi.

Condition de réciprocité — Réserve ratione temporis.

2) Obligation alléguée de recourir exclusivement à des mécanismes bilatéraux — Estoppel — *Principe de la bonne foi — Règle* pacta sunt servanda — *Question de savoir si l'épuisement des négociations diplomatiques est un préalable à la saisine de la Cour.*

3) Question de savoir si la commission du bassin du lac Tchad possède une compétence exclusive en matière de règlement de différends de frontières — Accords ou organismes au sens de l'article 52 de la Charte des Nations Unies — Estoppel — *Allégation selon laquelle la Cour devrait refuser de statuer au fond sur des conclusions pour des raisons d'opportunité judiciaire.*

4) Frontière se terminant sur un tripoint dans le lac Tchad — Incidence possible sur les intérêts juridiques d'Etats tiers.

INTERNATIONAL COURT OF JUSTICE

YEAR 1998

1998
11 June
General List
No. 94

11 June 1998

CASE CONCERNING THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA

(CAMEROON *v.* NIGERIA)

PRELIMINARY OBJECTIONS

(1) Optional Clause (Article 36, paragraph 2, of Statute) — Deposit of Declaration with United Nations Secretary-General (Article 36, paragraph 4, of Statute) — Transmission of copy by Secretary-General to States parties to Statute — Interval between deposit of Declaration and filing of Application — Alleged abuse of Optional Clause system — Date of establishment of consensual bond under Article 36, paragraph 2, of Statute — Res judicata *— Article 59 of Statute.*

Articles 16, 24 and 78 of Vienna Convention on the Law of Treaties.

Withdrawal of declarations of acceptance of compulsory jurisdiction — Reasonable period of notice — Question whether such period should be required for deposit of declarations.

Whether a State subscribing to Optional Clause and filing an application shortly thereafter has obligation to inform prospective respondent State — Principle of good faith.

Condition of reciprocity — Reservation ratione temporis.

(2) Asserted duty to resort exclusively to bilateral machinery — Estoppel — Principle of good faith — Rule pacta sunt servanda *— Whether exhaustion of diplomatic negotiations is precondition for referral to the Court.*

(3) Whether Lake Chad Basin Commission has exclusive jurisdiction for settlement of boundary disputes — Arrangements or agencies within meaning of Article 52 of United Nations Charter — Estoppel — Claim that the Court should decline to decide merits of submissions for reasons of judicial propriety.

(4) Boundary terminating in a tripoint in Lake Chad — Possible effect on legal interests of third States.

5) Question relative à l'existence d'un différend de frontière — Détermination de l'existence d'un différend.

6) Exposé des faits dans une requête — Exigences du paragraphe 2 de l'article 38 du Règlement — Sens du mot « succinct ».

7) Détermination du titre sur une presqu'île préalablement à une délimitation maritime — Pouvoir discrétionnaire de la Cour relativement à l'ordre dans lequel elle entend régler les questions portées devant elle — Absence alléguée d'efforts suffisants des Parties pour effectuer une délimitation par voie d'accord conformément au droit international — Saisine sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut — Caractère suffisamment précisé d'un différend.

8) Délimitation maritime mettant éventuellement en cause les droits et intérêts d'Etats tiers — Question de savoir si l'exception soulevée présente un caractère exclusivement préliminaire (paragraphe 7 de l'article 79 du Règlement).

ARRÊT

Présents: M. SCHWEBEL, *président*; M. WEERAMANTRY, *vice-président*; MM. ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, M^me^ HIGGINS, MM. PARRA-ARANGUREN, KOOIJMANS, REZEK, *juges*; MM. MBAYE, AJIBOLA, *juges* ad hoc; M. VALENCIA-OSPINA, *greffier*.

En l'affaire de la frontière terrestre et maritime entre le Cameroun et le Nigéria,

entre

la République du Cameroun,

représentée par

S. Exc. M. Laurent Esso, ministre de la justice, garde des sceaux,

comme agent;

M. Douala Moutomé, avocat au barreau du Cameroun, ancien ministre,

M. Maurice Kamto, professeur à l'Université de Yaoundé II, avocat au barreau de Paris,

M. Peter Ntamark, doyen, professeur de droit à la faculté de droit et de science politique de l'Université de Yaoundé II, *Barrister-at-Law*, membre de l'*Inner Temple*,

comme coagents;

S. Exc. M. Joseph Owona, ministre de la jeunesse et des sports,

M. Joseph-Marie Bipoun Woum, professeur à l'Université de Yaoundé II, ancien ministre,

comme conseillers spéciaux;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

comme agent adjoint, conseil et avocat;

M. Michel Aurillac, avocat à la cour, conseiller d'Etat honoraire, ancien ministre,

(5) Question relating to the existence of a boundary dispute — Determination of the existence of a dispute.

(6) Presentation of facts in an application — Requirements of Article 38, paragraph 2, of Rules of Court — Meaning of "succinct".

(7) Determination of title to a peninsula prior to maritime delimitation — Discretionary power of the Court concerning sequence in which it settles issues before it — Alleged absence of sufficient action by Parties to effect delimitation by agreement on basis of international law — Seisin based on declarations made under Article 36, paragraph 2, of Statute — Sufficiently precise character of a dispute.

(8) Maritime delimitation which may involve rights and interests of third States — Whether objection raised has exclusively preliminary character (Article 79, paragraph 7, of Rules of Court).

JUDGMENT

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judges* ad hoc MBAYE, AJIBOLA; *Registrar* VALENCIA-OSPINA.

In the case concerning the land and maritime boundary between Cameroon and Nigeria,

between

the Republic of Cameroon,

represented by

H.E. Mr. Laurent Esso, Minister of Justice, Keeper of the Seals,

as Agent;

Mr. Douala Moutomé, Member of the Cameroon Bar, former Minister,

Mr. Maurice Kamto, Professor, University of Yaoundé II, Member of the Paris Bar,

Mr. Peter Ntamark, Dean, Professor of Law, Faculty of Law and Political Science, University of Yaoundé II, Barrister-at-Law, member of the Inner Temple,

as Co-Agents;

H.E. Mr. Joseph Owona, Minister of Youth and Sport,

Mr. Joseph-Marie Bipoun Woum, Professor, University of Yaoundé II, former Minister,

as Special Advisers;

Mr. Alain Pellet, Professor, University of Paris X-Nanterre and Institute of Political Studies, Paris,

as Deputy-Agent, Counsel and Advocate;

Mr. Michel Aurillac, avocat à la cour, Honorary Member of the Council of State, former Minister,

M. Jean-Pierre Cot, professeur à l'Université de Paris I (Panthéon-Sorbonne), vice-président du Parlement européen, avocat aux barreaux de Paris et de Bruxelles, ancien ministre,
M. Keith Highet, conseil en droit international, vice-président du comité juridique interaméricain de l'Organisation des Etats américains,
M. Malcolm N. Shaw, *Barrister-at-Law*, professeur de droit international à la faculté de droit de l'Université de Leicester, titulaire de la chaire sir Robert Jennings,
M. Bruno Simma, professeur à l'Université de Munich,
sir Ian Sinclair, K.C.M.G., Q.C., *Barrister-at-Law*,
M. Christian Tomuschat, professeur à l'Université de Berlin,

comme conseils et avocats;

S. Exc. M. Pascal Biloa Tang, ambassadeur du Cameroun en France,
S. Exc. M^me^ Isabelle Bassong, ambassadeur du Cameroun auprès des Etats membres du Benelux,
S. Exc. M. Martin Belinga Eboutou, ambassadeur, représentant permanent du Cameroun auprès de l'Organisation des Nations Unies,
M. Pierre Semengue, général de corps d'armée, chef d'état-major général des armées,
M. Robert Akamba, administrateur civil principal, chargé de mission au secrétariat général de la présidence de la République,
M. Etienne Ateba, ministre-conseiller, chargé d'affaires par intérim à l'ambassade du Cameroun, La Haye,
M. Ernest Bodo Abanda, directeur du cadastre, membre de la commission nationale des frontières du Cameroun,
M. Ngolle Philip Ngwesse, directeur au ministère de l'administration territoriale,
M. Thomas Fozein Kwanke, conseiller des affaires étrangères, sous-directeur au ministère des relations extérieures,
M. Jean Gateaud, ingénieur général géographe,
M. Bienvenu Obelabout, directeur d'administration centrale au secrétariat général de la présidence de la République,
M. Marc Sassen, avocat et conseil juridique, La Haye,
M. Joseph Tjop, consultant à la société d'avocats Mignard, Teitgen, Grisoni et associés, chargé d'enseignement et de recherche à l'Université de Paris X-Nanterre,
M. Songola Oudini, directeur d'administration centrale au secrétariat général de la présidence de la République,

comme conseillers;

M^me^ Florence Kollo, traducteur-interprète principal,

comme traducteur-interprète;

M. Pierre Bodeau, attaché temporaire d'enseignement et de recherche à l'Université de Paris X-Nanterre,
M. Olivier Corten, maître de conférences à la faculté de droit de l'Université libre de Bruxelles,
M. Daniel Khan, assistant à l'Université de Munich,
M. Jean-Marc Thouvenin, maître de conférences à l'Université du Maine et à l'Institut d'études politiques de Paris,

comme assistants de recherche;

Mr. Jean-Pierre Cot, Professor, University of Paris I (Panthéon-Sorbonne), Vice-President of the European Parliament, Member of the Paris and Brussels Bars, former Minister,
Mr. Keith Highet, Counsellor in International Law, Vice-Chairman, Inter-American Juridical Committee, Organization of American States,
Mr. Malcolm N. Shaw, Barrister-at-Law, Sir Robert Jennings Professor of International Law, Faculty of Law, University of Leicester,

Mr. Bruno Simma, Professor, University of Munich,
Sir Ian Sinclair, K.C.M.G., Q.C., Barrister-at-Law,
Mr. Christian Tomuschat, Professor, University of Berlin,

as Counsel and Advocates;

H.E. Mr. Pascal Biloa Tang, Ambassador of Cameroon to France,
H.E. Mrs. Isabelle Bassong, Ambassador of Cameroon to the Benelux Countries,
H.E. Mr. Martin Belinga Eboutou, Ambassador, Permanent Representative of Cameroon to the United Nations,
Lieutenant General Pierre Semengue, Chief of Staff of the Armed Forces,

Mr. Robert Akamba, Principal Civil Administrator, chargé de mission, Secretariat of the Presidency of the Republic,
Mr. Etienne Ateba, Minister-Counsellor, Chargé d'affaires a.i. at the Embassy of Cameroon, The Hague,
Mr. Ernest Bodo Abanda, Director of the Cadastral Survey, Member of the National Boundary Commission of Cameroon,
Mr. Ngolle Philip Ngwesse, Director at the Ministry of Territorial Administration,
Mr. Thomas Fozein Kwanke, Counsellor in Foreign Affairs, Deputy Director at the Ministry of Foreign Relations,
Mr. Jean Gateaud, ingénieur général géographe,
Mr. Bienvenu Obelabout, Director, Central Administration, General Secretariat of the Presidency of the Republic,
Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,
Mr. Joseph Tjop, Consultant at Mignard, Teitgen, Grisoni and Associates, Senior Teaching and Research Assistant, University of Paris X-Nanterre,

Mr. Songola Oudini, Director, Central Administration, General Secretariat of the Presidency of the Republic,

as Advisers;

Mrs. Florence Kollo, Principal Translator-Interpreter,

as Translator-Interpreter;

Mr. Pierre Bodeau, Teaching and Research Assistant, University of Paris X-Nanterre,
Mr. Olivier Corten, Senior Lecturer, Faculty of Law, Université libre de Bruxelles,
Mr. Daniel Khan, Assistant, University of Munich,
Mr. Jean-Marc Thouvenin, Senior Lecturer, University of Maine, and Institute of Political Studies, Paris,

as Research Assistants;

M. Guy Roger Eba'a,
M. Daniel Nfan Bile,

comme responsables de la communication;

M^me^ René Bakker,
M^me^ Florence Jovis,
M^me^ Mireille Jung,

comme secrétaires,

et

la République fédérale du Nigéria,

représentée par

S. Exc. l'honorable Alhaji Abdullahi Ibrahim, OFR, SAN, *Attorney-General* de la Fédération et ministre de la justice,

comme agent;

Le chef Richard Akinjide, SAN, FCIArb, ancien ministre, membre des barreaux d'Angleterre et de Gambie,

comme coagent;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, membre de la Commission du droit international, membre du barreau d'Angleterre,
sir Arthur Watts, K.C.M.G., Q.C., membre du barreau d'Angleterre,
M. James Crawford, S.C., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de la Commission du droit international, membre du barreau d'Australie,

comme conseils et avocats;

M. Timothy H. Daniel, associé, cabinet D. J. Freeman de la City de Londres,
M. Alan Perry, associé, cabinet D. J. Freeman de la City de Londres,
M. David Lerer, *Solicitor*, cabinet D. J. Freeman de la City de Londres,
M. Christopher Hackford, *Solicitor*, cabinet D. J. Freeman de la City de Londres,
M^me^ Louise Cox, *Solicitor* stagiaire, cabinet D. J. Freeman de la City de Londres,

comme *Solicitors*;

M. A. H. Yadudu, professeur, conseiller spécial du chef de l'Etat pour les questions juridiques,
M. A. Oye Cukwurah, professeur, membre de la commission nationale des frontières, Abuja,
M. I. A. Ayua, professeur, directeur général, NIALS,
M. L. S. Ajiborisha, général de brigade, directeur des opérations, DHQ,
M^me^ Stella Omiyi, directeur, direction du droit international et comparé, ministère fédéral de la justice,
M. K. Mohammed, directeur de la recherche et de l'analyse, Présidence,
M. Jalal A. Arabi, conseiller juridique du secrétaire du gouvernement de la Fédération,
M. M. M. Kida, sous-directeur, ministère des affaires étrangères,
M. Alhaji A. A. Adisa, adjoint du directeur général du service cartographique de la Fédération, Abuja,
M. P. M. Mann, chargé d'affaires à l'ambassade du Nigéria, La Haye,

Mr. Guy Roger Eba'a,
Mr. Daniel Nfan Bile,

as Communications Specialists;

Mrs. René Bakker,
Mrs. Florence Jovis,
Mrs. Mireille Jung,

as Secretaries,

and

the Federal Republic of Nigeria,

represented by

H.E. the Honourable Alhaji Abdullahi Ibrahim, OFR, SAN, Attorney-General of the Federation and Minister of Justice,

as Agent;

Chief Richard Akinjide, SAN, FCIArb, former Minister, Member of the English and Gambian Bars,

as Co-Agent;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford, Member of the International Law Commission, Member of the English Bar,
Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar,
Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the International Law Commission, Member of the Australian Bar,

as Counsel and Advocates;

Mr. Timothy H. Daniel, Partner, D. J. Freeman of the City of London,
Mr. Alan Perry, Partner, D. J. Freeman of the City of London,
Mr. David Lerer, Solicitor, D. J. Freeman of the City of London,
Mr. Christopher Hackford, Solicitor, D. J. Freeman of the City of London,

Ms Louise Cox, trainee Solicitor, D. J. Freeman of the City of London,

as Solicitors;

Mr. A. H. Yadudu, Professor, Special Adviser to the Head of State on Legal Matters,
Mr. A. Oye Cukwurah, Professor, National Boundary Commission, Abuja,

Mr. I. A. Ayua, Professor, Director-General, NIALS,
Brigadier General L. S. Ajiborisha, Director of Operations, DHQ,
Mrs. Stella Omiyi, Director, International and Comparative Law Department, Federal Ministry of Justice,
Mr. K. Mohammed, Director of Research and Analysis, the Presidency,
Mr. Jalal A. Arabi, Legal Adviser to the Secretary to the Government of the Federation,
Mr. M. M. Kida, Assistant Director, Ministry of Foreign Affairs,
Mr. Alhaji A. A. Adisa, Deputy Surveyor-General of the Federation, Abuja,

Mr. P. M. Mann, Chargé d'affaires, Embassy of Nigeria, The Hague,

M^me^ V. Okwecheme, conseiller à l'ambassade du Nigéria, La Haye,
M. Amuzuei, conseiller à l'ambassade du Nigéria, La Haye,
M. Clive Schofield, cartographe, unité de recherche sur les frontières internationales, Université de Durham,
M. Arthur Corner, cartographe, Université de Durham,
M^me^ Michelle Burgoine, assistant pour les techniques de l'information,
comme conseillers;

M^me^ Coralie Ayad, cabinet D. J. Freeman de la City de Londres,
comme secrétaire,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant:

1. Le 29 mars 1994, le Gouvernement de la République du Cameroun (dénommée ci-après le «Cameroun») a déposé au Greffe de la Cour une requête introductive d'instance contre le Gouvernement de la République fédérale du Nigéria (dénommée ci-après le «Nigéria») au sujet d'un différend présenté comme «port[ant] essentiellement sur la question de la souveraineté sur la presqu'île de Bakassi». Le Cameroun exposait en outre dans sa requête que la «délimitation [de la frontière maritime entre les deux Etats] est demeurée partielle et [que] les deux parties n'ont pas pu, malgré de nombreuses tentatives, se mettre d'accord pour la compléter». Il priait en conséquence la Cour, «[a]fin d'éviter de nouveaux incidents entre les deux pays, ... de bien vouloir déterminer le tracé de la frontière maritime entre les deux Etats au-delà de celui qui avait été fixé en 1975». La requête invoquait, pour fonder la compétence de la Cour, les déclarations par lesquelles les deux Parties ont accepté la juridiction de la Cour au titre du paragraphe 2 de l'article 36 du Statut de la Cour.

2. Conformément au paragraphe 2 de l'article 40 du Statut, la requête a été immédiatement communiquée au Gouvernement du Nigéria par le greffier.

3. Le 6 juin 1994, le Cameroun a déposé au Greffe une requête additionnelle «aux fins d'élargissement de l'objet du différend» à un autre différend décrit dans cette requête additionnelle comme «port[ant] essentiellement sur la question de la souveraineté sur une partie du territoire camerounais dans la zone du lac Tchad». Le Cameroun demandait également à la Cour, dans sa requête additionnelle, de «préciser définitivement» la frontière entre les deux Etats du lac Tchad à la mer, et la priait de joindre les deux requêtes et «d'examiner l'ensemble en une seule et même instance». La requête additionnelle se référait, pour fonder la compétence de la Cour, à la «base de ... compétence ... déjà ... indiquée» dans la requête introductive d'instance du 29 mars 1994.

4. Le 7 juin 1994, le greffier a communiqué la requête additionnelle au Gouvernement du Nigéria.

5. Lors d'une réunion que le président de la Cour a tenue avec les représentants des Parties le 14 juin 1994, l'agent du Nigéria a déclaré ne pas voir d'objection à ce que la requête additionnelle soit traitée, ainsi que le Cameroun en avait exprimé le souhait, comme un amendement à la requête initiale, de sorte que la Cour puisse examiner l'ensemble en une seule et même instance. Par une ordonnance en date du 16 juin 1994, la Cour a indiqué qu'elle ne voyait pas elle-même d'objection à ce qu'il soit ainsi procédé, et a fixé respectivement

Mrs. V. Okwecheme, Counsellor, Embassy of Nigeria, The Hague,
Mr. Amuzuei, Counsellor, Embassy of Nigeria, The Hague,
Mr. Clive Schofield, Cartographer, International Boundaries Research Unit, Durham University,
Mr. Arthur Corner, Cartographer, Durham University,
Ms Michelle Burgoine, Information Technology Assistant,
as Advisers;

Mrs. Coralie Ayad, D. J. Freeman of the City of London
as Secretary.

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 29 March 1994, the Government of the Republic of Cameroon (hereinafter called "Cameroon") filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Nigeria (hereinafter called "Nigeria") in respect of a dispute described as "relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula". Cameroon further stated in its Application that the "delimitation [of the maritime boundary between the two States] has remained a partial one and [that], despite many attempts to complete it, the two parties have been unable to do so". It accordingly requested the Court, "in order to avoid further incidents between the two countries, . . . to determine the course of the maritime boundary between the two States beyond the line fixed in 1975". In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of Nigeria by the Registrar.

3. On 6 June 1994, Cameroon filed in the Registry an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute described in that Additional Application as "relat[ing] essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad". Cameroon also requested the Court, in its Additional Application, "to specify definitively" the frontier between the two States from Lake Chad to the sea, and asked it to join the two Applications and "to examine the whole in a single case". In order to found the jurisdiction of the Court, the Additional Application referred to the "basis of . . . jurisdiction . . . already . . . indicated" in the Application instituting proceedings of 29 March 1994.

4. On 7 June 1994, the Registrar communicated the Additional Application to the Government of Nigeria.

5. At a meeting which the President of the Court held with the representatives of the Parties on 14 June 1994, the Agent of Nigeria stated that he had no objection to the Additional Application being treated, in accordance with the wish expressed by Cameroon, as an amendment to the initial Application, so that the Court could deal with the whole in a single case. By an Order dated 16 June 1994, the Court indicated that it had no objection itself to such a procedure, and fixed 16 March 1995 and 18 December 1995, respectively, as the

au 16 mars 1995 et au 18 décembre 1995 les dates d'expiration des délais pour le dépôt du mémoire du Cameroun et du contre-mémoire du Nigéria.

6. Conformément au paragraphe 3 de l'article 40 du Statut, tous les Etats admis à ester devant la Cour ont été informés de la requête.

7. Le Cameroun a dûment déposé son mémoire dans le délai prescrit dans l'ordonnance de la Cour en date du 16 juin 1994.

8. Dans le délai fixé pour le dépôt de son contre-mémoire, le Nigéria a déposé des exceptions préliminaires à la compétence de la Cour et à la recevabilité de la requête. En conséquence, par une ordonnance en date du 10 janvier 1996, le président de la Cour, constatant qu'en vertu des dispositions du paragraphe 3 de l'article 79 du Règlement la procédure sur le fond était suspendue, a fixé au 15 mai 1996 la date d'expiration du délai dans lequel le Cameroun pourrait présenter un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires.

Le Cameroun a déposé un tel exposé dans le délai ainsi prescrit, et l'affaire s'est trouvée en état pour ce qui est des exceptions préliminaires.

9. La Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire: le Cameroun a désigné M. Kéba Mbaye, et le Nigéria M. Bola Ajibola.

10. Par une lettre datée du 10 février 1996 et reçue au Greffe le 12 février 1996, le Cameroun a présenté une demande en indication de mesures conservatoires en vertu de l'article 41 du Statut. Par une ordonnance en date du 15 mars 1996, la Cour, après avoir entendu les Parties, a indiqué certaines mesures conservatoires.

11. Par diverses communications, le Cameroun a souligné auprès de la Cour toute l'importance qu'il attachait à un règlement rapide de l'affaire; il a en outre déposé, sous le couvert d'une lettre datée du 9 avril 1997, un document avec annexes intitulé «Mémorandum de la République du Cameroun sur la procédure». Le Nigéria a fait connaître ses vues sur cette dernière communication dans une lettre datée du 13 mai 1997.

12. Par une lettre datée du 2 février 1998, le Nigéria a demandé à produire un volume de documents intitulé «Documents supplémentaires (Procès-verbaux de la commission du bassin du lac Tchad)». Par une lettre datée du 16 février 1998, l'agent du Cameroun a indiqué que le Cameroun ne s'opposait pas à la production de ces documents. La Cour en a accepté la présentation conformément au paragraphe 1 de l'article 56 de son Règlement.

13. Par une lettre datée du 11 février 1998, l'agent du Cameroun a demandé à produire certains «documents nouveaux relatifs aux événements qui se sont produits depuis le dépôt du mémoire» du Cameroun et a prié «en outre la Cour de bien vouloir considérer les annexes au [mémorandum d'avril 1997] comme parties intégrantes de la présente procédure». Après examen des vues exprimées par le Nigéria dans sa lettre susmentionnée du 13 mai 1997 (voir paragraphe 11 ci-dessus) et dans sa lettre du 24 février 1998, la Cour a accepté la production de ces documents conformément aux dispositions de l'article 56 de son Règlement.

14. Conformément au paragraphe 2 de l'article 53 du Règlement, la Cour a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, les exceptions préliminaires du Nigéria et l'exposé écrit contenant les observations et conclusions du Cameroun sur ces exceptions, ainsi que les documents qui étaient joints à ces pièces.

time-limits for the filing of the Memorial of Cameroon and the Counter-Memorial of Nigeria.

6. Pursuant to Article 40, paragraph 3, of the Statute, all States entitled to appear before the Court were notified of the Application.

7. Cameroon duly filed its Memorial within the time-limit prescribed in the Court's Order dated 16 June 1994.

8. Within the time-limit fixed for the filing of its Counter-Memorial, Nigeria filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Accordingly, by an Order dated 10 January 1996, the President of the Court, noting that, under Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed 15 May 1996 as the time-limit within which Cameroon might present a written statement of its observations and submissions on the preliminary objections.

Cameroon filed such a statement within the time-limit so prescribed, and the case became ready for hearing in respect of the preliminary objections.

9. Since the Court included upon the Bench no judge of the nationality of the Parties, each Party exercised its right under Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case: Cameroon chose Mr. Kéba Mbaye and Nigeria chose Mr. Bola Ajibola.

10. By a letter dated 10 February 1996 and received in the Registry on 12 February 1996, Cameroon submitted a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 15 March 1996, the Court, after hearing the Parties, indicated certain provisional measures.

11. By various communications, Cameroon stressed the importance of a speedy disposal of the case; it also filed, under cover of a letter dated 9 April 1997, a document with annexes entitled "Memorandum of the Republic of Cameroon on Procedure". Nigeria made known its views on the latter communication in a letter dated 13 May 1997.

12. By a letter dated 2 February 1998, Nigeria sought to introduce a volume of documents entitled "Supplemental Documents (Lake Chad Basin Commission Proceedings)". By a letter dated 16 February 1998, the Agent of Cameroon indicated that Cameroon did not oppose their introduction. The Court admitted the said documents pursuant to Article 56, paragraph 1, of the Rules of Court.

13. By a letter dated 11 February 1998, the Agent of Cameroon sought to introduce certain "new documents relating to events occurring since the filing of the Memorial" of Cameroon, and "moreover requested the Court to consider the annexes to the [Memorandum of April 1997] as an integral part of the proceedings". Having considered the views expressed by Nigeria in its above-mentioned letter of 13 May 1997 (see paragraph 11 above) and in its letter of 24 February 1998, the Court admitted the documents pursuant to the provisions of Article 56 of its Rules.

14. In accordance with Article 53, paragraph 2, of its Rules, the Court decided to make accessible to the public, on the opening of the oral proceedings, the preliminary objections of Nigeria and the written statement containing the observations and submissions of Cameroon on the objections, as well as the documents annexed to those pleadings.

15. Des audiences publiques ont été tenues entre le 2 et le 11 mars 1998, au cours desquelles ont été entendus en leurs plaidoiries et réponses:

Pour le Nigéria: S. Exc. l'honorable Alhaji Abdullahi Ibrahim,
M. Richard Akinjide,
M. Ian Brownlie,
sir Arthur Watts,
M. James Crawford.

Pour le Cameroun: S. Exc. M. Laurent Esso,
M. Douala Moutomé,
M. Maurice Kamto,
M. Peter Ntamark,
M. Joseph-Marie Bipoun Woum,
M. Alain Pellet,
M. Michel Aurillac,
M. Jean-Pierre Cot,
M. Keith Highet,
M. Malcolm N. Shaw,
M. Bruno Simma,
sir Ian Sinclair,
M. Christian Tomuschat.

A l'audience, un membre de la Cour a posé aux Parties une question à laquelle il a été répondu par écrit, après la clôture de la procédure orale.

*

16. Dans la requête, les demandes ci-après ont été formulées par le Cameroun:

«Sur la base de l'exposé des faits et des moyens juridiques qui précèdent, la République du Cameroun, tout en se réservant le droit de compléter, d'amender ou de modifier la présente requête pendant la suite de la procédure et de présenter à la Cour une demande en indication de mesures conservatoires si celles-ci se révélaient nécessaires, prie la Cour de dire et juger:

a) que la souveraineté sur la presqu'île de Bakassi est camerounaise, en vertu du droit international, et que cette presqu'île fait partie intégrante du territoire de la République du Cameroun;

b) que la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation *(uti possidetis juris)*;

c) que, en utilisant la force contre la République du Cameroun, la République fédérale du Nigéria a violé et viole ses obligations en vertu du droit international conventionnel et coutumier;

d) que la République fédérale du Nigéria, en occupant militairement la presqu'île camerounaise de Bakassi, a violé et viole les obligations qui lui incombent en vertu du droit conventionnel et coutumier;

e) que, vu ces violations des obligations juridiques susvisées, la République fédérale du Nigéria a le devoir exprès de mettre fin à sa présence militaire sur le territoire camerounais, et d'évacuer sans délai et sans condition ses troupes de la presqu'île camerounaise de Bakassi;

15. Public sittings were held between 2 March and 11 March 1998, at which the Court heard the oral arguments and replies of:

For Nigeria: H.E. the Honourable Alhaji Abdullahi Ibrahim,
Mr. Richard Akinjide,
Mr. Ian Brownlie,
Sir Arthur Watts,
Mr. James Crawford.

For Cameroon: H.E. Mr. Laurent Esso,
Mr. Douala Moutomé,
Mr. Maurice Kamto,
Mr. Peter Ntamark,
Mr. Joseph-Marie Bipoun Woum,
Mr. Alain Pellet,
Mr. Michel Aurillac,
Mr. Jean-Pierre Cot,
Mr. Keith Highet,
Mr. Malcolm N. Shaw,
Mr. Bruno Simma,
Sir Ian Sinclair,
Mr. Christian Tomuschat.

At the hearings, a Member of the Court put a question to the Parties, who answered in writing after the close of the oral proceedings.

*

16. In its Application, Cameroon made the following requests:

"On the basis of the foregoing statement of facts and legal grounds, the Republic of Cameroon, while reserving for itself the right to complement, amend or modify the present Application in the course of the proceedings and to submit to the Court a request for the indication of provisional measures should they prove to be necessary, asks the Court to adjudge and declare:

(a) that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon;

(b) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization *(uti possidetis juris)*;

(c) that by using force against the Republic of Cameroon, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law;

(d) that the Federal Republic of Nigeria, by militarily occupying the Cameroonian Peninsula of Bakassi, has violated and is violating the obligations incumbent upon it by virtue of treaty law and customary law;

(e) that in view of these breaches of legal obligation, mentioned above, the Federal Republic of Nigeria has the express duty of putting an end to its military presence in Cameroonian territory, and effecting an immediate and unconditional withdrawal of its troops from the Cameroonian Peninsula of Bakassi;

e') que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés *sub litterae a), b), c), d)* et *e)* ci-dessus;

e") qu'en conséquence une réparation d'un montant à déterminer par la Cour est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci, la République du Cameroun se réservant d'introduire devant la Cour une évaluation précise des dommages provoqués par la République fédérale du Nigéria.

f) Afin d'éviter la survenance de tout différend entre les deux Etats relativement à leur frontière maritime, la République du Cameroun prie la Cour de procéder au prolongement du tracé de sa frontière maritime avec la République fédérale du Nigéria jusqu'à la limite des zones maritimes que le droit international place sous leur juridiction respective.»

17. Dans la requête additionnelle, les demandes ci-après ont été formulées par le Cameroun:

«Sur la base de l'exposé des faits et des moyens juridiques qui précèdent et sous toutes les réserves formulées au paragraphe 20 de sa requête du 29 mars 1994, la République du Cameroun prie la Cour de dire et juger:

a) que la souveraineté sur la parcelle litigieuse dans la zone du lac Tchad est camerounaise en vertu du droit international, et que cette parcelle fait partie intégrante du territoire de la République du Cameroun;

b) que la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation *(uti possidetis juris)* ainsi que ses engagements juridiques récents relativement à la démarcation des frontières dans le lac Tchad;

c) que la République fédérale du Nigéria, en occupant avec l'appui de ses forces de sécurité des parcelles du territoire camerounais dans la zone du lac Tchad, a violé et viole ses obligations en vertu du droit conventionnel et coutumier;

d) que, vu les obligations juridiques susvisées, la République fédérale du Nigéria a le devoir exprès d'évacuer sans délai et sans conditions ses troupes du territoire camerounais dans la zone du lac Tchad;

e) que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés aux sous-paragraphes *a), b), c)* et *d)* ci-dessus;

e') qu'en conséquence une réparation d'un montant à déterminer par la Cour est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci, la République du Cameroun se réservant d'introduire devant la Cour une évaluation précise des dommages provoqués par la République fédérale du Nigéria.

f) Que vu les incursions répétées des populations et des forces armées nigérianes en territoire camerounais tout le long de la frontière entre les deux pays, les incidents graves et répétés qui s'ensuivent, et l'attitude instable et réversible de la République fédérale du Nigéria relativement aux instruments juridiques définissant la frontière entre les

(e') that the internationally unlawful acts referred to under *(a), (b), (c), (d)* and *(e)* above involve the responsibility of the Federal Republic of Nigeria;

(e") that, consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.

(f) In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions."

17. In its Additional Application, Cameroon made the following requests:

"On the basis of the foregoing statement of facts and legal grounds, and subject to the reservations expressed in paragraph 20 of its Application of 29 March 1994, the Republic of Cameroon asks the Court to adjudge and declare:

(a) that sovereignty over the disputed parcel in the area of Lake Chad is Cameroonian, by virtue of international law, and that that parcel is an integral part of the territory of Cameroon;

(b) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization *(uti possidetis juris)*, and its recent legal commitments concerning the demarcation of frontiers in Lake Chad;

(c) that the Federal Republic of Nigeria, by occupying, with the support of its security forces, parcels of Cameroonian territory in the area of Lake Chad, has violated and is violating its obligations under treaty law and customary law;

(d) that in view of these legal obligations, mentioned above, the Federal Republic of Nigeria has the express duty of effecting an immediate and unconditional withdrawal of its troops from Cameroonian territory in the area of Lake Chad;

(e) that the internationally unlawful acts referred to under *(a), (b), (c)* and *(d)* above involve the responsibility of the Federal Republic of Nigeria;

(e') that consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.

(f) That in view of the repeated incursions of Nigerian groups and armed forces into Cameroonian territory, all along the frontier between the two countries, the consequent grave and repeated incidents, and the vacillating and contradictory attitude of the Federal Republic of Nigeria in regard to the legal instruments defining the

deux pays et au tracé exact de cette frontière, la République du Cameroun prie respectueusement la Cour de bien vouloir préciser définitivement la frontière entre elle et la République fédérale du Nigéria du lac Tchad à la mer.»

18. Dans la procédure écrite, les conclusions ci-après ont été présentées par les Parties:

Au nom du Gouvernement du Cameroun,

dans le mémoire:

«La République du Cameroun a l'honneur de conclure à ce qu'il plaise à la Cour internationale de Justice de dire et juger:

a) Que la frontière lacustre et terrestre entre le Cameroun et le Nigéria suit le tracé suivant:

— du point de longitude 14° 04′ 59″ 9999 à l'est de Greenwich et de latitude de 13° 050′ 00″ 0001, nord, elle passe ensuite par le point situé à 14° 12′ 11″ 7 de longitude est et 12° 32′ 17″ 4 de latitude nord;

— de ce point, elle suit le tracé fixé par la déclaration franco-britannique du 10 juillet 1919, tel que précisé par les alinéas 3 à 60 de la déclaration Thomson-Marchand confirmée par l'échange de lettres du 9 janvier 1931, jusqu'au «pic assez proéminent» décrit par cette dernière disposition et connu sous le nom usuel de «mont Kombon»;

— du mont Kombon, la frontière se dirige ensuite vers la «borne 64» visée au paragraphe 12 de l'accord germano-britannique d'Obokum du 12 avril 1913 et suit, dans ce secteur, le tracé décrit à la section 6 (1) du *Nigeria (Protectorate and Cameroons) Order in Council* britannique du 2 août 1946;

— de la «borne 64» elle suit le tracé décrit par les paragraphes 13 à 21 de l'accord d'Obokum du 12 avril 1913 jusqu'à la borne 114 sur la Cross River;

— de ce point, jusqu'à l'intersection de la ligne droite joignant Bakassi Point à King Point et du centre du chenal navigable de l'Akwayafé, la frontière est déterminée par les paragraphes 16 à 21 de l'accord germano-britannique du 11 mars 1913.

b) Que, dès lors, notamment, la souveraineté sur la presqu'île de Bakassi d'une part et sur la parcelle litigieuse occupée par le Nigéria dans la zone du lac Tchad d'autre part, en particulier sur Darak et sa région, est camerounaise.

c) Que la limite des zones maritimes relevant respectivement de la République du Cameroun et de la République fédérale du Nigéria suit le tracé suivant:

— de l'intersection de la ligne droite joignant Bakassi Point à King Point et du centre du chenal navigable de l'Akwayafé jusqu'au «point 12», cette limite est déterminée par la «ligne de compromis» reportée sur la carte de l'amirauté britannique n° 3343 par les chefs d'Etat des deux pays le 4 avril 1971 (déclaration de Yaoundé) et, de ce «point 12» jusqu'au «point G» par la déclaration signée à Maroua le 1er juin 1975;

frontier between the two countries and the exact course of that frontier, the Republic of Cameroon respectfully asks the Court to specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea."

18. In the written proceedings, the Parties presented the following submissions:

On behalf of the Government of Cameroon,

in the Memorial:

"The Republic of Cameroon has the honour to request that the Court be pleased to adjudge and declare:

(a) That the lake and land boundary between Cameroon and Nigeria takes the following course:

— from the point at longitude 14° 04′ 59″ 9999 E of Greenwich and latitude 13° 05′ 00″ 0001 N, it then runs through the point located at longitude 14° 12′ 11″ 7 E and latitude 12° 32′ 17″ 4 N;

— thence it follows the course fixed by the Franco-British Declaration of 10 July 1919, as specified in paragraphs 3 to 60 of the Thomson-Marchand Declaration, confirmed by the Exchange of Letters of 9 January 1931, as far as the 'very prominent peak' described in the latter provision and called by the usual name of 'Mount Kombon';

— from Mount Kombon the boundary then runs to 'Pillar 64' mentioned in paragraph 12 of the Anglo-German Agreement of Obokum of 12 April 1913 and follows, in that sector, the course described in Section 6 (1) of the British Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946;

— from Pillar 64 it follows the course described in paragraphs 13 to 21 of the Obokum Agreement of 12 April 1913 as far as Pillar 114 on the Cross River;

— thence, as far as the intersection of the straight line joining Bakassi Point to King Point and the centre of the navigable channel of the Akwayafe, the boundary is determined by paragraphs 16 to 21 of the Anglo-German Agreement of 11 March 1913.

(b) That notably, therefore, sovereignty over the Peninsula of Bakassi and over the disputed parcel occupied by Nigeria in the area of Lake Chad, in particular over Darak and its region, is Cameroonian.

(c) That the boundary of the maritime zones appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows the following course:

— from the intersection of the straight line joining Bakassi Point to King Point and the centre of the navigable channel of the Akwayafe to 'point 12', that boundary is determined by the 'compromise line' entered on British Admiralty Chart No. 3343 by the Heads of State of the two countries on 4 April 1971 (Yaoundé Declaration) and, from that 'point 12' to 'point G', by the Declaration signed at Maroua on 1 June 1975;

— du point G, cette limite s'infléchit ensuite vers le sud-ouest dans la direction indiquée par les points G, H, I, J, K représentés sur le croquis figurant à la page 556 du présent mémoire et qui répond à l'exigence d'une solution équitable, jusqu'à la limite extérieure des zones maritimes que le droit international place sous la juridiction respective des deux Parties.

d) Qu'en contestant les tracés de la frontière définie ci-dessus *sub litterae a)* et *c)* la République fédérale du Nigéria a violé et viole le principe fondamental du respect des frontières héritées de la colonisation *(uti possidetis juris)* ainsi que ses engagements juridiques relativement à la démarcation des frontières dans le lac Tchad et à la délimitation terrestre et maritime.

e) Qu'en utilisant la force contre la République du Cameroun, et, en particulier, en occupant militairement des parcelles du territoire camerounais dans la zone du lac Tchad et la péninsule camerounaise de Bakassi, en procédant à des incursions répétées, tant civiles que militaires, tout le long de la frontière entre les deux pays, la République fédérale du Nigéria a violé et viole ses obligations en vertu du droit international conventionnel et coutumier.

f) Que la République fédérale du Nigéria a le devoir exprès de mettre fin à sa présence tant civile que militaire sur le territoire camerounais et, en particulier, d'évacuer sans délai et sans conditions ses troupes de la zone occupée du lac Tchad et de la péninsule camerounaise de Bakassi et de s'abstenir de tels faits à l'avenir.

g) Que la responsabilité de la République fédérale du Nigéria est engagée par les faits internationalement illicites exposés ci-dessus et précisés dans le corps du présent mémoire.

h) Qu'en conséquence une réparation est due par la République fédérale du Nigéria à la République du Cameroun pour les préjudices matériels et moraux subis par celle-ci selon des modalités à fixer par la Cour.

La République du Cameroun a en outre l'honneur de prier la Cour de bien vouloir l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due en réparation des préjudices qu'elle a subis en conséquence des faits internationalement illicites attribuables à la République fédérale du Nigéria, dans une phase ultérieure de la procédure.

Les présentes conclusions sont soumises sous réserve de tous éléments de fait et de droit et de toutes preuves qui viendraient à être soumis ultérieurement; la République du Cameroun se réserve le droit de les compléter ou de les amender le cas échéant, conformément aux dispositions du Statut et du Règlement de la Cour.»

Au nom du Gouvernement du Nigéria,

dans les exceptions préliminaires:

Première exception préliminaire:

«1) que le Cameroun, en déposant sa requête du 29 mars 1994, a violé son obligation d'agir de bonne foi, a abusé du système institué par le paragraphe 2 de l'article 36 du Statut, et n'a pas tenu compte de la condition de réciprocité prévue par le paragraphe 2 de l'article 36 du Statut,

— from point G that boundary then swings south-westward in the direction which is indicated by points G, H, I, J and K represented on the sketch-map on page 556 of this Memorial and meets the requirement for an equitable solution, up to the outer limit of the maritime zones which international law places under the respective jurisdictions of the two Parties.

(d) That by contesting the courses of the boundary defined above under *(a)* and *(c)*, the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization *(uti possidetis juris)* and its legal commitments concerning the demarcation of frontiers in Lake Chad and land and maritime delimitation.

(e) That by using force against the Republic of Cameroon and, in particular, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Cameroonian Peninsula of Bakassi, and by making repeated incursions, both civilian and military, all along the boundary between the two countries, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law.

(f) That the Federal Republic of Nigeria has the express duty of putting an end to its civilian and military presence in Cameroonian territory and, in particular, of effecting an immediate and unconditional withdrawal of its troops from the occupied area of Lake Chad and from the Cameroonian Peninsula of Bakassi and of refraining from such acts in the future.

(g) That the internationally wrongful acts referred to above and described in detail in the body of this Memorial involve the responsibility of the Federal Republic of Nigeria.

(h) That, consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in a form to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon.

The Republic of Cameroon further has the honour to request the Court to permit it to present an assessment of the amount of compensation due to it as reparation for the damage it has suffered as a result of the internationally wrongful acts attributable to the Federal Republic of Nigeria, at a subsequent stage of the proceedings.

These submissions are lodged subject to any points of fact and law and any evidence that may subsequently be lodged; the Republic of Cameroon reserves the right to complete or amend them, as necessary, in accordance with the Statute and the Rules of Court."

On behalf of the Government of Nigeria,

in the preliminary objections:

First preliminary objection:

"(1) that Cameroon, by lodging the Application on 29 March 1994, violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36,

ainsi que des termes de la déclaration du Nigéria du 3 septembre 1965;

2) qu'en conséquence les conditions nécessaires pour autoriser le Cameroun à invoquer sa déclaration en vertu du paragraphe 2 de l'article 36 comme fondement de la compétence de la Cour n'étaient pas remplies lorsque la requête a été soumise;
3) que, partant, la Cour n'est pas compétente pour connaître de la requête.»

Deuxième exception préliminaire:

«Pendant une période d'au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants:

1) Cet ensemble de comportements communs constitue un accord implicite de recourir exclusivement aux mécanismes bilatéraux existants et de ne pas invoquer la compétence de la Cour.
2) *A titre subsidiaire*, dans ces circonstances, la République du Cameroun est privée de son droit à invoquer la compétence de la Cour.»

Troisième exception préliminaire:

«Sans préjuger de ce qui sera décidé au sujet de la deuxième exception préliminaire, le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad et que, dans ce contexte, les procédures de règlement prévues dans le cadre de la commission sont obligatoires pour les Parties.

Le recours aux procédures de règlement des différends de la commission du bassin du lac Tchad impliquait nécessairement, pour ce qui a trait aux relations mutuelles entre le Nigéria et le Cameroun, que ne soit pas invoquée la compétence de la Cour en vertu du paragraphe 2 de l'article 36 en ce qui concerne les questions relevant de la compétence exclusive de la commission.»

Quatrième exception préliminaire:

«La Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.»

Cinquième exception préliminaire:

«1) Le Nigéria considère qu'il n'existe pas de différend concernant la délimitation de la frontière en tant que telle sur toute sa longueur entre le tripoint du lac Tchad et la mer, et notamment:

a) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle dans le lac Tchad, sans préjuger de la question du titre sur Darak et les îles avoisinantes habitées par des Nigérians;
b) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre le tripoint du lac Tchad et le mont Kombon;
c) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et le mont Kombon;
d) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et la mer.

paragraph 2, of the Statute and the terms of Nigeria's Declaration of 3 September 1965;

(2) that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court's jurisdiction did not exist when the Application was lodged; and

(3) that accordingly, the Court is without jurisdiction to entertain the Application."

Second preliminary objection:

"For a period of at least 24 years prior to the filing of the Application the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery.

(1) This course of joint conduct constitutes an implied agreement to resort exclusively to the existing bilateral machinery and not to invoke the jurisdiction of the Court.

(2) *In the alternative*, in the circumstances the Republic of Cameroon is estopped from invoking the jurisdiction of the Court."

Third preliminary objection:

"Without prejudice to the second preliminary objection, the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission, and in this context the procedures of settlement within the Lake Chad Basin Commission are obligatory for the Parties.

The operation of the dispute settlement procedures of the Lake Chad Basin Commission involved the necessary implication, for the relations of Nigeria and Cameroon *inter se*, that the jurisdiction of the Court by virtue of Article 36, paragraph 2, would not be invoked in relation to matters within the exclusive competence of the Commission."

Fourth preliminary objection:

"The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake."

Fifth preliminary objection:

"(1) In the submission of Nigeria there is no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and in particular:

(a) there is no dispute in respect of the boundary delimitation as such within Lake Chad, subject to the question of title to Darak and adjacent islands inhabited by Nigerians;

(b) there is no dispute relating to the boundary delimitation as such from the tripoint in Lake Chad to Mount Kombon;

(c) there is no dispute relating to the boundary delimitation as such between Boundary Pillar 64 on the Gamana River and Mount Kombon; and

(d) there is no dispute relating to the boundary delimitation as such between Pillar 64 on the Gamana River and the sea.

2) La présente exception préliminaire est présentée sans préjuger de la question du titre du Nigéria sur la presqu'île de Bakassi.»

Sixième exception préliminaire:

«1) que la requête (et pour autant qu'ils sont pertinents l'amendement et le mémoire) déposée par le Cameroun ne satisfait pas aux critères exigés quant à l'exposé des faits sur lesquels elle se fonde, notamment en ce qui concerne les dates, les circonstances et les lieux précis des prétendus incursions et incidents imputés à des organes de l'Etat nigérian;

2) que ces carences font qu'il est impossible

a) au Nigéria de connaître, ainsi qu'il en a le droit, les circonstances qui, selon le Cameroun, sont à l'origine de l'engagement de la responsabilité internationale du Nigéria et de l'obligation de réparation qui en découle pour lui;

b) à la Cour de procéder à un examen judiciaire équitable et effectif des questions de responsabilité étatique et de réparation soulevées par le Cameroun et de se prononcer sur celles-ci;

3) et que, par conséquent, toutes les demandes concernant les questions de responsabilité étatique et de réparation présentées par le Cameroun dans ce contexte doivent être déclarées irrecevables.»

Septième exception préliminaire:

«Il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour, pour les motifs suivants:

1) il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi;

2) dans l'éventualité où la question du titre concernant la presqu'île de Bakassi serait réglée, les demandes concernant les questions de délimitation maritime ne seront pas recevables faute d'action suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international.»

Huitième exception préliminaire:

«La question de la délimitation maritime met nécessairement en cause les droits et les intérêts d'Etats tiers et la demande à ce sujet est irrecevable.»

Conclusions finales:

«Pour les motifs qu'elle a exposés, la République fédérale du Nigéria prie la Cour de dire et juger:

qu'elle n'a pas compétence pour connaître des demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun;

et/ou

que les demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun sont irrecevables dans la mesure précisée dans les présentes exceptions préliminaires.»

Au nom du Gouvernement du Cameroun,

dans l'exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires:

(2) This preliminary objection is without prejudice to the title of Nigeria over the Bakassi Peninsula."

Sixth preliminary objection:

"(1) that the Application (and so far as relevant, Amendment and Memorial) filed by Cameroon does not meet the required standard of adequacy as to the facts on which it is based, including the dates, circumstances and precise locations of the alleged incursions and incidents by Nigerian State organs;

(2) that those deficiencies make it impossible

(a) for Nigeria to have the knowledge to which it is entitled of the circumstances which are said by Cameroon to result in Nigeria's international responsibility and consequential obligation to make reparation; and

(b) for the Court to carry out a fair and effective judicial examination of, or make a judicial determination on, the issues of State responsibility and reparation raised by Cameroon; and

(3) that accordingly all the issues of State responsibility and reparation raised by Cameroon in this context should be declared inadmissible."

Seventh preliminary objection:

"There is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court, for the following reasons:

(1) no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula;

(2) at the juncture where there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'."

Eighth preliminary objection:

"The question of maritime delimitation necessarily involves the rights and interests of third States and is inadmissible."

Concluding submissions:

"For the reasons advanced, the Federal Republic of Nigeria requests the Court to adjudge and declare that:

it lacks jurisdiction over the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon;

and/or

the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon are inadmissible to the extent specified in these preliminary objections."

On behalf of the Government of Cameroon,

in the written statement containing its observations on the preliminary objections:

«Pour les motifs exposés ..., la République du Cameroun prie la Cour internationale de Justice de bien vouloir:

1) rejeter les exceptions préliminaires soulevées par la République fédérale du Nigéria;
2) constater que, par ses déclarations formelles, celle-ci a accepté la compétence de la Cour;
3) dire et juger:
   — qu'elle a compétence pour se prononcer sur la requête formée par le Cameroun le 29 mars 1994 et complétée par la requête additionnelle en date du 6 juin 1994 et
   — que la requête ainsi consolidée est recevable;
4) compte dûment tenu de la nature particulière de cette affaire, qui porte sur un différend afférent à la souveraineté territoriale du Cameroun et crée des tensions graves entre les deux pays, fixer des délais pour la suite de la procédure qui permettent l'examen au fond du litige à une date aussi rapprochée que possible.»

19. Dans la procédure orale, les conclusions ci-après ont été présentées par les Parties:

Au nom du Gouvernement du Nigéria,

à l'audience du 9 mars 1998:

«[P]our les motifs qui ont été exposés par écrit ou oralement, le Nigéria conclut:

Première exception préliminaire

1.1. Que le Cameroun, en déposant sa requête du 29 mars 1994, a violé son obligation d'agir de bonne foi, a abusé du système institué par le paragraphe 2 de l'article 36 du Statut et n'a pas tenu compte de la condition de réciprocité prévue par le paragraphe 2 de l'article 36 du Statut, ainsi que des termes de la déclaration du Nigéria du 3 septembre 1965;

1.2. Qu'en conséquence, les conditions nécessaires pour autoriser le Cameroun à invoquer sa déclaration en vertu du paragraphe 2 de l'article 36 comme fondement de la compétence de la Cour n'étaient pas remplies lorsque la requête a été soumise;

1.3. Que, partant, la Cour n'est pas compétente pour connaître de la requête.

Deuxième exception préliminaire

2.1. Que, pendant une période d'au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants;

2.1.1. Que cet ensemble de comportements communs constitue un accord implicite de recourir exclusivement aux mécanismes bilatéraux existants et de ne pas invoquer la compétence de la Cour;

2.1.2. Qu'*à titre subsidiaire*, dans ces circonstances, la République du Cameroun est privée de son droit à invoquer la compétence de la Cour.

Troisième exception préliminaire

3.1. Que, sans préjuger de ce qui sera décidé au sujet de la deuxième

"For the reasons given . . ., the Republic of Cameroon requests the International Court of Justice:

(1) to dismiss the preliminary objections raised by the Federal Republic of Nigeria;
(2) to find that, by its formal declarations, Nigeria has accepted the jurisdiction of the Court;
(3) to adjudge and declare:
— that it has jurisdiction to decide on the Application filed by Cameroon on 29 March 1994 as supplemented by the additional Application of 6 June 1994; and
— that the Application, thus consolidated, is admissible;
(4) having due regard to the particular nature of the case, which relates to a dispute concerning the territorial sovereignty of Cameroon and is creating serious tensions between the two countries, to fix time-limits for the further proceedings which will enable the Court to proceed to the merits at the earliest possible time."

19. In the oral proceedings, the Parties presented the following submissions:

On behalf of the Government of Nigeria,

at the hearing on 9 March 1998:

"[F]or the reasons that have been stated either in writing or orally, Nigeria submits:

First preliminary objection

1.1. That Cameroon, by lodging the Application on 29 March 1994, violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36, paragraph 2, of the Statute and the terms of Nigeria's Declaration of 3 September 1965;

1.2. that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court's jurisdiction did not exist when the Application was lodged;

1.3. that accordingly, the Court is without jurisdiction to entertain the Application.

Second preliminary objection

2.1. That for a period of at least 24 years prior to the filing of the Application, the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery;

2.1.1. that this course of joint conduct constitutes an implied agreement to resort exclusively to the existing bilateral machinery and not to invoke the jurisdiction of the Court;
2.1.2. that *in the alternative*, in the circumstances the Republic of Cameroon is estopped from invoking the jurisdiction of the Court.

Third preliminary objection

3.1. That without prejudice to the second preliminary objection, the

exception préliminaire, le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad et que, dans ce contexte, les procédures de règlement prévues dans le cadre de la commission sont obligatoires pour les Parties;

3.2. Que le recours aux procédures de règlement des différends de la commission du bassin du lac Tchad impliquait nécessairement, pour ce qui a trait aux relations mutuelles entre le Nigéria et le Cameroun, que ne soit pas invoquée la compétence de la Cour en vertu du paragraphe 2 de l'article 36 en ce qui concerne les questions relevant de la compétence exclusive de la commission.

Quatrième exception préliminaire

4.1. Que la Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.

Cinquième exception préliminaire

5.1. Que, sans préjuger de la question du titre du Nigéria sur la presqu'île de Bakassi, il n'existe pas de différend concernant la délimitation de la frontière en tant que telle sur toute sa longueur entre le tripoint du lac Tchad et la mer, et notamment:

a) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle dans le lac Tchad, sans préjuger de la question du titre sur Darak et les îles avoisinantes habitées par des Nigérians;

b) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre le tripoint du lac Tchad et le mont Kombon;

c) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et le mont Kombon;

d) qu'il n'y a pas de différend concernant la délimitation de la frontière en tant que telle entre la borne frontière 64 sur la rivière Gamana et la mer.

Sixième exception préliminaire

6.1. Que la requête (et les pièces ultérieures dans la mesure où elles pouvaient être déposées) introduite par le Cameroun ne satisfait pas aux critères exigés quant à l'exposé des faits sur lesquels elle se fonde, notamment en ce qui concerne les dates, les circonstances et les lieux précis des prétendus incursions et incidents imputés à des organes de l'Etat nigérian;

6.2. Que ces carences font qu'il est impossible

a) au Nigéria de connaître, ainsi qu'il en a le droit, les circonstances qui, selon le Cameroun, sont à l'origine de l'engagement de la responsabilité internationale du Nigéria et de l'obligation de réparation qui en découle pour lui;

b) à la Cour de procéder à un examen judiciaire équitable et effectif des questions de responsabilité étatique et de réparation soulevées par le Cameroun et de se prononcer sur celles-ci;

6.3. Que, par conséquent, toutes les demandes concernant les questions de responsabilité étatique et de réparation présentées par le Cameroun dans ce contexte doivent être déclarées irrecevables;

6.4. Que, sans préjudice de ce qui précède, les allégations formulées par le Cameroun quant à la responsabilité étatique du Nigéria ou à la répara-

settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission, and in this context the procedures of settlement within the Lake Chad Basin Commission are obligatory for the Parties;

3.2. that the operation of the dispute settlement procedures of the Lake Chad Basin Commission involved the necessary implication, for the relations of Nigeria and Cameroon *inter se*, that the jurisdiction of the Court by virtue of Article 36, paragraph 2, would not be invoked in relation to matters within the exclusive competence of the Commission.

Fourth preliminary objection

4.1. That the Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake.

Fifth preliminary objection

5.1. That, without prejudice to the title of Nigeria over the Bakassi Peninsula, there is no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and in particular:

(a) there is no dispute in respect of the boundary delimitation as such within Lake Chad, subject to the question of title to Darak and adjacent islands inhabited by Nigerians;

(b) there is no dispute relating to the boundary delimitation as such from the tripoint in Lake Chad to Mount Kombon;

(c) there is no dispute relating to the boundary delimitation as such between boundary pillar 64 on the Gamana River and Mount Kombon; and

(d) there is no dispute relating to the boundary delimitation as such between pillar 64 on the Gamana River and the sea.

Sixth preliminary objection

6.1. That the Application (and so far as permissible, subsequent pleadings) filed by Cameroon does not meet the required standard of adequacy as to the facts on which it is based, including the dates, circumstances and precise locations of the alleged incursions and incidents by Nigerian State organs;

6.2. that those deficiencies make it impossible

(a) for Nigeria to have the knowledge to which it is entitled of the circumstances which are said by Cameroon to result in Nigeria's international responsibility and consequential obligation to make reparation; and

(b) for the Court to carry out a fair and effective judicial examination of, or make a judicial determination on, the issues of State responsibility and reparation raised by Cameroon;

6.3. that accordingly all the issues of State responsibility and reparation raised by Cameroon in this context should be declared inadmissible;

6.4. that, without prejudice to the foregoing, any allegations by Cameroon as to State responsibility or reparation on the part of Nigeria in

tion due par celui-ci à l'égard des questions visées à l'alinéa *f)* du paragraphe 17 de la requête additionnelle du 6 juin 1994 du Cameroun sont irrecevables.

Septième exception préliminaire

7.1. Qu'il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour, pour les motifs suivants:

1) il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi;
2) en tout état de cause, les demandes concernant les questions de délimitation maritime sont irrecevables faute d'action suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international».

Huitième exception préliminaire

8.1. Que la question de la délimitation maritime met nécessairement en cause les droits et les intérêts d'Etats tiers et que la demande à ce sujet est irrecevable au-delà du point G.

Partant, le Nigéria prie officiellement la Cour de dire et juger:

1) qu'elle n'a pas compétence pour connaître des demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun; et/ou
2) que les demandes formulées à l'encontre de la République fédérale du Nigéria par la République du Cameroun sont irrecevables dans la mesure précisée dans les présentes exceptions préliminaires.»

Au nom du Gouvernement du Cameroun,

à l'audience du 11 mars 1998:

«Pour les motifs qui ont été développés dans les pièces de procédure écrite et lors de la procédure orale, la République du Cameroun prie la Cour internationale de Justice de bien vouloir:

a) rejeter les exceptions préliminaires soulevées par la République fédérale du Nigéria;
b) à titre tout à fait subsidiaire, joindre au fond, le cas échéant, celles de ces exceptions qui ne lui paraîtraient pas présenter un caractère exclusivement préliminaire;
c) dire et juger: qu'elle a compétence pour se prononcer sur la requête formée par le Cameroun le 29 mars 1994 et complétée par la requête additionnelle du 6 juin 1994, et que cette requête ainsi consolidée est recevable;
d) compte dûment tenu de la nature particulière de cette affaire, fixer des délais pour la suite de la procédure qui permettent l'examen au fond du litige à une date aussi rapprochée que possible.»

* * *

20. La Cour examinera successivement les huit exceptions préliminaires soulevées par le Nigéria.

respect of matters referred to in paragraph 17 *(f)* of Cameroon's amending Application of 6 June 1994 are inadmissible.

Seventh preliminary objection

7.1. That there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court, for the following reasons:

(1) no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula;
(2) in any event, the issues of maritime delimitation are inadmissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'.

Eighth preliminary objection

8.1. That the question of maritime delimitation necessarily involves the rights and interests of third States and is inadmissible beyond point G.

Accordingly, Nigeria formally requests the Court to adjudge and declare that:

(1) it lacks jurisdiction over the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon; and/or

(2) the claims brought against the Federal Republic of Nigeria by the Republic of Cameroon are inadmissible to the extent specified in the preliminary objections."

On behalf of the Government of Cameroon,

at the hearing on 11 March 1998:

"For the reasons developed in the written pleadings and in the oral proceedings, the Republic of Cameroon requests the International Court of Justice:

(a) to dismiss the preliminary objections raised by the Federal Republic of Nigeria;
(b) completely in the alternative, to join to the merits, as appropriate, such of those objections as it may deem not to be of an exclusively preliminary character;
(c) to adjudge and declare: that it has jurisdiction to decide on the Application filed by Cameroon on 29 March 1994 as supplemented by the Additional Application of 6 June 1994; and that the Application, thus consolidated, is admissible;
(d) having due regard to the particular nature of the case, to fix time-limits for the further proceedings which will permit examination of the merits of the dispute at the earliest possible time."

* * *

20. The Court will successively examine the eight preliminary objections raised by Nigeria.

PREMIÈRE EXCEPTION PRÉLIMINAIRE

21. Selon la première exception, la Cour n'a pas compétence pour connaître de la requête du Cameroun.

22. Dans cette perspective, le Nigéria expose qu'il avait accepté la juridiction obligatoire de la Cour par déclaration datée du 14 août 1965 remise au Secrétaire général des Nations Unies le 3 septembre 1965. Le Cameroun, quant à lui, a accepté cette juridiction par déclaration remise au Secrétaire général le 3 mars 1994. Ce dernier a transmis copie de la déclaration camerounaise aux parties au Statut onze mois et demi plus tard. Le Nigéria indique qu'il n'avait donc aucun moyen de savoir et ne savait pas, à la date d'introduction de la requête, soit le 29 mars 1994, que le Cameroun avait remis une déclaration. Le Cameroun aurait par suite «agi prématurément». En procédant de la sorte, le demandeur «aurait violé son obligation d'agir de bonne foi», «abusé du système institué par l'article 36, paragraphe 2, du Statut» et méconnu «la condition de réciprocité» prévue par cet article ainsi que par la déclaration du Nigéria. La Cour ne serait par suite pas compétente pour connaître de la requête.

23. Le Cameroun considère au contraire que sa requête remplit toutes les conditions requises par le Statut. Il rappelle que, dans l'affaire du *Droit de passage sur territoire indien*, la Cour a jugé que

> «le Statut ne prescrit aucun délai entre le dépôt par un Etat d'une déclaration d'acceptation et d'une requête, et que le principe de réciprocité n'est pas affecté par un délai dans la réception par les Parties au Statut des copies de la déclaration» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 147).

Le Cameroun souligne qu'il n'existe aucune raison de revenir sur ce précédent, au risque d'ébranler le système de la juridiction obligatoire reposant sur la clause facultative. Il ajoute que la déclaration camerounaise était en vigueur dès le 3 mars 1994, du fait qu'à cette date elle avait été enregistrée conformément à l'article 102 de la Charte des Nations Unies. Le Cameroun expose qu'en tout état de cause le Nigéria s'est comporté depuis l'ouverture de l'instance de manière telle qu'il doit être regardé comme ayant accepté la compétence de la Cour.

24. Le Nigéria fait valoir en réponse que «l'affaire du *Droit de passage sur territoire indien* correspondait à une première impression»; que l'arrêt rendu alors est dépassé; qu'il est resté isolé; que le droit international, spécialement en ce qui concerne la bonne foi, a évolué depuis lors et que, conformément à l'article 59 du Statut, ledit arrêt ne jouit de l'autorité de la chose jugée que pour les parties en litige et dans le cas qui a été décidé. Pour ces motifs, la solution retenue en 1957 ne devrait pas l'être en l'espèce. Le Nigéria s'oppose à l'argumentation tirée par le Cameroun de l'article 102 de la Charte. Il prétend aussi qu'en l'espèce il n'a jamais

FIRST PRELIMINARY OBJECTION

21. The first objection contends that the Court has no jurisdiction to entertain Cameroon's Application.

22. In this regard, Nigeria notes that it had accepted the Court's compulsory jurisdiction by a declaration dated 14 August 1965, deposited with the Secretary-General of the United Nations on 3 September 1965. Cameroon had also accepted the Court's compulsory jurisdiction by a declaration deposited with the Secretary-General on 3 March 1994. The Secretary-General transmitted copies of the Cameroon Declaration to the parties to the Statute eleven-and-a-half months later. Nigeria maintains, accordingly, that it had no way of knowing, and did not actually know, on the date of the filing of the Application, i.e., 29 March 1994, that Cameroon had deposited a declaration. Cameroon consequently is alleged to have "acted prematurely". By proceeding in this way, the Applicant "is alleged to have violated its obligation to act in good faith", "abused the system instituted by Article 36, paragraph 2, of the Statute" and disregarded "the condition of reciprocity" provided for by that Article and by Nigeria's Declaration. The Court consequently does not have jurisdiction to hear the Application.

23. In contrast, Cameroon contends that its Application fulfils all the conditions required by the Statute. It notes that in the case concerning *Right of Passage over Indian Territory*, the Court held that

> "the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 147).

Cameroon indicates that there is no reason not to follow this precedent, at the risk of undermining the system of compulsory jurisdiction provided by the Optional Clause. It adds that the Cameroonian Declaration was in force as early as 3 March 1994, as at that date it was registered in accordance with Article 102 of the United Nations Charter. Cameroon states that in any event Nigeria has acted, since the beginning of these proceedings, in such a way that it should be regarded as having accepted the jurisdiction of the Court.

24. Nigeria argues in reply that the "case concerning the *Right of Passage over Indian Territory*, was a first impression", that the Judgment given is outdated, and that it is an isolated one; that international law, especially as it relates to good faith, has evolved since and that in accordance with Article 59 of the Statute, that Judgment only has the force of *res judicata* as between the parties and in respect of that case. For these reasons, the solution adopted in 1957 should not be adopted here. Nigeria does not accept the reasoning of Cameroon based on Article 102 of the Charter. Nigeria also contends that there is no question of its

accepté la compétence de la Cour et que de ce fait il n'y a pas *forum prorogatum*.

Le Cameroun conteste chacun de ces arguments.

25. La Cour observera en premier lieu que, selon le paragraphe 2 de l'article 36 du Statut:

> «Les Etats parties au présent Statut pourront, à n'importe quel moment, déclarer reconnaître comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, la juridiction de la Cour sur tous les différends d'ordre juridique»

ayant l'un des objets prévus par cette disposition.

Le paragraphe 4 de l'article 36 précise que:

> «Ces déclarations seront remises au Secrétaire général des Nations Unies qui en transmettra copie aux parties au présent Statut ainsi qu'au Greffier de la Cour.»

Au vu de ces dispositions, la Cour, dans l'affaire du *Droit de passage sur territoire indien*, a conclu que:

> «par le dépôt de sa déclaration d'acceptation entre les mains du Secrétaire général, l'Etat acceptant devient partie au système de la disposition facultative à l'égard de tous autres Etats déclarants, avec tous les droits et obligations qui découlent de l'article 36. Le rapport contractuel entre les parties et la juridiction obligatoire de la Cour qui en découle sont établis «de plein droit et sans convention spéciale» du fait du dépôt de la déclaration... C'est en effet ce jour-là que le lien consensuel qui constitue la base de la disposition facultative prend naissance entre les Etats intéressés.» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 146.)

Les conclusions auxquelles la Cour était ainsi parvenue en 1957 traduisent l'essence même de la clause facultative d'acceptation de la juridiction obligatoire. Tout Etat partie au Statut, en acceptant la juridiction de la Cour conformément au paragraphe 2 de l'article 36, accepte cette juridiction dans ses relations avec les Etats ayant antérieurement souscrit à la même clause. En même temps, il fait une offre permanente aux autres Etats parties au Statut n'ayant pas encore remis de déclaration d'acceptation. Le jour où l'un de ces Etats accepte cette offre en déposant à son tour sa déclaration d'acceptation, le lien consensuel est établi et aucune autre condition n'a besoin d'être remplie. Dès lors, et comme la Cour l'a déclaré en 1957:

> «tout Etat faisant une déclaration d'acceptation doit être censé tenir compte du fait qu'en vertu du Statut il peut se trouver à tout moment tenu des obligations découlant de la disposition facultative vis-à-vis d'un nouveau signataire, par suite du dépôt de la déclaration d'acceptation de ce dernier» (*ibid.*, p. 146).

having consented to the jurisdiction of the Court in the case and hence there is no *forum prorogatum*.

Cameroon contests each of these arguments.

25. The Court observes initially that, in accordance with Article 36, paragraph 2, of the Statute:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes"

as specified in that clause.

Article 36, paragraph 4, provides:

> "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

In the case concerning *Right of Passage over Indian Territory*, the Court concluded, in the light of these provisions, that:

> "by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration . . . For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)

The conclusions thus reached by the Court in 1957 reflect the very essence of the Optional Clause providing for acceptance of the Court's compulsory jurisdiction. Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled. Thus, as the Court stated in 1957:

> "every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance" (*ibid.*, p. 146).

26. Par ailleurs, et comme la Cour l'a également déclaré dans l'affaire du *Droit de passage sur territoire indien*, l'Etat déclarant

> «n'a à s'occuper ni du devoir du Secrétaire général ni de la manière dont ce devoir est rempli. L'effet juridique de la déclaration ne dépend pas de l'action ou de l'inaction ultérieure du Secrétaire général. Au surplus, contrairement à d'autres instruments, l'article 36 n'énonce aucune exigence supplémentaire, par exemple celle que la communication du Secrétaire général ait été reçue par les parties au Statut, ou qu'un intervalle doit s'écouler après le dépôt de la déclaration, avant que celle-ci ne puisse prendre effet. Toute condition de ce genre introduirait un élément d'incertitude dans le jeu du système de la disposition facultative. La Cour ne peut introduire dans la disposition facultative aucune condition de ce genre.» (*C.I.J. Recueil 1957*, p. 146-147.)

27. La Cour rappellera en outre que, contrairement à ce que soutient le Nigéria, cet arrêt n'est pas resté isolé. Il a été réaffirmé dans l'affaire du *Temple de Préah Vihéar (exceptions préliminaires, arrêt, C.I.J. Recueil 1961,* p. 31) et dans celle des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique) (compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 392). Dans cette dernière affaire, la Cour a souligné que:

> «en ce qui concerne l'exigence du consentement comme fondement de sa compétence et plus particulièrement les formalités exigibles pour que ce consentement soit exprimé conformément aux dispositions de l'article 36, paragraphe 2, du Statut, la Cour s'est déjà exprimée, notamment dans l'affaire du *Temple de Préah Vihéar*. Elle a alors indiqué que «la seule formalité prescrite est la remise de l'acceptation au Secrétaire général des Nations Unies, conformément au paragraphe 4 de l'article 36 du Statut (*C.I.J. Recueil 1961*, p. 31).» (*C.I.J. Recueil 1984*, p. 412, par. 45.)

28. Le Nigéria conteste néanmoins cette solution en rappelant que, conformément à l'article 59 du Statut, «[l]a décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé». Dès lors les arrêts rendus antérieurement, notamment dans l'affaire du *Droit de passage sur territoire indien*, n'auraient «manifestement pas d'effet déterminant sur la procédure actuelle».

Il est vrai que, conformément à l'article 59, les arrêts de la Cour ne sont obligatoires que pour les parties en litige et dans le cas qui a été décidé. Il ne saurait être question d'opposer au Nigéria les décisions prises par la Cour dans des affaires antérieures. La question est en réalité de savoir si, dans la présente espèce, il existe pour la Cour des raisons de s'écarter des motifs et des conclusions adoptés dans ces précédents.

*

26. Furthermore, and as the Court also declared in the case concerning *Right of Passage over Indian Territory*, the State making the declaration

> "is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature." (*I.C.J. Reports 1957*, pp. 146-147.)

27. The Court furthermore recalls that, contrary to what is maintained by Nigeria, this Judgment is not an isolated one. It has been reaffirmed in the case concerning the *Temple of Preah Vihear* (*Preliminary Objections, I.C.J. Reports 1961*, p. 31), and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392). In that latter case, the Court pointed out that:

> "as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, *inter alia*, the case concerning the *Temple of Preah Vihear*. On that occasion it stated: 'The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute.' (*I.C.J. Reports 1961*, p. 31.)" (*I.C.J. Reports 1984*, p. 412, para. 45.)

28. Nigeria nonetheless contests that conclusion pointing out that, in accordance with Article 59 of the Statute, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". Thus, judgments given earlier, in particular in the case concerning *Right of Passage over Indian Territory*, "clearly [have] no direct compelling effect in the present case".

It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.

*

29. Dans cette perspective, le Nigéria soutient tout d'abord que l'interprétation donnée en 1957 du paragraphe 4 de l'article 36 du Statut devrait être revue à la lumière de l'évolution du droit des traités intervenue depuis lors. A cet égard, le Nigéria se prévaut de l'article 78 *c)* de la convention de Vienne sur le droit des traités du 23 mai 1969. Cet article concerne les notifications et communications faites en vertu de la convention. Il précise que:

> «Sauf dans les cas où le traité ou la présente convention en dispose autrement, une notification ou une communication qui doit être faite par un Etat en vertu de la présente convention:
>
> . . . . . .
>
> *c)* si elle est transmise à un dépositaire, n'est considérée comme ayant été reçue par l'Etat auquel elle est destinée qu'à partir du moment où cet Etat aura reçu du dépositaire [les informations requises].»

Selon le Nigéria, cette règle «doit s'appliquer à la déclaration du Cameroun». Au vu des dispositions de la convention de Vienne, la Cour devrait, d'après le Nigéria, revenir sur la solution qu'elle avait adoptée dans l'affaire du *Droit de passage sur territoire indien*. Le Cameroun expose, quant à lui, que les déclarations d'acceptation de la juridiction obligatoire de la Cour «ne sont pas des traités au sens de la convention de Vienne» et qu'«il n'était manifestement pas dans les intentions des rédacteurs de la convention ... d'aller à l'encontre de la jurisprudence établie de la Cour en la matière». Selon le Cameroun, cette jurisprudence devrait être maintenue.

30. La Cour notera que le régime de remise et de transmission des déclarations d'acceptation de la juridiction obligatoire établi au paragraphe 4 de l'article 36 du Statut de la Cour est distinct du régime prévu pour les traités par la convention de Vienne. Dès lors, les dispositions de cette convention ne sauraient éventuellement être appliquées aux déclarations que par analogie (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 420, par. 63).

31. La Cour observera par ailleurs qu'en tout état de cause les dispositions de la convention de Vienne n'ont pas la portée que leur attribue le Nigéria. L'article 78 de la convention n'a en effet pour objet que de traiter des modalités selon lesquelles les notifications et communications doivent être effectuées. Il ne gouverne pas les conditions dans lesquelles s'exprime le consentement par un Etat à être lié par un traité et celles dans lesquelles un traité entre en vigueur, ces questions étant réglées par les articles 16 et 24 de la convention. Aussi bien la Commission du droit international, dans son rapport à l'Assemblée générale sur le projet qui devait devenir par la suite la convention de Vienne, précisait-elle que, si le futur article 78 comportait *in limine* une réserve explicite, c'était «avant tout pour prévenir toute erreur sur le rapport» entre cet article et les futurs articles 16 et 24 (*Annuaire de la Commission du droit international*,

29. In this regard, Nigeria maintains first of all that the interpretation given in 1957 to Article 36, paragraph 4, of the Statute should be reconsidered in the light of the evolution of the law of treaties which has occurred since. In that connection, Nigeria relies on Article 78 *(c)* of the Vienna Convention on the Law of Treaties of 23 May 1969. That Article relates to the notifications and communications made under that Convention. It provides that:

> "Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:
>
> . . . . . .
>
> *(c)* if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary."

According to Nigeria, that rule "must apply to Cameroon's Declaration". In the light of the provisions of the Vienna Convention, Nigeria contends that the Court should overturn the solution it adopted earlier in the case concerning *Right of Passage over Indian Territory*. Cameroon states, for its part, that the declarations of acceptance of the Court's compulsory jurisdiction "are not treaties within the meaning of the Vienna Convention" and "it was clearly no part of the intentions of the drafters of the . . . Convention . . . to interfere with the settled jurisprudence of the Court in this matter". This jurisprudence, Cameroon argues, should be followed.

30. The Court notes that the régime for depositing and transmitting declarations of acceptance of compulsory jurisdiction laid down in Article 36, paragraph 4, of the Statute of the Court is distinct from the régime envisaged for treaties by the Vienna Convention. Thus the provisions of that Convention may only be applied to declarations by analogy (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 420, para. 63).

31. The Court furthermore observes that in any event the provisions of the Vienna Convention do not have the scope which Nigeria imputes to them. Article 78 of the Convention is only designed to lay down the modalities according to which notifications and communications should be carried out. It does not govern the conditions in which a State expresses its consent to be bound by a treaty and those under which a treaty comes into force, those questions being governed by Articles 16 and 24 of the Convention. Indeed, the International Law Commission, in its Report to the General Assembly on the draft which was subsequently to become the Vienna Convention, specified that if the future Article 78 included *in limine* an explicit reservation, that was "primarily in order to prevent any misconception as to the relation" between that Article and the future Articles 16 and 24 (*Yearbook of the International Law Com-*

1966, vol. II, p. 295). Elle ajoutait que de ce fait «les dispositions particulières de ces derniers articles prévalent».

Or, selon l'article 16:

> «A moins que le traité n'en dispose autrement, les instruments de ratification, d'acceptation, d'approbation ou d'adhésion établissent le consentement d'un Etat à être lié par un traité au moment:
>
> . . . . . .
>
> *b)* de leur dépôt auprès du dépositaire.»

Le paragraphe 3 de l'article 24 dispose en outre que:

> «Lorsque le consentement d'un Etat à être lié par un traité est établi à une date postérieure à l'entrée en vigueur dudit traité, celui-ci, à moins qu'il n'en dispose autrement, entre en vigueur à l'égard de cet Etat à cette date.»

Dans son rapport à l'Assemblée générale, la Commission du droit international avait souligné que:

> «Dans le cas du dépôt d'un instrument auprès d'un dépositaire, la question se pose de savoir si c'est le dépôt lui-même qui établit le lien juridique entre l'Etat déposant et les autres Etats contractants ou bien si le lien juridique n'est créé qu'au moment où ces derniers sont informés du dépôt par le dépositaire.» (*Annuaire de la Commission du droit international*, 1966, vol. II, p. 219.)

Après avoir décrit les avantages et les inconvénients des deux solutions, elle avait conclu que:

> «Il ne fait pas de doute pour la Commission que la règle générale existante est que c'est l'acte même du dépôt qui crée le lien juridique ... Telle a été l'opinion de la Cour internationale de Justice dans l'affaire du *Droit de passage sur territoire indien (exceptions préliminaires)*, où il s'agissait d'une situation analogue concernant le dépôt de déclarations d'acceptation de la clause facultative en vertu du paragraphe 2 de l'article 36 du Statut de la Cour ... [Ainsi] la règle existante semble être bien établie.» *(Ibid.)*

Cette règle générale a trouvé son expression dans les articles 16 et 24 de la convention de Vienne: le dépôt des instruments de ratification, d'acceptation, d'approbation ou d'adhésion établit le consentement d'un Etat à être lié par un traité; ce dernier entre en vigueur à l'égard de cet Etat le jour de ce dépôt.

Ainsi, les règles adoptées en ce domaine par la convention de Vienne correspondent à la solution retenue par la Cour dans l'affaire du *Droit de passage sur territoire indien*. Cette solution doit être maintenue.

32. Le Nigéria souligne cependant qu'en tout état de cause le Cameroun ne pouvait déposer une requête devant la Cour sans laisser s'écouler un délai raisonnable «pour permettre au Secrétaire général de s'acquitter

mission, 1966, Vol. II, p. 271). It added that consequently "specific provisions [of those latter Articles] will prevail".

According to Article 16:

> "Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
>
> . . . . . .
>
> *(b)* their deposit with the depositary."

Article 24 further provides in its paragraph 3 that:

> "When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides."

In its report to the General Assembly, the International Law Commission had pointed out that:

> "In the case of the deposit of an instrument with a depositary, the problem arises whether the deposit by itself establishes the legal nexus between the depositing State and other contracting States or whether the legal nexus arises only upon their being informed by the depositary." (*Yearbook of the International Law Commission,* 1966, Vol. II, p. 201.)

After describing the advantages and disadvantages of both solutions, it concluded that:

> "The Commission considered that the existing general rule clearly is that the act of deposit by itself establishes the legal nexus . . . This was the view taken by the International Court of Justice in the *Right of Passage over Indian Territory* (preliminary objections) case in the analogous situation of the deposit of instruments of acceptance of the optional clause under Article 36, paragraph 2, of the Statute of the Court . . . [Therefore] the existing rule appears to be well-settled." *(Ibid.)*

This general rule is reflected in Articles 16 and 24 of the Vienna Convention: the deposit of instruments of ratification, acceptance, approval or accession to a treaty establishes the consent of a State to be bound by a treaty; the treaty enters into force as regards that State on the day of the deposit.

Thus the rules adopted in this sphere by the Vienna Convention correspond to the solution adopted by the Court in the case concerning *Right of Passage over Indian Territory*. That solution should be maintained.

32. Nigeria maintains however that, in any event, Cameroon could not file an application before the Court without allowing a reasonable period to elapse "as would . . . have enabled the Secretary-General to take the

de la tâche qu'il devait remplir pour ce qui est de la déclaration du Cameroun du 3 mars 1994». Le respect d'un tel délai s'imposerait d'autant plus que, selon le Nigéria, la Cour, dans son arrêt du 26 novembre 1984 rendu en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, a exigé un délai raisonnable pour le retrait des déclarations facultatives d'acceptation de la juridiction obligatoire.

33. La Cour, dans l'arrêt ainsi évoqué, a constaté que les Etats-Unis avaient remis en 1984 au Secrétaire général, trois jours avant le dépôt d'une requête par le Nicaragua, une notification limitant la portée de leur déclaration d'acceptation de la juridiction de la Cour. La Cour a constaté que cette déclaration comportait une clause de préavis de six mois. Elle a estimé que cette condition devait être respectée en cas de retrait ou de modification de la déclaration et en a conclu que la notification de modification de 1984 ne pouvait abolir avec effet immédiat l'obligation antérieurement assumée par les Etats-Unis (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, C.I.J. Recueil 1984*, p. 421, par. 65).

La Cour a noté en outre, à propos de la déclaration du Nicaragua dont les Etats-Unis se prévalaient par voie de réciprocité, qu'en tout état de cause

> «le droit de mettre fin immédiatement à des déclarations de durée indéfinie est loin d'être établi. L'exigence de bonne foi paraît imposer de leur appliquer par analogie le traitement prévu par le droit des traités, qui prescrit un délai raisonnable pour le retrait ou la dénonciation de traités ne renfermant aucune clause de durée» (*ibid.*, p. 420, par. 63).

La Cour a ajouté: «la question de savoir quel délai raisonnable devrait être respecté n'a pas à être approfondie: il suffira d'observer qu'[un] laps de temps [de trois jours] ne constitue pas un «délai raisonnable» *(ibid.)*.

34. La Cour estime que cette solution relative au retrait des déclarations d'acceptation de la juridiction obligatoire n'est pas transposable au cas de la remise de ces déclarations. En effet, le retrait met fin à des liens consensuels existants alors que la remise établit de tels liens. Par suite, le retrait a pour conséquence de priver purement et simplement les autres Etats ayant antérieurement accepté la compétence de la Cour du droit qu'ils avaient de saisir cette dernière d'un différend les opposant à l'Etat ayant retiré sa déclaration. A l'inverse, la remise d'une déclaration ne prive ces mêmes Etats d'aucun droit acquis. A la suite d'une telle remise, aucun délai n'est dès lors requis pour l'établissement d'un lien consensuel.

35. La Cour observera en outre qu'imposer l'écoulement d'un délai raisonnable avant qu'une déclaration puisse prendre effet serait introduire un élément d'incertitude dans le jeu du système de la clause facultative. Ainsi qu'il a été rappelé au paragraphe 26 ci-dessus, la Cour avait,

action required of him in relation to Cameroon's Declaration of 3 March 1994". Compliance with that time period is essential, the more so because, according to Nigeria, the Court, in its Judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, required a reasonable time for the withdrawal of declarations under the Optional Clause.

33. The Court, in the above Judgment, noted that the United States had, in 1984, deposited with the Secretary-General, three days before the filing of Nicaragua's Application, a notification limiting the scope of its Declaration of acceptance of the Court's jurisdiction. The Court noted that that Declaration contained a clause requiring six months' notice of termination. It considered that that condition should be complied with in cases of either termination or modification of the Declaration, and concluded that the 1984 notification of modification could not, with immediate effect, override the obligation entered into by the United States beforehand (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 421, para. 65).

The Court noted, moreover, in relation to Nicaragua's Declaration upon which the United States was relying on the grounds of reciprocity, that, in any event,

> "the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity" (*ibid.*, p. 420, para. 63).

The Court added: "the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that [three days] would not amount to a 'reasonable time'" *(ibid.)*.

34. The Court considers that the foregoing conclusion in respect of the withdrawal of declarations under the Optional Clause is not applicable to the deposit of those declarations. Withdrawal ends existing consensual bonds, while deposit establishes such bonds. The effect of withdrawal is therefore purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it against the withdrawing State. In contrast, the deposit of a declaration does not deprive those States of any accrued right. Accordingly no time period is required for the establishment of a consensual bond following such a deposit.

35. The Court notes moreover that to require a reasonable time to elapse before a declaration can take effect would be to introduce an element of uncertainty into the operation of the Optional Clause system. As set out in paragraph 26 above, in the case concerning *Right of Passage*

dans l'affaire du *Droit de passage sur territoire indien*, estimé ne pouvoir créer une telle incertitude. Les conclusions auxquelles elle était alors parvenue demeurent valables et s'imposent d'autant plus que l'augmentation du nombre des Etats parties au Statut et l'intensification des relations interétatiques ont depuis 1957 multiplié les occasions de différends juridiques susceptibles d'être soumis à la Cour. Celle-ci ne saurait introduire dans la clause facultative une condition supplémentaire de délai qui n'y figure pas.

*

36. Le Nigéria expose en deuxième lieu que le Cameroun a omis de l'informer du fait qu'il entendait accepter la juridiction de la Cour, puis du fait qu'il avait accepté cette juridiction et enfin qu'il avait l'intention de déposer une requête. Le Nigéria soutient en outre que le Cameroun aurait même continué, au cours du premier trimestre 1994, à entretenir avec lui des contacts bilatéraux sur les questions de frontières alors qu'il s'apprêtait à s'adresser à la Cour. Un tel comportement, selon le Nigéria, porterait atteinte au principe de la bonne foi qui jouerait aujourd'hui un rôle plus grand dans la jurisprudence de la Cour qu'autrefois; il ne saurait être accepté.

37. Le Cameroun, pour sa part, fait valoir qu'il n'avait aucune obligation d'informer à l'avance le Nigéria de ses intentions ou de ses décisions. Il ajoute qu'en tout état de cause «le Nigéria n'a nullement été pris par surprise par le dépôt de la requête camerounaise, et ... connaissait parfaitement l'intention du Cameroun en ce sens plusieurs semaines avant le dépôt». Le principe de la bonne foi n'aurait en rien été méconnu.

38. La Cour observera que le principe de la bonne foi est un principe bien établi du droit international. Il est énoncé au paragraphe 2 de l'article 2 de la Charte des Nations Unies; il a aussi été incorporé à l'article 26 de la convention de Vienne sur le droit des traités du 23 mai 1969. Il a été mentionné dès le début de ce siècle dans la sentence arbitrale du 7 septembre 1910 rendue en l'affaire des *Pêcheries de la côte septentrionale de l'Atlantique* (Nations Unies, *Recueil des sentences arbitrales*, vol. XI, p. 188). Il a en outre été consacré dans plusieurs arrêts de la Cour permanente de Justice internationale (*Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 30; *Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance du 6 décembre 1930, C.P.J.I. série A n° 24*, p. 12, et *1932, C.P.J.I. série A/B n° 46*, p. 167). Il a enfin été appliqué par la présente Cour dès 1952 dans l'affaire relative aux *Droits des ressortissants des Etats-Unis d'Amérique au Maroc* (*arrêt, C.I.J. Recueil 1952*, p. 212), puis dans l'affaire de la *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)* (*compétence de la Cour, arrêt, C.I.J. Recueil 1973*, p. 18), dans celles des *Essais nucléaires* (*C.I.J. Recueil 1974*, p. 268 et 473) et dans celle des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)* (*compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 105).

over Indian Territory, the Court had considered that it could not create such uncertainty. The conclusions it had reached then remain valid and apply all the more since the growth in the number of States party to the Statute and the intensification of inter-State relations since 1957 have increased the possibilities of legal disputes capable of being submitted to the Court. The Court cannot introduce into the Optional Clause an additional time requirement which is not there.

*

36. Nigeria's second argument is that Cameroon omitted to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application. Nigeria further argued that Cameroon even continued, during the first three months of 1994, to maintain bilateral contacts with it on boundary questions while preparing itself to address the Court. Such conduct, Nigeria contends, infringes upon the principle of good faith which today plays a larger role in the case-law of the Court than before, and should not be accepted.

37. Cameroon, for its part, argues that it had no obligation to inform Nigeria in advance of its intentions, or of its decisions. It adds that in any event "Nigeria was not at all surprised by the filing of Cameroon's Application and . . . knew perfectly well what Cameroon's intentions were in that regard several weeks before the filing". The principle of good faith was not at all disregarded.

38. The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969. It was mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries* case (United Nations, *Reports of International Arbitral Awards*, Vol. XI, p. 188). It was moreover upheld in several judgments of the Permanent Court of International Justice (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 30; *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12, and *1932, P.C.I.J., Series A/B, No. 46*, p. 167). Finally, it was applied by this Court as early as 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco* (*Judgment, I.C.J. Reports 1952*, p. 212), then in the case concerning *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland) (Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 18), the *Nuclear Tests* cases (*I.C.J. Reports 1974*, pp. 268 and 473), and the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105).

39. La Cour notera par ailleurs que, si le principe de la bonne foi «est l'un des principes de base qui président à la création et à l'exécution d'obligations juridiques..., il n'est pas en soi une source d'obligation quand il n'en existerait pas autrement» (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 105, par. 94). Or, il n'existe en droit international aucune obligation spécifique pour les Etats d'informer les autres Etats parties au Statut qu'ils ont l'intention de souscrire à la clause facultative ou qu'ils ont souscrit à ladite clause. En conséquence, le Cameroun n'était pas tenu d'informer le Nigéria qu'il avait l'intention de souscrire ou qu'il avait souscrit à la clause facultative.

Par ailleurs:

> «Un Etat qui accepte la compétence de la Cour doit prévoir qu'une requête puisse être introduite contre lui devant la Cour par un nouvel Etat déclarant le jour même où ce dernier dépose une déclaration d'acceptation entre les mains du Secrétaire général.» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 146.)

De ce fait le Cameroun n'était pas davantage tenu d'informer le Nigéria de son intention de saisir la Cour. En l'absence de telles obligations et de toute atteinte aux droits correspondants du Nigéria, ce dernier n'est pas fondé à se prévaloir du principe de la bonne foi à l'appui de ses conclusions.

40. En ce qui concerne les faits de l'espèce, sur lesquels les Parties ont beaucoup insisté, la Cour, indépendamment de toute considération de droit, ajoutera que le Nigéria n'était pas dans l'ignorance des intentions du Cameroun. En effet, ce dernier avait, le 28 février 1994, saisi le Conseil de sécurité des incidents survenus peu de temps auparavant dans la presqu'île de Bakassi. En réponse, le Nigéria avait, le 4 mars 1994, exprimé au Conseil de sécurité sa surprise de constater que «le Gouvernement camerounais avait décidé d'internationaliser cette affaire en ... *c)* engageant une procédure auprès de la Cour internationale de Justice». Certes, à la date du 4 mars, le Cameroun avait remis sa déclaration d'acceptation de la juridiction obligatoire de la Cour, mais n'avait pas encore saisi cette dernière. La communication du Nigéria au Conseil de sécurité n'en montrait pas moins que celui-ci n'ignorait pas les intentions du Cameroun.

En outre, la Cour fera observer que, dès le 4 mars 1994, le *Journal des Nations Unies*, diffusé au siège à New York à l'intention des organes des Nations Unies ainsi que des missions permanentes, faisait état de la remise par le Cameroun au Secrétaire général d'une «déclaration reconnaissant comme obligatoire la juridiction de la Cour internationale de Justice en application du paragraphe 2 de l'article 36 du Statut de la Cour» (*Journal des Nations Unies*, vendredi 4 mars 1994, n° 1994/43, deuxième partie).

Enfin, le 11 mars 1994, lors de la session extraordinaire de l'organe central du mécanisme de l'Organisation de l'unité africaine pour la pré-

39. The Court furthermore notes that although the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). There is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause.

Moreover:

> "A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)

Thus, Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions.

40. On the facts of the matter, to which the Parties devoted considerable attention, and quite apart from legal considerations, the Court would add that Nigeria was not unaware of Cameroon's intentions. On 28 February 1994, Cameroon had informed the Security Council of incidents which had occurred shortly beforehand in the Bakassi Peninsula. In response, on 4 March 1994, Nigeria apprised the Security Council of its surprise in noting that "the Cameroon Government had decided to raise the matter to an international level by . . . *(c)* bringing proceedings before the International Court of Justice". Indeed on 4 March, Cameroon had deposited its declaration of acceptance of the compulsory jurisdiction of the Court, but had not yet seised the Court. Nigeria's communication to the Security Council nevertheless showed that it was not uninformed of Cameroon's intentions.

Further the Court points out that, on 4 March 1994, the *Journal of the United Nations*, issued at Headquarters in New York to United Nations organs and to the permanent missions, reported that Cameroon had deposited with the Secretary-General a "declaration recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court" (*Journal of the United Nations*, Friday 4 March 1994, No. 1994/43 (Part II)).

Lastly, on 11 March 1994, the bringing of the matter to the Security Council and the International Court of Justice by Cameroon was men-

vention, la gestion et le règlement des conflits, consacrée au conflit frontalier entre le Cameroun et le Nigéria, la saisine par le Cameroun tant du Conseil de sécurité que de la Cour internationale de Justice avait été évoquée.

*

41. Le Nigéria rappelle en troisième lieu que, par sa déclaration remise le 3 septembre 1965, il avait reconnu

> «comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, c'est-à-dire sous la seule condition de réciprocité, la juridiction de la Cour internationale de Justice conformément au paragraphe 2 de l'article 36 du Statut de la Cour».

Le Nigéria soutient qu'à la date d'introduction de la requête du Cameroun il ignorait que ce dernier avait accepté la juridiction obligatoire de la Cour. Il n'aurait donc pu présenter une requête contre le Cameroun. Il y avait dès lors absence de réciprocité à cette date. La condition contenue dans la déclaration du Nigéria jouait; en conséquence, la Cour serait incompétente pour connaître de la requête.

42. Le Cameroun conteste cette argumentation tant en fait qu'en droit. Il souligne que la condition de réciprocité n'a jamais eu dans l'esprit des Etats parties à la clause facultative le sens que lui attribue aujourd'hui le Nigéria; la Cour aurait donné à cette condition un sens tout différent dans plusieurs de ses arrêts. L'interprétation fournie aujourd'hui par le Nigéria de sa propre déclaration serait une interprétation nouvelle à l'appui de laquelle n'est citée aucune autorité. En définitive, selon le Cameroun, la déclaration nigériane aurait eu seulement pour objet de préciser qu'il y a «une seule et unique condition au caractère obligatoire de la compétence de la Cour: que le Cameroun accepte la même obligation que le Nigéria, c'est-à-dire qu'il accepte la compétence de la Cour. C'est le cas.»

43. La Cour a eu à de nombreuses reprises à s'interroger sur le sens qu'il convient de donner à la condition de réciprocité pour l'application du paragraphe 2 de l'article 36 du Statut. Dès 1952, elle a jugé dans l'affaire de l'*Anglo-Iranian Oil Co.* que, lorsque des déclarations sont faites sous condition de réciprocité, «compétence est conférée à la Cour seulement dans la mesure où elles coïncident pour la lui conférer» (*C.I.J. Recueil 1952*, p. 103). La Cour a appliqué de nouveau cette règle dans l'affaire de *Certains emprunts norvégiens* (*C.I.J. Recueil 1957*, p. 23 et 24) et l'a précisée dans l'affaire de l'*Interhandel* où elle a jugé que:

> «La réciprocité en matière de déclarations portant acceptation de la juridiction obligatoire de la Cour permet à une partie d'invoquer une réserve à cette acceptation qu'elle n'a pas exprimée dans sa propre déclaration mais que l'autre partie a exprimée dans la sienne... La réciprocité permet à l'Etat qui a accepté le plus largement

tioned at the extraordinary general meeting of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity, devoted to the border conflict between Cameroon and Nigeria.

*

41. Nigeria recalls in the third place that, by its Declaration deposited on 3 September 1965, it had recognized

> "as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court".

Nigeria maintains that on the date on which Cameroon's Application was filed, it did not know that Cameroon had accepted the Court's compulsory jurisdiction. Accordingly it could not have brought an application against Cameroon. There was an absence of reciprocity on that date. The condition contained in the Nigerian Declaration was operative; consequently, the Court does not have jurisdiction to hear the Application.

42. Cameroon disputes this argument in fact as well as in law. It states that, in the minds of the States party to the Optional Clause, the condition of reciprocity never possessed the meaning which Nigeria now ascribes to it; the Court had ascribed a completely different meaning to it in a number of its judgments. The interpretation now provided by Nigeria of its own declaration was a new interpretation for which no authority was cited in support. In sum, the purpose of the Nigerian Declaration, according to Cameroon, was only to emphasize that there is "a sole and unique condition to the compulsory character of the Court's jurisdiction in this case, i.e., that Cameroon should accept the same obligation as Nigeria, or in other words that it should accept the jurisdiction of the Court. This Cameroon does."

43. The Court has on numerous occasions had to consider what meaning it is appropriate to give to the condition of reciprocity in the implementation of Article 36, paragraph 2, of the Statute. As early as 1952, it held in the case concerning *Anglo-Iranian Oil Co.* that, when declarations are made on condition of reciprocity, "jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it" (*I.C.J. Reports 1952*, p. 103). The Court applied that rule again in the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957*, pp. 23 and 24) and clarified it in the *Interhandel* case where it held that:

> "Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. . . Reciprocity enables the State which has made the wider acceptance of the

> la juridiction de la Cour de se prévaloir des réserves à cette acceptation énoncées par l'autre partie. Là s'arrête l'effet de réciprocité.» (*C.I.J. Recueil 1959*, p. 23.)

En définitive, «[l]a notion de réciprocité porte sur l'étendue et la substance des engagements, y compris les réserves dont ils s'accompagnent, et non sur les conditions formelles relatives à leur création, leur durée ou leur dénonciation» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 419, par. 62). Elle conduit seulement la Cour à vérifier si, au moment du dépôt de la requête introductive d'instance, «les deux Etats ont accepté «la même obligation» par rapport à l'objet du procès» (*ibid.*, p. 420-421, par. 64).

Ainsi, dans une instance judiciaire, la notion de réciprocité, comme celle d'égalité, «ne sont pas des conceptions abstraites. Elles doivent être rattachées à des dispositions du Statut ou des déclarations» (*Droit de passage sur territoire indien, exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 145). Par voie de conséquence, «le principe de réciprocité n'est pas affecté par un délai dans la réception par les parties au Statut des copies de la déclaration» (*ibid.*, p. 147).

Le Nigéria estime cependant que ce précédent n'est pas applicable en l'espèce. Il souligne que, s'il a dans sa déclaration de 1965 reconnu la juridiction de la Cour comme obligatoire à l'égard de tout autre Etat acceptant la même obligation, il a précisé cette phrase en y ajoutant les mots: «c'est-à-dire sous la seule condition de réciprocité». «Ces mots supplémentaires ont manifestement un sens et un effet ... celui de compléter la «coïncidence» prévue par le paragraphe 2 de l'article 36 par l'élément de mutualité inhérent au concept de «réciprocité.» La condition nigériane aurait en d'autres termes eu pour but «d'atténuer les effets» de la décision prise dans l'affaire du *Droit de passage sur territoire indien* en créant une égalité des risques et en évitant toute saisine de la Cour par surprise.

44. A l'appui de ce raisonnement, le Nigéria invoque la décision rendue dans l'affaire de l'*Anglo-Iranian Oil Co.*, dans laquelle la Cour a précisé qu'elle ne saurait fonder son interprétation de la déclaration iranienne reconnaissant la compétence de la Cour

> «sur une interprétation purement grammaticale du texte. Elle doit rechercher l'interprétation qui est en harmonie avec la manière naturelle et raisonnable de lire le texte, eu égard à l'intention du Gouvernement de l'Iran à l'époque où celui-ci a accepté la compétence obligatoire de la Cour.» (*Anglo-Iranian Oil Co., exceptions préliminaires, C.I.J. Recueil 1952*, p. 104.)

La Cour en avait déduit qu'«il est peu probable que le Gouvernement de l'Iran ait été disposé, de sa propre initiative, à accepter de soumettre à une cour internationale de justice les différends relatifs» (*ibid.*, p. 105) aux conventions capitulaires qu'il venait de dénoncer.

> jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends." (*I.C.J. Reports 1959*, p. 23.)

In the final analysis, "[t]he notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 419, para. 62). It simply requires that the Court ascertain whether, at the time of filing the Application instituting proceedings "the two States accepted 'the same obligation' in relation to the subject-matter of the proceedings" (*ibid.*, pp. 420-421, para. 64).

Therefore, in legal proceedings, the notion of reciprocity, and that of equality, "are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 145). Consequently, "the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute" (*ibid.*, p. 147).

Nigeria considers, however, that that precedent does not apply here. It points out that, although in its 1965 Declaration, it recognized the jurisdiction of the Court as compulsory in relation to any other State accepting the same obligation, it was more explicit in adding the words "and that is to say, on the sole condition of reciprocity". "Those additional words clearly have some meaning and effect . . . it is the supplementing of the 'coincidence' required by Article 36, paragraph 2, by the element of mutuality inherent in the concept of 'reciprocity'." The Nigerian condition, in other words, sought "to mitigate the effects" of the Court's earlier decision in the case concerning *Right of Passage over Indian Territory* by creating an equality of risk and precluding that proceedings be brought before the Court by surprise.

44. In support of its position, Nigeria invokes the decision given in the case concerning *Anglo-Iranian Oil Co.*, in which the Court stated that it could not base its interpretation of the Iranian Declaration recognizing the jurisdiction of the Court

> "on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court." (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 104.)

The Court had concluded that "[i]t is unlikely that the Government of Iran . . . should have been willing, on its own initiative, to agree that disputes relating" (*ibid.*, p. 105) to the capitulations which it had just denounced be submitted to an international court of justice.

45. La Cour estime que la situation est en l'espèce toute différente. Le Nigéria n'apporte pas de preuve à l'appui de sa thèse selon laquelle il aurait entendu insérer dans sa déclaration du 14 août 1965 une condition de réciprocité ayant un sens différent de celui que la Cour avait donné à de telles clauses en 1957. Dans le but de se protéger contre le dépôt de requêtes par surprise, le Nigéria aurait pu, en 1965, insérer dans sa déclaration une réserve analogue à celle que le Royaume-Uni avait ajoutée à sa propre déclaration en 1958. Une dizaine d'autres Etats ont procédé de la sorte. Le Nigéria ne l'a pas fait à l'époque. Il s'est borné, comme la plupart des Etats ayant souscrit à la clause facultative, à rappeler que les engagements qu'il prenait l'étaient, conformément au paragraphe 2 de l'article 36 du Statut, à l'égard de tout autre Etat acceptant la même obligation. A la lumière de cette pratique, le membre de phrase additionnel «c'est-à-dire sous la seule condition de réciprocité» doit être considéré comme explicatif et ne posant aucune condition supplémentaire. Une telle interprétation «est en harmonie avec la manière naturelle et raisonnable de lire le texte» (*Anglo-Iranian Oil Co., exceptions préliminaires, C.I.J. Recueil 1952*, p. 104) et la condition de réciprocité du Nigéria ne saurait être regardée comme une réserve *ratione temporis*.

46. La Cour aboutit dès lors à la conclusion que la manière dont la requête camerounaise a été présentée n'a pas été contraire à l'article 36 du Statut. Le dépôt de cette requête n'a pas davantage été opéré en violation d'un droit que le Nigéria tiendrait du Statut ou de sa déclaration telle qu'en vigueur à la date d'introduction de la requête du Cameroun.

*

47. La première exception préliminaire du Nigéria doit en conséquence être rejetée. La Cour n'aura par suite pas à examiner l'argumentation tirée par le Cameroun de l'article 102 de la Charte, ni les conclusions subsidiaires du Cameroun fondées sur le *forum prorogatum*. La Cour est en tout état de cause compétente pour connaître de la requête du Cameroun.

* *

DEUXIÈME EXCEPTION PRÉLIMINAIRE

48. Le Nigéria soulève une deuxième exception préliminaire en exposant que, pendant

> «au moins vingt-quatre ans avant le dépôt de la requête, les Parties ont, au cours des contacts et des entretiens qu'elles ont eus régulièrement, accepté l'obligation de régler toutes les questions frontalières au moyen des mécanismes bilatéraux existants».

Selon le Nigéria, un accord implicite serait ainsi intervenu en vue de recourir exclusivement à ces mécanismes et de ne pas invoquer la compétence de

45. The Court considers that the situation in this case is very different. Nigeria does not offer evidence in support of its argument that it intended to insert into its Declaration of 14 August 1965 a condition of reciprocity with a different meaning from the one which the Court had drawn from such clauses in 1957. In order to protect itself against the filing of surprise applications, in 1965, Nigeria could have inserted in its Declaration an analogous reservation to that which the United Kingdom added to its own Declaration in 1958. Ten or so other States proceeded in this way. Nigeria did not do so at that time. Like the majority of States which subscribe to the Optional Clause, it merely specified that the commitments it was entering into, in accordance with Article 36, paragraph 2, of the Statute, were reciprocal in relation to any other State accepting the same obligation. In the light of this practice, the additional phrase of the sentence, "that is to say, on the sole condition of reciprocity" must be understood as explanatory and not adding any further condition. This interpretation is "in harmony with a natural and reasonable way of reading the text" (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 104) and Nigeria's condition of reciprocity cannot be treated as a reservation *ratione temporis*.

46. The Court therefore concludes that the manner in which Cameroon's Application was filed was not contrary to Article 36 of the Statute. Nor was it made in violation of a right which Nigeria may claim under the Statute, or by virtue of its Declaration, as it was in force on the date of the filing of Cameroon's Application.

*

47. Nigeria's first preliminary objection is accordingly rejected. The Court is therefore not called upon to examine the reasoning put forward by Cameroon under Article 102 of the Charter, nor Cameroon's alternative submissions based on *forum prorogatum*. In any event, the Court has jurisdiction to pass upon Cameroon's Application.

* *

SECOND PRELIMINARY OBJECTION

48. Nigeria raises a second preliminary objection stating that

> "for a period of at least 24 years prior to the filing of the Application the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery".

According to Nigeria, an implicit agreement is thus said to have been reached with a view to resorting exclusively to such machinery and to

la Cour internationale de Justice. A titre subsidiaire, le Nigéria soutient que la conduite du Cameroun a créé une situation d'*estoppel* qui lui interdirait de s'adresser à la Cour. Le Nigéria invoque enfin le principe de la bonne foi et la règle *pacta sunt servanda* à l'appui de son argumentation.

49. Le Cameroun expose que les organes bilatéraux qui ont traité de diverses difficultés frontalières apparues entre les deux pays n'ont eu qu'une existence intermittente et qu'aucun mécanisme institutionnel permanent n'a été mis sur pied. Il souligne en outre qu'aucun accord explicite ou implicite n'est intervenu entre les Parties pour conférer une compétence exclusive à de tels organes. Enfin, selon le Cameroun, les conditions fixées par la jurisprudence de la Cour pour qu'existe une situation d'*estoppel* ne seraient pas réunies en l'espèce. Dès lors, il n'y aurait pas lieu à application du principe de la bonne foi et de la règle *pacta sunt servanda.*

50. L'exception nigériane comporte ainsi deux branches. Mais avant de se prononcer en droit en les examinant successivement, la Cour rappellera les faits pertinents en la matière.

51. Le premier contact bilatéral rapporté au dossier concerne un litige de caractère local dans les districts de Danare (Nigéria) et Budam (Cameroun). Ce litige donna lieu en 1965 à des «pourparlers exploratoires» concernant la démarcation de la frontière dans ce secteur. Celle-ci ayant été opérée par les autorités allemande et britannique au début du siècle, il fut convenu de rechercher les bornes existantes en vue d'identifier la frontière et de procéder à sa démarcation non seulement entre Danare et Budam, mais sur un tronçon d'environ 20 milles, des chutes d'eau d'Obokum à Bashu (bornes n^{os} 114 à 105). Les bornes existantes furent retrouvées, mais par la suite aucun des travaux envisagés ne fut effectué.

52. Cinq ans plus tard, à la suite d'incidents survenus dans la région de la Cross River et de la presqu'île de Bakassi, les deux gouvernements décidèrent de constituer une commission mixte sur les frontières. Lors de la première réunion de cette commission, les délégués du Cameroun et du Nigéria approuvèrent le 14 août 1970 une déclaration recommandant la délimitation de la frontière en trois étapes:

«*a)* la délimitation de la frontière maritime;

b) la délimitation de la frontière terrestre, telle que définie par le protocole anglo-allemand signé à Obokum le 12 avril 1913 et confirmé par l'accord anglo-allemand de Londres concernant: 1) le tracé de la frontière entre le Nigéria et le Cameroun de Yola à la mer; 2) la réglementation de la navigation sur la Cross River et l'échange de lettres entre les Gouvernements britannique et allemand du 6 juillet 1914;

c) la délimitation du reste de la frontière terrestre».

La déclaration précisait en outre les bases sur lesquelles la délimitation maritime devait être opérée. Elle recommandait que le travail de démarcation entamé en 1965 fût poursuivi. Enfin, elle préconisait qu'à la fin de chacune des étapes un traité séparé fût signé par les deux pays afin de

refraining from relying on the jurisdiction of the International Court of Justice. In the alternative, Nigeria claims that by its conduct Cameroon is estopped from turning to the Court. Finally, Nigeria invokes the principle of good faith and the rule *pacta sunt servanda* in support of this argument.

49. Cameroon maintains that the bilateral bodies which dealt with various boundary difficulties that had emerged between the two countries had only been temporary and that no permanent institutional machinery had been set up. It contends that no explicit or implicit agreement had been established between the Parties with a view to vesting exclusive jurisdiction in such bodies. Finally, according to Cameroon, the conditions laid down in the Court's case-law for the application of estoppel to arise were not fulfilled here. Therefore, there was no occasion to apply the principle of good faith and the rule *pacta sunt servanda.*

50. Nigeria's objection thus consists of two branches. But before making a legal determination considering them in turn, the Court will review the relevant facts.

51. The first bilateral contact referred to in the pleadings concerns a local dispute in the districts of Danare (Nigeria) and Budam (Cameroon). This dispute gave rise in 1965 to "exploratory talks" concerning the demarcation of the boundary in this sector. That course having been determined by the German and British authorities at the beginning of the century, it was agreed to locate existing boundary pillars with a view to identifying the boundary and proceeding with its demarcation not only between Danare and Budam, but also on a stretch of some 20 miles from Obokum Falls to Bashu (boundary pillars Nos. 114 to 105). The existing pillars were identified but none of the work planned was subsequently carried out.

52. Five years later, in response to incidents that occurred in the Cross River region and the Bakassi Peninsula, the two Governments decided to set up a Joint Boundary Commission. At the first meeting of that Commission, the delegates from Cameroon and Nigeria approved, on 14 August 1970, a declaration recommending that the delimitation of the boundary be carried out in three stages:

> "*(a)* the delimitation of the maritime boundary;
> *(b)* the delimitation of the land boundary as defined in the Anglo-German Protocol signed at Obokum on 12 April 1913 and confirmed by the London Anglo-German agreement 'respecting (1) the settlement of Frontier between Nigeria and Cameroon from Yola to the sea; and (2) the Regulation of navigation on the Cross River', and the exchange of letters between the British and German Governments on 6 July 1914;
> *(c)* the delimitation of the rest of the land boundary".

The declaration further specified the bases on which the delimitation of the maritime boundary was to be carried out. It recommended that the demarcation work commenced in 1965 be resumed. Finally, it recommended that, on completion of each of these stages, a separate treaty be

donner une portée légale à la frontière ainsi délimitée et fixée sur le terrain.

Un comité technique mixte fut ensuite créé en vue de mettre en œuvre la déclaration conjointe. Comme convenu, il commença ses travaux par la délimitation maritime. Les négociations se poursuivirent à divers niveaux à ce sujet pendant près de cinq ans. Elles se conclurent le 4 avril 1971 en ce qui concerne la frontière maritime à l'embouchure de la Cross River, puis aboutirent le 1er juin 1975 à Maroua à une déclaration des deux chefs d'Etat concernant le tracé de la frontière maritime depuis cette embouchure jusqu'à un point dénommé «G» situé selon les Parties à environ 17 milles marins des côtes.

53. Au cours des années qui suivirent, les contacts entre les deux pays sur les questions de frontières devinrent moins fréquents. Tout au plus peut-on noter la tenue de deux commissions mixtes. La première, en 1978, réunit les deux ministres des affaires étrangères. Ceux-ci exposèrent leurs points de vue sur certains problèmes frontaliers sans entamer de négociation et la réunion n'aboutit à aucun procès-verbal commun. La seconde, en 1987, réunit les ministres chargés du plan dans les deux pays et n'aborda pas les questions frontalières.

54. Les négociations sur ces questions, interrompues après 1975, ne reprirent entre les deux Etats que seize ans plus tard, lorsque les deux ministres des affaires étrangères adoptèrent le 29 août 1991 un communiqué conjoint selon lequel:

> «Au sujet des problèmes frontaliers, les deux parties sont convenues de faire examiner en détail tous les aspects de la question par les experts de la commission nationale des frontières du Nigéria et par les experts de la République du Cameroun lors d'une réunion qui aura lieu à Abuja en octobre 1991 et dont l'objectif sera de formuler des recommandations visant à résoudre pacifiquement les problèmes de nature frontalière.»

En fait, une première réunion de ces experts avait eu lieu en même temps que celle des ministres des affaires étrangères en août 1991. Elle fut suivie d'une deuxième réunion à Abuja en décembre 1991, puis d'une troisième à Yaoundé en août 1993. Ces réunions ne permirent d'aboutir à aucun accord, notamment en ce qui concerne la déclaration de Maroua, considérée comme obligatoire par le Cameroun, mais non par le Nigéria.

55. En définitive, la Cour constate que les négociations entre les deux Etats concernant la délimitation ou la démarcation de leur frontière ont été menées dans des cadres variés à des niveaux divers: chefs d'Etat, ministres des affaires étrangères, experts. Elles ont été actives durant la période allant de 1970 à 1975, puis elles ont été interrompues jusqu'en 1991.

*

56. Abordant les questions de droit, la Cour traitera maintenant de la première branche de l'exception nigériane. Elle rappellera tout d'abord

signed by the two countries to give effect to the boundary so demarcated and surveyed.

A Joint Technical Committee was then set up for the purpose of implementing the joint declaration. As agreed, it began its work with the delimitation of the maritime boundary. Negotiations went on at various levels on this matter for almost five years. They concluded on 4 April 1971 as regards the maritime boundary at the mouth of the Cross River, then led on 1 June 1975 to a declaration in Maroua by the two Heads of State concerning the course of the maritime boundary from the mouth of the Cross River to a point denominated "G" situated, according to the Parties, some 17 nautical miles from the coast.

53. Over the following years, contacts between the two countries on these boundary issues became less frequent. At most, it may be noted that two Joint Committee meetings were held. The first, in 1978, was attended by the two Foreign Ministers. They set forth their points of view on a number of boundary problems without undertaking negotiations and the meeting did not result in any joint minutes. The second meeting, held in 1987, brought together the Ministers responsible for planning in the two countries and did not broach boundary matters.

54. The negotiations on these issues, which were interrupted after 1975, were only resumed between the two States 16 years later when, on 29 August 1991, the two Foreign Ministers adopted a joint communiqué stating:

> "On border issues, the two sides agreed to examine in detail all aspects of the matter by the experts of the National Boundary Commission of Nigeria and the experts of the Republic of Cameroon at a meeting to be convened at Abuja in October 1991 with a view to making appropriate recommendations for a peaceful resolution of outstanding border issues."

Indeed, a first meeting of these experts took place at the same time as that of the Foreign Ministers in August 1991. It was followed by a second meeting at Abuja in December 1991, then by a third at Yaoundé in August 1993. No agreement could be reached at these meetings, in particular as regards the Maroua Declaration, which was considered binding by Cameroon but not by Nigeria.

55. In sum, the Court notes that the negotiations between the two States concerning the delimitation or the demarcation of the boundary were carried out in various frameworks and at various levels: Heads of State, Foreign Ministers, experts. The negotiations were active during the period 1970 to 1975 and then were interrupted until 1991.

*

56. Turning to legal considerations, the Court will now consider the first branch of the Nigerian objection. It recalls first that, "Negotiation

que «[l]a négociation et le règlement judiciaire sont l'une et l'autre cités comme moyens de règlement pacifique des différends à l'article 33 de la Charte des Nations Unies» (*Plateau continental de la mer Egée, arrêt, C.I.J. Recueil 1978*, p. 12, par. 29). Il n'existe ni dans la Charte, ni ailleurs en droit international, de règle générale selon laquelle l'épuisement des négociations diplomatiques serait un préalable à la saisine de la Cour. Un tel préalable n'avait pas été incorporé dans le Statut de la Cour permanente de Justice internationale, contrairement à ce qu'avait proposé le Comité consultatif de juristes en 1920 (Comité consultatif de juristes, *Procès-verbaux des séances du Comité (16 juin-24 juillet 1920) avec annexes*, p. 679, 725-726). Il ne figure pas davantage à l'article 36 du Statut de la présente Cour.

Un préalable de ce type peut être incorporé et est souvent inséré dans les clauses compromissoires figurant dans les traités. Il peut également figurer dans un compromis, les signataires se réservant alors de ne saisir la Cour qu'une fois écoulé un certain délai (voir par exemple *Différend frontalier (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 9). Enfin, les Etats demeurent libres d'insérer dans leur déclaration facultative d'acceptation de la juridiction obligatoire de la Cour une réserve excluant de la compétence de cette dernière les différends au sujet desquels les parties en cause seraient convenues ou conviendraient d'avoir recours à un autre mode de règlement pacifique. Au cas particulier, aucune réserve de ce type n'avait cependant été insérée dans les déclarations du Nigéria ou du Cameroun à la date d'introduction de la requête.

Par ailleurs, le fait que les deux Etats aient, dans les circonstances rappelées aux paragraphes 54 et 55 ci-dessus, tenté, lors de contacts bilatéraux, de résoudre certaines des questions frontalières les opposant, n'impliquait pas que l'un ou l'autre ait exclu la possibilité de porter tout différend frontalier le concernant dans d'autres enceintes et notamment devant la Cour internationale de Justice. Dans sa première branche, l'exception du Nigéria ne saurait en conséquence être accueillie.

57. Passant à la seconde branche de l'exception, la Cour examinera si les conditions fixées par la jurisprudence pour qu'existe une situation d'*estoppel* sont réunies en l'espèce.

L'existence d'une telle situation supposerait que le Cameroun ait adopté un comportement ou fait des déclarations qui auraient attesté d'une manière claire et constante qu'il avait accepté de régler le différend de frontières soumis aujourd'hui à la Cour par des voies exclusivement bilatérales. Elle impliquerait en outre que le Nigéria, se fondant sur cette attitude, ait modifié sa position à son détriment ou ait subi un préjudice quelconque (*Plateau continental de la mer du Nord, arrêt, C.I.J. Recueil 1969*, p. 26, par. 30; *Différend frontalier, terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 118, par. 63).

Ces conditions ne sont pas remplies en l'espèce. En effet, comme il a été précisé au paragraphe 56 ci-dessus, le Cameroun n'a pas reconnu un caractère exclusif aux négociations menées avec le Nigéria, pas plus que

and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 12, para. 29). Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920 (Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, pp. 679, 725-726). Nor is it to be found in Article 36 of the Statute of this Court.

A precondition of this type may be embodied and is often included in compromissory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seise the Court only after a certain lapse of time (cf. *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 9). Finally, States remain free to insert into their optional declaration accepting the compulsory jurisdiction of the Court a reservation excluding from the latter those disputes for which the parties involved have agreed or subsequently agree to resort to an alternative method of peaceful settlement. In this case, however, no reservation of this type was included in the Declarations of Nigeria or Cameroon on the date of the filing of the Application.

Moreover, the fact that the two States have attempted, in the circumstances set out in paragraphs 54 and 55 above, to solve some of the boundary issues dividing them during bilateral contacts, did not imply that either one had excluded the possibility of bringing any boundary dispute concerning it before other fora, and in particular the International Court of Justice. The first branch of Nigeria's objection accordingly is not accepted.

57. Turning to the second branch of the objection, the Court will examine whether the conditions laid down in its jurisprudence for an estoppel to exist are present in the instant case.

An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 26, para. 30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63).

These conditions are not fulfilled in this case. Indeed, as pointed out in paragraph 56 above, Cameroon did not attribute an exclusive character to the negotiations conducted with Nigeria, nor, as far as it appears, did

le Nigéria ne semble l'avoir fait; en outre ce dernier n'établit pas avoir modifié sa position à son détriment ou avoir subi un préjudice du fait qu'il aurait pu sans cela rechercher une solution aux problèmes de frontières existant entre les deux Etats en recourant à d'autres procédures, mais qu'il a été empêché de le faire en se fondant sur la position prétendument adoptée par le Cameroun.

58. Enfin, la Cour n'est pas convaincue que le Nigéria aurait subi un préjudice du fait que le Cameroun a entamé une procédure devant la Cour au lieu de poursuivre des négociations qui, d'ailleurs, étaient dans une impasse au moment du dépôt de la requête.

59. Dans ces conditions, le Cameroun, en saisissant la Cour, n'a pas méconnu les règles de droit invoquées par le Nigéria à l'appui de sa deuxième exception. Le Nigéria n'est par suite pas fondé à se prévaloir du principe de la bonne foi et de la règle *pacta sunt servanda*, principe et règle qui ne concernent que l'exécution d'obligations existantes. Dans sa seconde branche, l'exception du Nigéria ne saurait être accueillie.

60. La deuxième exception préliminaire doit ainsi être rejetée dans sa totalité.

* *

TROISIÈME EXCEPTION PRÉLIMINAIRE

61. Dans sa troisième exception préliminaire, le Nigéria soutient que «le règlement des différends frontaliers dans la région du lac Tchad relève de la compétence exclusive de la commission du bassin du lac Tchad».

62. A l'appui de cette argumentation, le Nigéria invoque à la fois les textes conventionnels régissant le statut de la commission et la pratique des Etats membres. Il expose que «les procédures de règlement par la commission sont obligatoires pour les parties» et que le Cameroun ne pouvait par suite saisir la Cour sur la base du paragraphe 2 de l'article 36 du Statut.

63. Le Cameroun, quant à lui, expose à la Cour que:

> «aucune disposition du statut de la commission du bassin du lac Tchad n'établit au bénéfice de cette organisation internationale une quelconque compétence exclusive en matière de délimitation de frontières».

Il ajoute que l'on ne saurait déduire une telle exclusivité du comportement des Etats membres. Par voie de conséquence, il demande à la Cour de rejeter la troisième exception préliminaire.

*

64. La Cour observera que le statut de la commission du bassin du lac Tchad a été fixé en annexe à une convention du 22 mai 1964 signée à cette

Nigeria. Furthermore, Nigeria does not show that it has changed its position to its detriment or that it has sustained prejudice in that it could otherwise have sought a solution to the border problems existing between the two States by having recourse to other procedures, but was precluded from doing so by reliance on the positions allegedly taken by Cameroon.

58. Finally, the Court has not been persuaded that Nigeria has been prejudiced as a result of Cameroon's having instituted proceedings before the Court instead of pursuing negotiations which, moreover, were deadlocked when the Application was filed.

59. This being so, in bringing proceedings before the Court, Cameroon did not disregard the legal rules relied on by Nigeria in support of its second objection. Consequently, Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations. The second branch of Nigeria's objection is not accepted.

60. The second preliminary objection as a whole is thus rejected.

* *

THIRD PRELIMINARY OBJECTION

61. In its third preliminary objection, Nigeria contends that "the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission".

62. In support of this argument, Nigeria invokes the treaty texts governing the Statute of the Commission as well as the practice of member States. It argues that "the procedures for settlement by the Commission are binding upon the Parties" and that Cameroon was thus barred from raising the matter before the Court on the basis of Article 36, paragraph 2, of the Statute.

63. For its part, Cameroon submits to the Court that

> "no provision of the Statute of the Lake Chad Basin Commission establishes in favour of that international organization any exclusive competence in relation to boundary delimitation".

It adds that no such exclusive jurisdiction can be inferred from the conduct of member States. It therefore calls upon the Court to reject the third preliminary objection.

*

64. The Court observes that the Statute of the Lake Chad Basin Commission was annexed to an Agreement of 22 May 1964 signed on that

date par le Cameroun, le Niger, le Nigéria et le Tchad. Cette convention, relative à la mise en valeur du bassin du lac Tchad, a pour objet, selon son préambule, «de formuler les principes pour l'utilisation des ressources du bassin du lac Tchad à des fins économiques, y compris l'aménagement des eaux». L'article IV du statut développe ces principes en précisant que

> «[l']exploitation du bassin et en particulier l'utilisation des eaux superficielles et souterraines s'entend au sens le plus large, et se réfère notamment aux besoins du développement domestique, industriel et agricole, et à la collecte des produits de sa faune et de sa flore».

Les Etats membres s'engagent en outre, selon l'article VII du statut, à adopter «des règlements communs pour faciliter au maximum la navigation et le transport sur le lac et les voies navigables du bassin et en assurer la sécurité et le contrôle».

La convention crée en son article premier la commission du bassin du lac Tchad. Celle-ci est constituée de deux commissaires par Etat membre. Conformément au paragraphe 3 de l'article X du statut, les décisions de la commission sont prises à l'unanimité.

Les attributions de la commission sont fixées à l'article IX du même statut. Elle prépare notamment «des règlements communs, permettant la pleine application des principes affirmés dans le présent statut et dans la convention à laquelle il est annexé, et en [assure] une application effective». Elle exerce diverses compétences en vue de coordonner l'action des Etats membres en ce qui concerne l'utilisation des eaux du bassin. Parmi ses attributions figure enfin, selon le paragraphe *g)* de l'article IX, celle «d'examiner les plaintes et de contribuer à la solution de différends».

65. Les Etats membres ont en outre confié à la commission certaines tâches qui n'avaient pas été initialement prévues par les textes conventionnels. A la suite d'incidents entre le Cameroun et le Nigéria survenus en 1983 dans la région du lac Tchad, une réunion extraordinaire de la commission fut convoquée du 21 au 23 juillet 1983 à Lagos sur l'initiative des chefs d'Etat intéressés, en vue de confier à la commission le soin de traiter certaines questions frontalières et de sécurité. Deux sous-commissions d'experts furent alors créées. Elles se réunirent du 12 au 16 novembre 1984. Un accord intervint immédiatement entre les experts pour retenir «comme documents de travail ... traitant de la délimitation des frontières dans le lac Tchad» diverses conventions et accords bilatéraux conclus entre l'Allemagne, la France et le Royaume-Uni entre 1906 et 1931. Les experts proposèrent en même temps que la frontière ainsi délimitée soit démarquée aussi rapidement que possible.

Cette démarcation fut opérée de 1988 à 1990 au cours de trois campagnes d'abornement lors desquelles furent posées sept bornes principales et soixante-huit bornes intermédiaires. Le rapport final de bornage fut signé par les délégués des quatre Etats intéressés. Puis, le 23 mars 1994,

date by Cameroon, Chad, Niger and Nigeria. According to its preamble, this convention concerning the development of the Lake Chad Basin is designed "to formulate principles of the utilization of the resources of the Basin for economic purposes, including the harnessing of the water". Article IV of the Statute develops those principles by providing that

> "[t]he development of the said Basin and in particular the utilisation of surface and ground waters shall be given its widest connotation and refers in particular to domestic, industrial and agricultural development, the collection of the products of its fauna and flora".

In addition, under Article VII of the Statute, member States undertake to "establish common rules for the purpose of facilitating navigation on the Lake and on the navigable waters in the Basin and to ensure the safety and control of navigation".

Article I of the Convention establishes the Lake Chad Basin Commission. The Commission comprises two commissioners per member State. In accordance with Article X, paragraph 3, of the Statute, the decisions of the Commission shall be by unanimous vote.

The functions of the Commission are laid down in Article IX of the same Statute. They are *inter alia* to prepare "general regulations which will permit the full application of the principles set forth in the present Convention and its annexed Statute, and to ensure their effective application". The Commission exercises various powers with a view to co-ordinating action by member States regarding the use of the waters of the Basin. Finally, one of its responsibilities under Article IX, paragraph *(g)*, is "to examine complaints and to promote the settlement of disputes and the resolution of differences".

65. Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts. Further to incidents between Cameroon and Nigeria in 1983 in the Lake Chad area, an extraordinary meeting of the Commission was convened from 21 to 23 July 1983 in Lagos on the initiative of the Heads of State concerned, in order to entrust to the Commission certain boundary and security matters. Two sub-commissions of experts were then set up. They met from 12 to 16 November 1984. An agreement was immediately reached between the experts to adopt "as working documents" various bilateral conventions and agreements concluded between Germany, France and the United Kingdom between 1906 and 1931 "on the delimitation of Borders in the Lake Chad area". The experts proposed at the same time that the boundary so delimited be demarcated as early as possible.

This demarcation was carried out from 1988 to 1990 in the course of three boundary-marking operations involving the setting up of seven main and 68 intermediary boundary pillars. The Final Report on Beaconing was signed by the delegates of the four States concerned. Then,

lors du huitième sommet d'Abuja de la commission du bassin du lac Tchad, les chefs d'Etat et de gouvernement furent informés de «l'achèvement des travaux de matérialisation des frontières sur le terrain». Ils décidèrent alors «d'approuver le document technique de la démarcation des frontières internationales des Etats membres dans le lac Tchad», étant entendu «que chaque pays adopte le document conformément à ses propres lois». La question de la ratification de ce document a été évoquée lors du neuvième sommet des chefs d'Etat et de gouvernement de la commission à N'Djamena, les 30 et 31 octobre 1996, en l'absence des chefs d'Etat du Cameroun et du Nigéria, sans qu'aucun progrès soit constaté. Depuis lors, le Cameroun a cependant déposé, le 22 décembre 1997, un instrument de ratification tandis que le Nigéria ne l'a pas fait.

*

66. A la lumière des textes conventionnels et de la pratique ainsi rappelés, la Cour examinera les positions des Parties sur cette question. Le Nigéria, pour sa part, soutient en premier lieu que «le rôle et le statut de la commission» doivent être compris «dans le cadre du système des organisations régionales» auquel se réfère l'article 52 de la Charte des Nations Unies. Il en conclut que «la commission exerce un pouvoir exclusif pour les questions de sécurité et d'ordre public dans la région du lac Tchad et que ces questions incluent à juste titre les affaires de délimitation frontalière».

Le Cameroun fait valoir, quant à lui, que la commission ne constitue pas un accord ou organisme régional au sens de l'article 52 de la Charte, en soulignant en particulier le fait que:

> «il n'a jamais été question d'étendre cette catégorie aux organisations internationales régionales techniques qui, comme la [commission], peuvent comprendre un mécanisme de règlement pacifique des différends ou de promotion de ce règlement».

67. La Cour rappellera que le paragraphe 1 de l'article 52 de la Charte vise les accords ou les «organismes régionaux destinés à régler les affaires qui, touchant au maintien de la paix et de la sécurité internationales, se prêtent à une action de caractère régional». D'après le paragraphe 2 du même article,

> «[l]es Membres des Nations Unies qui concluent ces accords ou constituent ces organismes doivent faire tous leurs efforts pour régler d'une manière pacifique, par le moyens desdits accords ou organismes, les différends d'ordre local, avant de les soumettre au Conseil de sécurité».

Selon l'article 53, le Conseil de sécurité peut utiliser ces accords ou organismes «pour l'application des mesures coercitives prises sous son autorité».

Il ressort des textes conventionnels et de la pratique analysés aux para-

on 23 March 1994, at the Eighth Summit of the Lake Chad Basin Commission in Abuja, the Heads of State and Government were informed that "the physical work in the field on the border demarcation exercise was fully completed". They then decided "to approve the technical document on the demarcation of the international boundaries of member States in Lake Chad", on the understanding "that each country should adopt the document in accordance with its national laws". The question of the ratification of that document came up at the Ninth Summit of Heads of State of the Commission held on 30 and 31 October 1996 in N'Djamena when Heads of State of Cameroon and Nigeria were absent and where no progress was recorded. Since then, however, on 22 December 1997, Cameroon deposited its instrument of ratification, whereas Nigeria has not done so.

*

66. In the light of the treaty texts and the practice thus recalled, the Court will consider the positions of the Parties on this matter. For its part, Nigeria first of all contends that "the role and Statute of the Commission" must be understood "in the framework of regional agencies" referred to in Article 52 of the United Nations Charter. It accordingly concludes that "the Commission has an exclusive power in relation to issues of security and public order in the region of Lake Chad and that these issues appropriately encompass the business of boundary demarcation".

Cameroon argues, for its part, that the Commission does not constitute a regional arrangement or agency within the meaning of Article 52 of the Charter, pointing in particular to the fact that

> "there has never been any question of extending this category to international regional organizations of a technical nature which, like the [Commission], can include a mechanism for the peaceful settlement of disputes or for the promotion of that kind of settlement".

67. The Court notes that Article 52, paragraph 1, of the Charter refers to "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action". According to paragraph 2 of that Article,

> "[t]he Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council".

Under Article 53, the Security Council may use these arrangements or agencies for "enforcement action under its authority".

From the treaty texts and the practice analysed at paragraphs 64 and

graphes 64 et 65 ci-dessus que la commission du bassin du lac Tchad constitue une organisation internationale exerçant ses compétences dans une zone géographique déterminée; qu'elle n'a toutefois pas pour fin de régler au niveau régional des affaires qui touchent au maintien de la paix et de la sécurité internationales. Elle n'entre donc pas dans les prévisions du chapitre VIII de la Charte.

68. Mais en serait-il autrement que l'argumentation du Nigéria n'en devrait pas moins être écartée. A cet égard, la Cour rappellera que, dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, elle avait estimé que le processus de Contadora ne pouvait être «considéré comme constituant à proprement parler un «accord régional» aux fins du chapitre VIII de la Charte des Nations Unies». Mais elle avait ajouté qu'en tout état de cause

> «la Cour n'est en mesure d'admettre, ni qu'il existe une obligation quelconque d'épuisement des procédures régionales de négociation préalable à sa saisine, ni que l'existence du processus de Contadora empêche la Cour en l'espèce d'examiner la requête nicaraguayenne» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 440).

L'existence de procédures régionales de négociation ne saurait, quelle qu'en soit la nature, empêcher la Cour d'exercer les fonctions qui lui sont conférées par la Charte et le Statut.

69. Le Nigéria invoque par ailleurs l'article 95 de la Charte des Nations Unies, selon lequel:

> «Aucune disposition de la présente Charte n'empêche les Membres de l'Organisation de confier la résolution de leurs différends à d'autres tribunaux en vertu d'accords déjà existants ou qui pourront être conclus dans l'avenir.»

Selon le Nigéria, la commission du bassin du lac Tchad devrait être regardée comme un tribunal entrant dans les prévisions de ce texte. Il en résulterait que, si la Cour se prononçait sur ces conclusions du Cameroun, elle «porterait atteinte au principe d'autonomie juridictionnelle» et «exercerait alors un rôle de juridiction d'appel».

La Cour estime que la commission du bassin du lac Tchad ne saurait être regardée comme un tribunal. Elle ne rend ni sentence arbitrale, ni jugement et de ce fait n'est ni un organe arbitral ni un organe judiciaire. Par suite, l'argumentation du Nigéria sur ce point doit être écartée.

70. Le Nigéria soutient en outre que la convention du 22 mai 1964, confirmée par la pratique des Etats membres de la commission, donne compétence exclusive à cette dernière pour le règlement des différends frontaliers. Il en déduit que la Cour ne saurait connaître des conclusions du Cameroun tendant à ce qu'elle détermine dans ce secteur la frontière entre les deux pays.

65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.

68. However, even were it otherwise, Nigeria's argument should nonetheless be set aside. In this connection, the Court notes that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it did not consider that the Contadora process could "properly be regarded as a 'regional arrangement' for the purposes of Chapter VIII of the United Nations Charter". But it added that, in any event,

> "the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 440).

Whatever their nature, the existence of procedures for regional negotiation cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute.

69. Nigeria further invokes Article 95 of the United Nations Charter according to which:

> "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

According to Nigeria, the Lake Chad Basin Commission should be seen as a tribunal falling under the provisions of this text. This would mean that, if the Court were to pronounce on this submission of Cameroon it "would be in breach of the principle of the autonomy of jurisdictional competence" and "would be exercising an appellate jurisdiction".

The Court considers that the Lake Chad Basin Commission cannot be seen as a tribunal. It renders neither arbitral awards nor judgments and is therefore neither an arbitral nor a judicial body. Accordingly, this contention of Nigeria must also be set aside.

70. Nigeria further maintains that the Convention of 22 May 1964, confirmed by the practice of the member States of the Commission, attributes to that Commission an exclusive competence for the settlement of boundary disputes. It concludes from this that the Court cannot entertain Cameroon's submissions requesting it to determine the boundary between the two countries in this sector.

La Cour ne saurait accueillir cette argumentation. Elle notera tout d'abord qu'aucune disposition de la convention ne donne compétence et à fortiori compétence exclusive à la commission en matière de règlement des différends frontaliers. Une telle compétence ne saurait notamment être déduite du paragraphe *g) de* l'article IX de la convention (voir paragraphe 64 ci-dessus).

La Cour relèvera par ailleurs que les Etats membres de la commission ont par la suite chargé cette dernière de procéder à la démarcation des frontières dans la région sur la base des accords et traités figurant dans le rapport des experts de novembre 1984 (voir paragraphe 65 ci-dessus). De ce fait, et comme le souligne le Nigéria, «la question de la démarcation de frontière relève manifestement de la compétence de la commission». Cette démarcation était conçue par les Etats intéressés comme une opération matérielle à réaliser sur le terrain sous l'autorité de la commission en vue d'éviter le renouvellement des incidents survenus en 1983.

Mais la commission n'a jamais reçu compétence, et à fortiori compétence exclusive, pour se prononcer sur le différend territorial qui oppose actuellement le Cameroun et le Nigéria devant la Cour, différend qui au surplus n'était pas encore né en 1983. En conséquence, l'argumentation du Nigéria doit être écartée.

71. Le Nigéria expose également que, de 1983 à 1994, «le Cameroun a clairement et constamment montré son acceptation du régime de recours exclusif à la commission du bassin du lac Tchad»; puis il aurait fait appel à la Cour, contrairement aux engagements pris. Cette manière d'agir aurait été préjudiciable au Nigéria, ainsi privé des procédures de «consultation», de «négociation» qu'offrait la commission. La requête camerounaise serait frappée d'*estoppel*.

La Cour observera que les conditions fixées par sa jurisprudence pour qu'existe une situation d'*estoppel*, telles que rappelées au paragraphe 57 ci-dessus, ne sont pas remplies en l'espèce. En effet, le Cameroun n'a pas accepté la compétence de la commission pour régler le différend de frontières soumis actuellement à la Cour. L'argumentation exposée doit, là encore, être écartée.

72. A titre subsidiaire, le Nigéria expose enfin que, compte tenu de la démarcation en cours au sein de la commission du bassin du lac Tchad, la Cour «devrait, pour des raisons d'opportunité judiciaire, imposer des limites à l'exercice de sa fonction judiciaire dans la présente affaire» et se refuser à statuer au fond sur la requête du Cameroun, comme elle l'a fait en 1963 dans l'affaire du *Cameroun septentrional*.

Dans cette affaire, la Cour avait relevé que l'Assemblée générale des Nations Unies avait mis fin à l'accord de tutelle en ce qui concerne le Cameroun septentrional par sa résolution 1608 (XV); elle avait noté que le différend entre les parties «relatif à l'interprétation et à l'application [de cet accord concernait dès lors un traité] qui n'[était] plus en vigueur»; elle avait ajouté qu'«il n'y [avait] plus aucune possibilité que ce traité fasse à l'avenir l'objet d'un acte d'interprétation ou d'application

The Court cannot subscribe to that reasoning. It notes first of all that no provision in the Convention ascribes jurisdiction and *a fortiori* exclusive jurisdiction to the Commission as regards the settlement of boundary disputes. In particular, such a jurisdiction cannot be deduced from Article IX, paragraph *(g)*, of the Convention (see paragraph 64 above).

The Court further notes that the member States of the Commission subsequently charged it with carrying out the demarcation of boundaries in the region on the basis of the agreements and treaties referred to in the experts' report of November 1984 (see paragraph 65 above). Thus, as pointed out by Nigeria, "the question of boundary demarcation was clearly within the competence of the [Commission]". This demarcation was designed by the States concerned as a physical operation to be carried out in the field under the authority of the Commission with a view to avoiding the reoccurrence of the incidents that had arisen in 1983.

But the Commission has never been given jurisdiction, and *a fortiori* exclusive jurisdiction, to rule on the territorial dispute now involving Cameroon and Nigeria before the Court, a dispute which moreover did not as yet exist in 1983. Consequently, Nigeria's argument must be dismissed.

71. Nigeria also argues that, from 1983 to 1994, "Cameroon had clearly and consistently evinced acceptance of the régime of exclusive recourse to the Lake Chad Basin Commission"; Cameroon then appealed to the Court contrary to the commitments it had entered into. This course of conduct, it was argued, had been prejudicial to Nigeria, deprived as it was of the "consultation" and "negotiation" procedures afforded by the Commission. Nigeria claims that Cameroon is estopped from making its Application.

The Court points out that the conditions laid down in its case-law for an estoppel to arise, as set out in paragraph 57 above, are not fulfilled in this case. Indeed, Cameroon has not accepted that the Commission has jurisdiction to settle the boundary dispute now submitted to the Court. This argument must also be set aside.

72. In the alternative, Nigeria finally argues that, on account of the demarcation under way in the Lake Chad Basin Commission, the Court "cannot rule out the consideration of the need for judicial restraint on grounds of judicial propriety" and should decline to rule on the merits of Cameroon's Application, as it did in 1963 in the case concerning *Northern Cameroons*.

In that case, the Court had noted that the United Nations General Assembly had terminated the trusteeship agreement in respect of the Northern Cameroon by resolution 1608 (XV); it observed that the dispute between the parties "about the interpretation and application [of that agreement therefore concerned a treaty] no longer in force"; it went on to say that "there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the

conforme à un jugement rendu par la Cour». Elle en avait conclu que toute décision judiciaire serait dès lors «sans objet» et qu'il ne servirait «à rien d'entreprendre l'examen de l'affaire au fond». Relevant que les limites qui sont celles de sa fonction judiciaire «ne lui permett[ai]ent pas d'accueillir ... les demandes [du Cameroun, elle avait estimé ne pouvoir] statuer au fond sur [ces] demande[s]» (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963,* p. 37-38).

La Cour estime que la situation en l'espèce est toute différente. En effet, alors que le Cameroun ne contestait pas en 1963 la validité de la résolution de l'Assemblée générale mettant fin à la tutelle, le Nigéria, dans la présente affaire, ne considère pas le document technique sur la démarcation des frontières approuvé lors du sommet d'Abuja de la commission du bassin du lac Tchad comme un document réglant de manière définitive les problèmes de frontières dans cette région. Le Nigéria a réservé sa position devant la Cour en ce qui concerne le caractère contraignant de ce document. Il soutient que ce dernier doit être ratifié et rappelle qu'il ne l'a pas ratifié. Il a enfin précisé, lors du neuvième sommet de la commission à N'Djamena en 1996, qu'il ne «peut même pas engager le processus de ratification si la question n'est pas retirée de la Cour».

Le Cameroun, de son côté, estime que le Nigéria est dans l'obligation d'achever le processus d'approbation du document en cause et que, même en l'absence d'une telle action, la frontière entre les deux pays dans ce secteur «est définie juridiquement», «matérialisée sur le terrain» et «internationalement reconnue».

La Cour n'a pas à ce stade à prendre partie sur ces thèses adverses. Il lui suffira de constater que le Nigéria ne saurait soutenir à la fois que la procédure de démarcation engagée au sein de la commission du lac Tchad n'est pas parvenue à son terme et que cette procédure a en même temps rendu sans objet les conclusions du Cameroun. Il n'y a dès lors aucune raison d'opportunité judiciaire qui puisse amener la Cour à se refuser à statuer au fond sur ces conclusions.

73. Il résulte de ce qui précède que la troisième exception préliminaire du Nigéria doit être rejetée.

* *

QUATRIÈME EXCEPTION PRÉLIMINAIRE

74. La Cour abordera maintenant la quatrième exception préliminaire soulevée par le Nigéria. Selon cette exception:

> «La Cour ne devrait pas déterminer en l'espèce l'emplacement de la frontière dans le lac Tchad dans la mesure où cette frontière constitue le tripoint dans le lac ou est constituée par celui-ci.»

75. Le Nigéria soutient que la localisation du tripoint dans le lac Tchad affecte directement un Etat tiers, la République du Tchad, et que

Court might render". It had concluded that any adjudication would thus be "devoid of purpose" and that no purpose "would be served by undertaking an examination of the merits in the case". Observing that the limits of its judicial function "do not permit it to entertain the claims submitted to it [by Cameroon, it had considered itself unable to] adjudicate upon the merits of [those] claim[s]" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 37-38).

The Court considers that the situation in the present case is entirely different. Indeed, whereas in 1963 Cameroon did not challenge the validity of the General Assembly resolution terminating the trusteeship, Nigeria, in the present case, does not regard the technical document on the demarcation of the boundaries, approved at the Abuja Summit of the Lake Chad Basin Commission, as a document definitively settling boundary problems in that region. Nigeria reserved its position before the Court as regards the binding character of that document. It contends that the document requires ratification and recalls that it has not ratified it. Lastly, it specified at the Ninth Summit of the Commission at N'Djamena in 1996 that "Nigeria could not even start processing ratification unless the issue was out of Court".

Cameroon for its part considers that Nigeria is obliged to complete the process of approval of the document concerned and, that, even in the absence of so doing, the boundary between the two countries in this sector is "legally defined", "marked out on the ground" and "internationally recognized".

It is not for the Court at this stage to rule upon these opposing arguments. It need only note that Nigeria cannot assert both that the demarcation procedure initiated within the Lake Chad Commission was not completed and that, at the same time, that procedure rendered Cameroon's submissions moot. There is thus no reason of judicial propriety which should make the Court decline to rule on the merits of those submissions.

73. In the light of the above considerations, Nigeria's third preliminary objection must be rejected.

* *

FOURTH PRELIMINARY OBJECTION

74. The Court will now turn to the fourth preliminary objection raised by Nigeria. This objection contends that:

> "The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake."

75. Nigeria holds that the location of the tripoint within Lake Chad directly affects a third State, the Republic of Chad, and that the Court

la Cour ne saurait dès lors déterminer l'emplacement de ce tripoint. Le Nigéria prétend que sont inapplicables en l'espèce les conclusions auxquelles était parvenue la Chambre dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* selon lesquelles sa compétence

> «ne se trouve pas limitée du seul fait que le point terminal de la frontière se situe sur la frontière d'un Etat tiers non partie à l'instance. En effet les droits de l'Etat voisin, le Niger, sont sauvegardés en tout état de cause par le jeu de l'article 59 du Statut...» (*C.I.J. Recueil 1986,* p. 577, par. 46.)

Il affirme que la présente affaire se distingue de celle du *Différend frontalier* de 1986 en ce que celle-ci avait été introduite par un compromis traduisant l'accord des Parties de faire procéder à la délimitation de l'ensemble de la frontière. De plus, dans l'affaire du *Différend frontalier*, le Niger avait été considéré comme étant un Etat tiers «à part entière», alors qu'en l'espèce existe la commission du bassin du lac Tchad au sein de laquelle coopèrent les Etats riverains. Du fait de cette coopération, les accords frontaliers ou les autres accords conclus entre le Nigéria et le Cameroun en ce qui concerne le lac Tchad ne seraient pas *res inter alios acta* pour les autres Etats membres de cette commission. Ni le Niger, ni le Tchad ne seraient dès lors de simples tierces parties en l'espèce. Selon le Nigéria, «[l]e régime du lac Tchad fait l'objet d'une coopération multilatérale et ne se prête pas à la bilatéralisation complète» que la Chambre a adoptée dans l'affaire du *Différend frontalier*.

Le Nigéria fait aussi valoir que ce n'est pas simplement de manière théorique ou fortuite que le Tchad, en sa qualité d'Etat tiers, est concerné par la question des frontières; des incidents ont eu lieu entre le Nigéria et le Tchad sur le lac Tchad et à son sujet. Enfin, le Nigéria conteste la distinction que la Chambre a opérée dans l'affaire du *Différend frontalier* entre délimitation maritime et délimitation terrestre. «Des critères d'équidistance, de proportionnalité et d'équité ... ont été appliqués pour délimiter des frontières lacustres, notamment celles de grands lacs.» La position du Nigéria est telle qu'on serait fondé à en déduire que sa quatrième exception préliminaire est dirigée non seulement contre la compétence de la Cour (par analogie avec le principe énoncé dans l'affaire de l'*Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954,* p. 19), mais encore contre la recevabilité de la requête, étant donné que cette exception est selon cet Etat fondée sur l'un et l'autre terrain.

76. Le Cameroun, pour sa part, soutient que la Cour doit exercer sa compétence sur l'ensemble de la frontière qui fait l'objet du différend, jusqu'au point terminal septentrional situé dans le lac Tchad; la quatrième exception préliminaire du Nigéria irait directement à l'encontre de la jurisprudence constante en matière de tripoint. Le Cameroun rejette tout particulièrement la thèse du Nigéria selon laquelle il faut établir une distinction entre la décision rendue en l'affaire du *Différend frontalier* et la présente espèce: l'absence de compromis et partant le défaut de consentement du Nigéria pour ce qui est de l'introduction de l'instance ne sont

therefore cannot determine this tripoint. Nigeria maintains that the finding of the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*

> "that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute . . ." (*I.C.J. Reports 1986*, p. 577, para. 46)

is not applicable in the present case. It says there is a difference because the 1986 *Frontier Dispute* case was instituted by Special Agreement, which reflected the agreement of the Parties to have the entire boundary delimited. In addition, in the *Frontier Dispute* case Niger was treated as a wholly third party, while in the present case there is the Lake Chad Basin Commission in which the States bordering Lake Chad co-operate. Because of that co-operation, boundary or other agreements relating to Lake Chad between Nigeria and Cameroon are not *res inter alios acta* for the other member States of the Commission. Therefore, neither Niger nor Chad are simple third parties in this case. According to Nigeria, "the régime of Lake Chad is subject to multilateral co-operation, and is not susceptible to the thorough-going bilateralization" which the Chamber adopted in the *Frontier Dispute* case.

Nigeria also alleges that it is not the case that Chad as a third party is merely theoretically or contingently involved in the question of boundaries; there had been clashes between Nigeria and Chad in and in relation to Lake Chad. Finally, Nigeria questions the distinction which the Chamber in the *Frontier Dispute* case drew between maritime and land delimitation. "Criteria of equidistance, proportionality and equity have been applied to the delimitation of lacustrine boundaries, especially in large lakes." Nigeria's position is such that it would warrant the conclusion that its fourth preliminary objection goes not only to the jurisdiction of the Court (by analogy with the principle in the case of the *Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19), but also to the admissibility of the Application, as the objection is in its view well founded on either basis.

76. Cameroon claims that the Court must exercise its jurisdiction over the totality of the disputed boundary, as far as the northern end-point within Lake Chad; Nigeria's fourth preliminary objection directly conflicts with consistent case-law relating to tripoints. Cameroon particularly rejects the Nigerian argument which distinguishes the *Frontier Dispute* decision from the present case: the absence of a special agreement, and therefore the consent of Nigeria to the institution of the proceedings, is irrelevant; Nigeria does not cite any precedent in which a differentiation was made between "wholly third States" and States which would not be

pas des éléments pertinents; le Nigéria n'invoque aucun précédent où ait été opérée une distinction entre «Etats tiers à part entière» et ceux qui ne seraient pas de véritables Etats tiers. Les accords frontaliers *inter se*, conclus sans la participation d'Etats tiers, seraient fréquents, et l'article 59 suffirait à protéger les droits de ceux-ci. Le concept d'implication théorique d'un Etat tiers dans une question frontalière est, de l'avis du Cameroun, dénué de pertinence. Rien ne vient étayer un tel concept, et ses conséquences ne sont pas clairement expliquées. Le Cameroun conteste enfin les efforts déployés par le Nigéria pour écarter l'application de l'arrêt rendu dans l'affaire du *Différend frontalier* à la délimitation des frontières lacustres.

77. Dans la mesure où le Nigéria entend se prévaloir de la compétence exclusive de la commission du bassin du lac Tchad en matière de délimitation des frontières dans le lac Tchad, la Cour notera qu'elle a déjà répondu à ce moyen en examinant la troisième exception préliminaire. Celle-ci n'ayant pas été retenue, la Cour n'a pas à en traiter à nouveau.

78. La Cour observera en outre que les conclusions que le Cameroun lui a soumises dans la requête additionnelle (par. 17), telles que formulées dans son mémoire (mémoire du Cameroun, p. 669-671, par. 9), ne contiennent aucune demande spécifique tendant à ce que soit déterminé l'emplacement du tripoint Nigéria-Cameroun-Tchad dans le lac. La requête additionnelle prie la Cour de «préciser définitivement la frontière entre elle [la République du Cameroun] et la République fédérale du Nigéria du lac Tchad à la mer» (requête additionnelle, par. 17 *f)*), tandis que le mémoire prie la Cour de dire et juger:

> «que la frontière lacustre et terrestre entre le Cameroun et le Nigéria suit le tracé suivant:
>
> — du point de longitude 14° 04′ 59″ 9999 à l'est de Greenwich et de latitude de 13° 05′ 00″ 0001, nord, elle passe ensuite par le point situé à 14° 12′ 11″ 7 de longitude est et 12° 32′ 17″ 4 de latitude nord» (p. 669, par. 9.1 *a)*).

Ces conclusions ont néanmoins une incidence sur l'emplacement du tripoint. Elles pourraient mener soit à la confirmation de l'emplacement du tripoint tel qu'il a été accepté en pratique jusqu'à présent sur la base d'actes et d'accords des anciennes puissances coloniales et des démarcations opérées par la commission (voir paragraphe 65 ci-dessus), soit à une nouvelle détermination de l'emplacement du tripoint, comme suite éventuellement aux revendications que fait valoir le Nigéria sur Darak et des îles avoisinantes. Ces revendications ne sauraient être examinées au fond par la Cour au présent stade de la procédure. Mais la Cour notera à ce stade qu'elles sont dirigées contre le Cameroun et qu'elle pourra, le moment venu, prendre sa décision à cet égard sans se prononcer sur les intérêts du Tchad, comme elle va le montrer ci-après.

79. La Cour abordera donc maintenant l'élément clé de la quatrième exception préliminaire du Nigéria, à savoir l'affirmation selon laquelle la

real third States. *Inter se* boundary agreements from which third States are absent are frequent. Article 59 suffices as protection of the third States' rights. The concept of theoretical involvement of a third State in a boundary question is, in the view of Cameroon, not pertinent. There is no support for this concept, the implications of which are not clearly explained. Lastly Cameroon contests the efforts made by Nigeria to exclude the applicability of the *Frontier Dispute* Judgment to delimitation in lakes.

77. The Court notes that, to the extent that Nigeria's reference to the Lake Chad Basin Commission is to be understood as referring to an exclusive competence of the Commission for boundary delimitation in Lake Chad, this argument has been dealt with under the third preliminary objection. As the third preliminary objection has not been upheld, the Court need not deal with this argument again.

78. The Court moreover notes that the submissions of Cameroon addressed to it in the Additional Application (para. 17) and as formulated in the Memorial of Cameroon (Memorial of Cameroon, pp. 669-671, para. 9) do not contain a specific request to determine the localization of the tripoint Nigeria-Cameroon-Chad in the Lake. The Additional Application requests the Court "to specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea" (para. 17 *(f)* of the Additional Application), while the Memorial requests the Court to adjudge and declare:

> "that the lake and land boundary between Cameroon and Nigeria takes the following course:
>
> — from the point at longitude 14° 04′ 59″ 9999 E of Greenwich and latitude 13° 05′ 00″ 0001 N, it then runs through the point located at longitude 14° 12′ 11″ 7 E and latitude 12° 32′ 17″ 4 N" (p. 669, para. 9.1 *(a)*).

These submissions nevertheless bear upon the localization of the tripoint. They could lead either to a confirmation of the localization of the tripoint as accepted in practice up to now on the basis of acts and agreements of the former colonial powers and the demarcation carried out by the Commission (see paragraph 65 above), or they could lead to a redetermination of the situation of the tripoint, possibly as a consequence of Nigeria's claims to Darak and adjacent islands. Thus these claims cannot be considered on the merits by the Court at this stage of the proceedings. However, the Court notes, at the present stage, that they are directed against Cameroon and that in due course the Court will be in a position to take its decision in this regard without pronouncing on interests that Chad may have, as the Court will demonstrate hereafter.

79. The Court therefore now turns to the crux of Nigeria's fourth preliminary objection, namely the assertion that the legal interests of Chad

détermination du tripoint porterait atteinte aux intérêts juridiques du Tchad et que la Cour ne pourrait par suite procéder à cette détermination.

La Cour rappelle qu'elle a toujours reconnu comme un des principes fondamentaux de son Statut qu'aucun différend entre Etats ne peut être tranché sans le consentement de ces derniers à sa compétence (*Or monétaire pris à Rome en 1943, arrêt, C.I.J. Recueil 1954*, p. 32). Néanmoins, la Cour a également souligné qu'elle n'est pas nécessairement empêchée de statuer lorsque la décision qu'il lui est demandé de rendre est susceptible d'avoir des incidences sur les intérêts juridiques d'un Etat qui n'est pas partie à l'instance; et la Cour n'a refusé d'exercer sa compétence que lorsque les intérêts d'un Etat tiers «constituent ... l'objet même de la décision à rendre sur le fond» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 261, par. 55; *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 104-105, par. 34).

La Cour observera que les conclusions que le Cameroun lui a soumises visent sa frontière avec le Nigéria et uniquement cette frontière. Ces conclusions, que l'on se réfère à celles qui figurent dans la requête additionnelle du Cameroun ou à celles qui sont formulées dans son mémoire, ne visent nullement la frontière entre le Cameroun et la République du Tchad. Certes, l'invitation faite à la Cour de «préciser définitivement la frontière entre elle [la République du Cameroun] et la République fédérale du Nigéria du lac Tchad à la mer» (requête additionnelle, par. 17 *f)*) est susceptible d'affecter le tripoint, c'est-à-dire le point où les frontières du Cameroun, du Nigéria et du Tchad se rejoignent. Toutefois, la demande tendant à ce que soit précisée la frontière entre le Cameroun et le Nigéria du lac Tchad à la mer n'implique pas que le tripoint pourrait s'écarter de la ligne constituant la frontière entre le Cameroun et le Tchad. Ni le Cameroun ni le Nigéria ne contestent le tracé actuel de cette frontière au centre du lac, tel que décrit dans le «document technique de la démarcation des frontières» mentionné au paragraphe 65 ci-dessus. Les incidents survenus entre le Nigéria et le Tchad dans le lac, dont fait état le Nigéria, concernent celui-ci et le Tchad et non le Cameroun ou sa frontière avec le Tchad. Procéder à une nouvelle détermination du point où la frontière entre le Cameroun et le Nigéria rejoint celle entre le Tchad et le Cameroun ne pourrait conduire en l'espèce qu'au déplacement du tripoint le long de la ligne de la frontière, dans le lac, entre le Tchad et le Cameroun. Ainsi, les intérêts juridiques du Tchad, en tant qu'Etat tiers non partie à l'instance, ne constituent pas l'objet de la décision à rendre sur le fond de la requête du Cameroun; dès lors, l'absence du Tchad n'empêche nullement la Cour de se prononcer sur le tracé de la frontière entre le Cameroun et le Nigéria dans le lac.

80. La Cour relèvera aussi que, dans l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)*, le tripoint où la frontière entre la Libye et le Tchad rejoint la frontière occidentale du Soudan, sur le 24e méridien est de Greenwich, a été déterminé sans la participation du

would be affected by the determination of the tripoint, and that the Court can therefore not proceed to that determination.

The Court recalls that it has always acknowledged as one of the fundamental principles of its Statute that no dispute between States can be decided without their consent to its jurisdiction (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954,* p. 32.) Nevertheless, the Court has also emphasized that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case; and the Court has only declined to exercise jurisdiction when the interests of the third State "constitute the very subject-matter of the judgment to be rendered on the merits" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 104-105, para. 34).

The Court observes that the submissions presented to it by Cameroon refer to the frontier between Cameroon and Nigeria and to that frontier alone. These submissions do not refer to the frontier between Cameroon and the Republic of Chad either as contained in the Additional Application of Cameroon or as formulated in the Memorial. Certainly, the request to "specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea" (para. 17 *(f)* of the Additional Application) may affect the tripoint, i.e., the point where the frontiers of Cameroon, Chad and Nigeria meet. However, the request to specify the frontier between Cameroon and Nigeria from Lake Chad to the sea does not imply that the tripoint could be moved away from the line constituting the Cameroon-Chad boundary. Neither Cameroon nor Nigeria contests the current course of that boundary in the centre of Lake Chad as it is described in the "technical document on the demarcation of the . . . boundaries" mentioned in paragraph 65 above. Incidents between Nigeria and Chad in the Lake, as referred to by Nigeria, concern Nigeria and Chad but not Cameroon or its boundary with Chad. Any redefinition of the point where the frontier between Cameroon and Nigeria meets the Chad-Cameroon frontier could in the circumstances only lead to a moving of the tripoint along the line of the frontier in the Lake between Chad and Cameroon. Thus, the legal interests of Chad as a third State not party to the case do not constitute the very subject-matter of the judgment to be rendered on the merits of Cameroon's Application; and therefore, the absence of Chad does not prevent the Court from proceeding to a specification of the border between Cameroon and Nigeria in the Lake.

80. The Court notes also that, in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the tripoint where the boundary between Libya and Chad meets the western boundary of the Sudan, on the 24th meridian east of Greenwich, was determined without involve-

Soudan. Les points terminaux à l'est des principales lignes prises en considération par la Cour dans cette affaire, pour la délimitation de la frontière entre la Libye et le Tchad, étaient situés à divers emplacements sur la frontière occidentale du Soudan.

En outre, la Cour a, dans cette même affaire, fixé, en l'absence du Niger, la frontière occidentale entre la Libye et le Tchad jusqu'au point d'intersection du 15e méridien est et du 23e parallèle nord, point où, selon le Tchad, se rejoindraient les frontières de la Libye, du Niger et du Tchad.

81. Les faits de l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* sont tout à fait différents de ceux de la présente espèce, étant donné que la section en cause de la frontière du Niger n'était pas délimitée à l'époque considérée. La détermination du tripoint dans cette affaire concernait donc directement le Niger en tant qu'État tiers, ce qui d'ailleurs n'a pas empêché la Chambre de tracer la frontière entre le Burkina Faso et la République du Mali jusqu'à son point extrême. La question de savoir s'il faudra effectivement déplacer l'emplacement du tripoint dans le lac Tchad par rapport à la position où il se situe actuellement sera résolue lorsque la Cour aura rendu son arrêt sur le fond. Ce déplacement serait sans conséquence pour le Tchad.

82. Finalement, la Cour observera que, du fait que ni le Cameroun ni le Nigéria ne contestent le tracé actuel de la frontière, au centre du lac Tchad, entre le Cameroun et la République du Tchad (voir paragraphe 79 ci-dessus), elle n'a pas — à supposer même que cela fût possible au stade préliminaire actuel — à examiner l'argumentation présentée par le Nigéria en ce qui concerne les principes juridiques applicables à la détermination des frontières lacustres, spécialement dans le cas de grands lacs comme le lac Tchad.

83. La quatrième exception préliminaire doit donc être rejetée.

* *

CINQUIÈME EXCEPTION PRÉLIMINAIRE

84. Dans sa cinquième exception préliminaire, le Nigéria fait valoir qu'il n'existe pas de différend concernant «la délimitation de la frontière en tant que telle» sur toute sa longueur entre le tripoint du lac Tchad et la mer sous réserve, dans le lac Tchad, de la question du titre sur Darak et sur des îles avoisinantes et sous réserve de la question du titre sur la presqu'île de Bakassi.

85. Lors des plaidoiries, il est devenu clair que, outre les revendications sur Darak et Bakassi, le Nigéria et le Cameroun ont des prétentions contraires en ce qui concerne le village de Tipsan qui, selon l'une et l'autre des Parties, serait situé de son côté de la frontière. Un membre de la Cour a également demandé aux Parties lors de la procédure orale si le fait que le Nigéria soutient devant la Cour qu'il n'existe pas de différend

ment of the Sudan. The eastern end-points of the principal lines taken into consideration by the Court in that case for the delimitation of the boundary between Libya and Chad were situated at various locations on the western boundary of the Sudan.

Furthermore, in that case, the Court, in the absence of Niger, fixed the western boundary between Libya and Chad as far as the point of intersection of the 15th meridian east and the parallel 23° of latitude north, a point at which, according to Chad, the frontiers of Chad, Libya and Niger meet.

81. The factual situation underlying the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* was quite different from the present case in the sense that the relevant part of the boundary of Niger at the time was not delimited; in that case the fixing of the tripoint therefore immediately involved Niger as a third State, which, however, did not prevent the Chamber from tracing the boundary between Burkina Faso and the Republic of Mali to its furthest point. Whether the location of the tripoint in Lake Chad has actually to be changed from its present position will follow from the judgment on the merits of Cameroon's Application. Such a change would have no consequence for Chad.

82. Finally the Court observes that, since neither Cameroon nor Nigeria challenge the current course of the boundary, in the centre of Lake Chad, between Cameroon and the Republic of Chad (see paragraph 79 above), it does not have to address — even if that was possible at the present preliminary stage — the argument presented by Nigeria concerning the legal principles applicable to the determination of boundaries in lakes and especially in large lakes like Lake Chad.

83. The fourth preliminary objection is accordingly rejected.

* *

Fifth Preliminary Objection

84. In its fifth preliminary objection Nigeria alleges that there is no dispute concerning "boundary delimitation as such" throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, subject, within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula.

85. In the course of the oral proceedings, it became clear that in addition to Darak and Bakassi, there are competing claims of Nigeria and Cameroon in respect of the village of Tipsan, which each Party claims to be on its side of the boundary. Also, in the course of the oral proceedings, a question was asked of the Parties by a Member of the Court as to whether Nigeria's assertion that there is no dispute as regards the land

en ce qui concerne la frontière terrestre entre les deux Etats (sous réserve des problèmes existants dans la presqu'île de Bakassi et la région de Darak) signifie

> «que, en dehors de ces deux secteurs, il y a accord du Nigéria avec le Cameroun sur les coordonnées géographiques de cette frontière, telles qu'elles résulteraient des textes invoqués par le Cameroun dans sa requête et son mémoire».

La réponse donnée par le Nigéria à cette question sera examinée ci-après (paragraphe 91).

86. Pour le Cameroun, sa frontière actuelle avec le Nigéria a été délimitée avec précision par les anciennes puissances coloniales ainsi que par des décisions de la Société des Nations et des actes de l'Organisation des Nations Unies.

Ces délimitations ont été confirmées ou complétées par des accords conclus directement entre le Cameroun et le Nigéria après leur indépendance. Le Cameroun demande à la Cour «de bien vouloir préciser définitivement la frontière entre elle et le Nigéria du lac Tchad à la mer» (requête additionnelle, par. 17 *f)*) le long d'une ligne dont les coordonnées sont indiquées dans le mémoire du Cameroun.

Le fait que le Nigéria revendique des titres sur la presqu'île de Bakassi et Darak ainsi que sur des îles avoisinantes signifie, selon le Cameroun, que le Nigéria conteste la validité de ces instruments juridiques et remet ainsi en cause l'ensemble de la frontière qui est fondé sur ceux-ci. Pour le Cameroun, la survenance le long de la frontière de nombreux incidents et incursions en est la confirmation. Les revendications du Nigéria sur la presqu'île de Bakassi ainsi que sa position quant à la déclaration de Maroua mettent également en question le fondement de la frontière maritime entre les deux pays. Selon le Cameroun, contrairement à ce qu'affirme le Nigéria, un différend s'est élevé entre les deux Etats au sujet de l'ensemble de la frontière.

87. La Cour rappellera que:

> «au sens admis dans sa jurisprudence et celle de sa devancière un différend est un désaccord sur un point de droit ou de fait, un conflit, une opposition de thèses juridiques ou d'intérêts entre des parties (voir *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 11; *Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p. 27, et *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies, avis consultatif, C.I.J. Recueil 1988*, p. 27, par. 35)» (*Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 99-100, par. 22),

et que,

> «[p]our établir l'existence d'un différend: «Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre» (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J.*

boundary between the two States (subject to the existing problems in the Bakassi Peninsula and the Darak region) signifies,

> "that, these two sectors apart, there is agreement between Nigeria and Cameroon on the geographical co-ordinates of this boundary as they result from the texts relied on by Cameroon in its Application and its Memorial".

The reply given to this question by Nigeria will be examined below (paragraph 91).

86. For Cameroon its existing boundary with Nigeria was precisely delimited by the former colonial powers and by decisions of the League of Nations and acts of the United Nations.

These delimitations were confirmed or completed by agreements made directly between Cameroon and Nigeria after their independence. Cameroon requests that the Court "specify definitively the frontier between Cameroon and Nigeria from Lake Chad to the sea" (Additional Application, para. 17 *(f)*) along a line the co-ordinates of which are given in Cameroon's Memorial.

The fact that Nigeria claims title to the Bakassi Peninsula and Darak, and adjacent islands, means, in the view of Cameroon, that Nigeria contests the validity of these legal instruments and thus calls into question the entire boundary which is based on them. That, in the view of Cameroon, is confirmed by the occurrence, along the boundary, of numerous incidents and incursions. Nigeria's claims to Bakassi as well as its position regarding the Maroua Declaration also throw into doubt the basis of the maritime boundary between the two countries. In Cameroon's view, and contrary to what Nigeria asserts, a dispute has arisen between the two States concerning the whole of the boundary.

87. The Court recalls that,

> "in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 35)" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22);

and that,

> "[i]n order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*,

Recueil 1962, p. 328); par ailleurs, «l'existence d'un différend international demande à être établie objectivement» (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950,* p. 74)» (*C.I.J. Recueil 1995*, p. 100).

Sur la base de ces critères, il existe bel et bien des différends en ce qui concerne Darak et des îles avoisinantes, Tipsan ainsi que la presqu'île de Bakassi. Ce dernier différend pourrait, comme il a été indiqué par le Cameroun, avoir une influence sur la frontière maritime entre les deux Parties.

88. Tous ces différends concernent la frontière entre le Cameroun et le Nigéria. Etant donné toutefois la longueur totale de cette frontière qui s'étend sur plus de 1600 kilomètres, du lac Tchad jusqu'à la mer, on ne saurait affirmer que ces différends par eux-mêmes concernent une portion si importante de la frontière qu'il existerait de ce fait et nécessairement un différend portant sur l'ensemble de celle-ci.

89. En outre, la Cour relèvera que le Nigéria ne conteste pas expressément l'ensemble de la frontière. Mais un désaccord sur un point de droit ou de fait, un conflit, une opposition de thèses juridiques ou d'intérêts ou le fait que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre ne doivent pas nécessairement être énoncés *expressis verbis*. Pour déterminer l'existence d'un différend, il est possible, comme en d'autres domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie. A cet égard, la Cour ne trouve pas convaincante la thèse du Cameroun selon laquelle la contestation par le Nigéria de la validité des titres existants sur Bakassi, Darak et Tipsan met nécessairement en cause la validité en tant que telle des instruments sur lesquels repose le tracé de la totalité de la frontière depuis le tripoint dans le lac Tchad jusqu'à la mer et prouve ainsi l'existence d'un différend concernant l'ensemble de cette frontière.

90. Il convient certainement dans ce contexte de tenir compte de la survenance d'incidents frontaliers. Mais chaque incident frontalier n'implique pas une remise en cause de la frontière. De plus, certains des incidents dont le Cameroun fait état sont survenus dans des zones difficiles d'accès, où la démarcation de la frontière est inexistante ou imprécise. Et chaque incursion ou incident signalé par le Cameroun n'est pas nécessairement imputable à des personnes dont le comportement serait susceptible d'engager la responsabilité du Nigéria. Même considérés conjointement avec les différends frontaliers existants, les incidents et incursions dont fait état le Cameroun n'établissent pas par eux-mêmes l'existence d'un différend concernant l'ensemble de la frontière entre le Cameroun et le Nigéria.

91. La Cour relèvera cependant que le Nigéria s'est constamment montré réservé dans la manière de présenter sa propre position sur ce point. Bien qu'il ait été au courant des préoccupations et des inquiétudes du Cameroun, il a répété, sans en dire davantage, qu'il n'existe pas de

p. 328); and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)" (*I.C.J. Reports 1995*, p. 100).

On the basis of these criteria, there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the Peninsula of Bakassi. This latter dispute, as indicated by Cameroon, might have a bearing on the maritime boundary between the two Parties.

88. All of these disputes concern the boundary between Cameroon and Nigeria. However, given the great length of that boundary, which runs over more than 1,600 km from Lake Chad to the sea, it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary.

89. Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party. In this respect the Court does not find persuasive the argument of Cameroon that the challenge by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the sea is based, and therefore proves the existence of a dispute concerning the whole of the boundary.

90. The occurrence of boundary incidents certainly has to be taken into account in this context. However, not every boundary incident implies a challenge to the boundary. Also, certain of the incidents referred to by Cameroon took place in areas which are difficult to reach and where the boundary demarcation may have been absent or imprecise. And not every incursion or incident alleged by Cameroon is necessarily attributable to persons for whose behaviour Nigeria's responsibility might be engaged. Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.

91. However, the Court notes that Nigeria has constantly been reserved in the manner in which it has presented its own position on the matter. Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no

différend concernant «la délimitation de la frontière en tant que telle». La même prudence caractérise la réponse donnée par le Nigéria à la question qu'un membre de la Cour a posée à l'audience (voir paragraphe 85 ci-dessus). La question était de savoir s'il y avait accord entre les Parties sur les coordonnées géographiques de la frontière, telles que revendiquées par le Cameroun sur la base des textes qu'il invoque. La réponse du Nigéria se lit comme suit:

> «La frontière terrestre entre le Nigéria et le Cameroun n'est pas décrite par référence à des coordonnées géographiques. Ce sont plutôt les instruments pertinents (qui sont tous antérieurs à l'indépendance du Nigéria et du Cameroun) ainsi que la pratique bien établie, tant avant qu'après l'indépendance, qui fixent la frontière par référence à des caractéristiques physiques telles que ruisseaux, rivières, montagnes et routes, comme c'était couramment le cas à cette époque. Depuis l'indépendance, les deux Etats n'ont pas conclu d'accord bilatéral qui confirme expressément ou définisse de toute autre manière, par référence à des coordonnées géographiques, la frontière préexistant à l'indépendance. Le tracé de la frontière, qui était bien établi avant l'indépendance et les procédures de l'Organisation des Nations Unies qui s'y rapportent, a néanmoins continué d'être accepté en pratique depuis lors par le Nigéria et le Cameroun.»

92. La Cour notera que, dans cette réponse, le Nigéria n'indique pas s'il est ou non d'accord avec le Cameroun sur le tracé de la frontière ou sur sa base juridique, encore qu'il soit clairement en désaccord avec le Cameroun en ce qui concerne Darak et des îles avoisinantes, Tipsan et Bakassi. Le Nigéria déclare que la frontière terrestre existante est décrite par référence non à des coordonnées géographiques, mais à des caractéristiques physiques. S'agissant de la base juridique de la frontière, le Nigéria se réfère à des «instruments pertinents» sans préciser de quels instruments il s'agit; il déclare cependant qu'ils étaient antérieurs à l'indépendance et que depuis lors aucun accord bilatéral «qui confirme expressément ou définisse de toute autre manière, par référence à des coordonnées géographiques, la frontière préexistant à l'indépendance» n'a été conclu entre les Parties. Une telle formulation semble suggérer que les instruments existants appellent une confirmation. En outre, le Nigéria évoque la «pratique bien établie tant avant qu'après l'indépendance» comme une des bases juridiques de la frontière dont le tracé, déclare-t-il, a «continué d'être accepté en pratique»; il n'indique pas cependant de quelle pratique il s'agit.

93. La Cour est saisie de conclusions du Cameroun tendant à ce que sa frontière avec le Nigéria soit précisée définitivement du lac Tchad à la mer (voir paragraphe 86 ci-dessus). Le Nigéria soutient qu'il n'existe pas de différend concernant la délimitation de cette frontière en tant que telle sur toute sa longueur depuis le tripoint du lac Tchad jusqu'à la mer (voir paragraphe 84 ci-dessus) et que la demande du Cameroun aux fins de

dispute concerning "boundary delimitation as such". Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the oral proceedings (see paragraph 85 above). This question was whether there is agreement between the Parties on the geographical co-ordinates of the boundary as claimed by Cameroon on the basis of the texts it relies upon. The reply given by Nigeria reads as follows:

> "The land boundary between Nigeria and Cameroon is not described by reference to geographical co-ordinates. Rather, the relevant instruments (all of which pre-date the independence of Nigeria and Cameroon) and well-established practice, both before and after independence, fix the boundary by reference to physical features such as streams, rivers, mountains and roads, as was common in those days. Since independence, the two States have not concluded any bilateral agreement expressly confirming or otherwise describing the pre-independence boundary by reference to geographical co-ordinates. Nevertheless, the course of the boundary, which was well established before independence and related United Nations procedures, has continued to be accepted in practice since then by Nigeria and Cameroon."

92. The Court notes that, in this reply, Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or on its legal basis, though clearly it does differ with Cameroon about Darak and adjacent islands, Tipsan and Bakassi. Nigeria states that the existing land boundary is not described by reference to geographical co-ordinates but by reference to physical features. As to the legal basis on which the boundary rests, Nigeria refers to "relevant instruments" without specifying which these instruments are apart from saying that they pre-date independence and that, since independence, no bilateral agreements "expressly confirming or otherwise describing the pre-independence boundary by reference to geographical co-ordinates" have been concluded between the Parties. That wording seems to suggest that the existing instruments may require confirmation. Moreover, Nigeria refers to "well-established practice both before and after independence" as one of the legal bases of the boundary whose course, it states, "has continued to be accepted in practice"; however, it does not indicate what that practice is.

93. The Court is seised with the submission of Cameroon which aims at a definitive determination of its boundary with Nigeria from Lake Chad to the sea (see paragraph 86 above). Nigeria maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length from the tripoint in Lake Chad to the sea (see paragraph 84 above) and that Cameroon's request definitively to determine

fixer définitivement la frontière n'est pas recevable en l'absence d'un tel différend. Le Nigéria n'a cependant pas marqué son accord avec le Cameroun sur le tracé de cette frontière ou sur sa base juridique (voir paragraphe 92 ci-dessus) et il n'a pas fait connaître à la Cour la position qu'il adoptera ultérieurement sur les revendications du Cameroun. Le Nigéria est en droit de ne pas avancer, au présent stade de la procédure, des arguments qu'il considère comme relevant du fond, mais en pareille circonstance la Cour se trouve dans une situation telle qu'elle ne saurait se refuser à examiner les conclusions du Cameroun par le motif qu'il n'existerait pas de différend entre les deux Etats. Du fait de la position prise par le Nigéria, l'étendue exacte de ce différend ne saurait être déterminée à l'heure actuelle; un différend n'en existe pas moins entre les deux Parties, à tout le moins en ce qui concerne les bases juridiques de la frontière et il appartient à la Cour d'en connaître.

94. La cinquième exception préliminaire soulevée par le Nigéria doit donc être rejetée.

* *

SIXIÈME EXCEPTION PRÉLIMINAIRE

95. La Cour examinera maintenant la sixième exception préliminaire soulevée par le Nigéria, selon laquelle aucun élément ne permet au juge de décider que la responsabilité internationale du Nigéria est engagée en raison de prétendues incursions frontalières.

96. Selon le Nigéria, les conclusions du Cameroun ne satisfont pas aux exigences de l'article 38 du Règlement de la Cour et des principes généraux du droit qui prescrivent que soient clairement présentés les faits sur lesquels repose la requête du Cameroun, y compris les dates, les circonstances et les lieux précis des incursions et incidents allégués sur le territoire camerounais. Le Nigéria soutient que les éléments que le Cameroun a soumis à la Cour ne lui fournissent pas les informations dont il a besoin et auxquelles il a droit aux fins de préparer sa réponse. De même, selon le Nigéria, les éléments fournis sont si fragmentaires qu'ils ne permettent pas à la Cour de trancher équitablement et utilement, sur le plan judiciaire, les questions de responsabilité d'Etat et de réparation soulevées par le Cameroun. Tout en reconnaissant qu'un Etat dispose d'une certaine latitude pour développer ultérieurement le contenu de sa requête et de son mémoire, le Nigéria affirme que le Cameroun doit pour l'essentiel s'en tenir, dans ses développements, à l'affaire telle qu'elle a été présentée dans la requête.

97. Le Cameroun souligne qu'il a clairement indiqué dans ses écritures et plaidoiries que c'est seulement à titre indicatif qu'il s'est référé à certains faits pour établir la responsabilité du Nigéria et qu'il pourrait, le cas échéant, développer ces faits lors de la phase de l'examen au fond. Le Cameroun renvoie aux prescriptions du paragraphe 2 de l'article 38 du Règlement, qui fait mention d'un exposé «succinct» des faits. Il prétend

that boundary is not admissible in the absence of such a dispute. However, Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis (see paragraph 92 above) and it has not informed the Court of the position which it will take in the future on Cameroon's claims. Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute.

94. The fifth preliminary objection raised by Nigeria is thus rejected.

* *

SIXTH PRELIMINARY OBJECTION

95. The Court will now turn to Nigeria's sixth preliminary objection which is to the effect that there is no basis for a judicial determination that Nigeria bears international responsibility for alleged frontier incursions.

96. Nigeria contends that the submissions of Cameroon do not meet the standard required by Article 38 of the Rules of Court and general principles of law regarding the adequate presentation of facts on which Cameroon's request is based, including dates, the circumstances and precise locations of the alleged incursions and incidents into and on Cameroonian territory. Nigeria maintains that what Cameroon has presented to the Court does not give Nigeria the knowledge which it needs and to which it is entitled in order to prepare its reply. Similarly, in Nigeria's view, the material submitted is so sparse that it does not enable the Court to carry out fair and effective judicial determination of, or make determination on, the issues of State responsibility and reparation raised by Cameroon. While Nigeria acknowledges that a State has some latitude in expanding later on what it has said in its Application and in its Memorial, Cameroon is said to be essentially restricted in its elaboration to the case as presented in its Application.

97. Cameroon insists that it stated clearly in its pleadings that the facts referred to in order to establish Nigeria's responsibility were only of an indicative nature and that it could, where necessary, amplify those facts when it comes to the merits. Cameroon refers to the requirements established in Article 38, paragraph 2, of the Rules and which call for a "succinct" presentation of the facts. It holds that parties are free to develop

qu'il est loisible aux parties de développer ou de préciser au cours de la procédure les faits de l'affaire tels que présentés dans la requête.

98. La décision sur la sixième exception préliminaire du Nigéria dépend de la question de savoir si sont réunies en l'espèce les conditions que doit remplir une requête, telles qu'énoncées au paragraphe 2 de l'article 38 du Règlement de la Cour. Aux termes de ce paragraphe, la requête «indique ... la nature précise de la demande et contient un exposé succinct des faits et moyens sur lesquels cette demande repose». La Cour relève que le mot «succinct», au sens ordinaire de ce terme, ne signifie pas «complet» et que, ni le contexte dans lequel ce terme est employé au paragraphe 2 de l'article 38 du Règlement de la Cour, ni l'objet et le but de cette disposition ne conduisent à une telle interprétation. Le paragraphe 2 de l'article 38 n'exclut donc pas que l'exposé des faits et des motifs sur lesquels repose une demande soit complété ultérieurement.

99. Il ne découle pas davantage du paragraphe 2 de l'article 38 que la latitude dont dispose l'Etat demandeur pour développer ce qu'il a exposé dans sa requête soit strictement limitée, comme le suggère le Nigéria. Une telle conclusion ne saurait être tirée du terme «succinct»; elle ne saurait non plus être tirée des prononcés de la Cour selon lesquels la date pertinente pour apprécier la recevabilité d'une requête est la date de son dépôt; en effet, ces prononcés ne se réfèrent pas au contenu des requêtes (*Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 26, par. 44, et *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 130, par. 43). Une interprétation aussi restrictive ne correspondrait pas davantage aux conclusions de la Cour selon lesquelles

> «si, en vertu de l'article 40 du Statut, l'objet d'un différend porté devant la Cour *doit être* indiqué, l'article 32, paragraphe 2, du Règlement de la Cour [aujourd'hui l'article 38, paragraphe 2] impose au demandeur de se conformer «autant que possible» à certaines prescriptions. Cette expression s'applique non seulement à la mention de la disposition par laquelle le requérant prétend établir la compétence de la Cour mais aussi à l'indication précise de l'objet de la demande et à l'exposé succinct des faits et des motifs par lesquels la demande est prétendue justifiée.» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 28.)

La Cour rappellera également que, selon une pratique établie, les Etats qui déposent une requête à la Cour se réservent le droit de présenter ultérieurement des éléments de fait et de droit supplémentaires. Cette liberté de présenter de tels éléments trouve sa limite dans l'exigence que «le différend porté devant la Cour par requête ne se trouve pas transformé en

the facts of the case presented in the application or to render them more precise in the course of the proceedings.

98. The decision on Nigeria's sixth preliminary objection hinges upon the question of whether the requirements which an application must meet and which are set out in Article 38, paragraph 2, of the Rules of Court are met in the present instance. The requirements set out in Article 38, paragraph 2, are that the Application shall "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". The Court notes that "succinct", in the ordinary meaning to be given to this term, does not mean "complete" and neither the context in which the term is used in Article 38, paragraph 2, of the Rules of Court nor the object and purpose of that provision indicate that it should be interpreted in that way. Article 38, paragraph 2, does therefore not preclude later additions to the statement of the facts and grounds on which a claim is based.

99. Nor does Article 38, paragraph 2, provide that the latitude of an applicant State, in developing what it has said in its application is strictly limited, as suggested by Nigeria. That conclusion cannot be inferred from the term "succinct"; nor can it be drawn from the Court's pronouncements on the importance of the point of time of the submission of the application as the critical date for the determination of its admissibility; these pronouncements do not refer to the content of applications (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 130, para. 43). Nor would so narrow an interpretation correspond to the finding of the Court that,

> "whilst under Article 40 of its Statute the subject of a dispute brought before the Court *shall be* indicated, Article 32 (2) of the Rules of Court [today Article 38, paragraph 2] requires the Applicant 'as far as possible' to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving a succinct statement of the facts and grounds on which the claim is based." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28.)

The Court also recalls that it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations. The limit of the freedom to present such facts and considerations is "that the result is not to transform the dispute brought before the Court by the application into

un autre différend dont le caractère ne serait pas le même» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984,* p. 427, par. 80). En l'espèce, le Cameroun n'a pas opéré une telle transformation du différend.

100. En ce qui concerne le sens à donner au terme «succinct», la Cour se bornera à noter que dans la présente affaire la requête du Cameroun contient un exposé suffisamment précis des faits et moyens sur lesquels s'appuie le demandeur. Cet exposé remplit les conditions fixées par le paragraphe 2 de l'article 38 du Statut et la requête est par suite recevable.

Cette constatation ne préjuge cependant en rien la question de savoir si, compte tenu des éléments fournis à la Cour, les faits allégués par le demandeur sont ou non établis et si les moyens invoqués par lui sont ou non fondés. Ces questions relèvent du fond et il ne saurait en être préjugé dans la présente phase de l'affaire.

101. La Cour ne saurait enfin accepter l'idée selon laquelle le Nigéria se trouverait dans l'impossibilité de répondre utilement aux allégations présentées ou qu'elle-même se trouverait en définitive dans l'impossibilité de se prononcer équitablement et utilement à la lumière des preuves et moyens dont elle dispose du fait que, selon le Nigéria, la requête du Cameroun ne serait pas suffisamment claire et complète et serait inadéquate. C'est au demandeur de subir les conséquences d'une requête qui ne contiendrait pas un exposé satisfaisant des faits et motifs sur lesquels repose sa demande. Comme la Cour l'a dit dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)* :

> «c'est en définitive au plaideur qui cherche à établir un fait qu'incombe la charge de la preuve; lorsque celle-ci n'est pas produite, une conclusion peut être rejetée dans l'arrêt comme insuffisamment démontrée, mais elle ne saurait être déclarée irrecevable *in limine* parce qu'on prévoit que les preuves feront défaut» (*ibid.*, p. 437, par. 101).

102. En conséquence, la Cour rejette la sixième exception préliminaire soulevée par le Nigéria.

* *

SEPTIÈME EXCEPTION PRÉLIMINAIRE

103. Dans sa septième exception préliminaire, le Nigéria a soutenu qu'il n'existe pas de différend juridique concernant la délimitation de la frontière maritime entre les deux Parties, qui se prêterait actuellement à une décision de la Cour.

104. Le Nigéria déclare qu'il en est ainsi pour deux motifs: en premier lieu, il n'est pas possible de déterminer la frontière maritime avant de se prononcer sur le titre concernant la presqu'île de Bakassi. En second lieu, dans l'éventualité où une décision serait prise sur la question du titre

another dispute which is different in character" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80). In this case, Cameroon has not so transformed the dispute.

100. As regards the meaning to be given to the term "succinct", the Court would simply note that Cameroon's Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible.

This observation does not, however, prejudge the question whether, taking account of the information submitted to the Court, the facts alleged by the Applicant are established or not, and whether the grounds it relies upon are founded or not. Those questions belong to the merits and may not be prejudged in this phase of the proceedings.

101. Lastly, the Court cannot agree that the lack of sufficient clarity and completeness in Cameroon's Application and its inadequate character, as perceived by Nigeria, make it impossible for Nigeria to respond effectively to the allegations which have been presented or makes it impossible for the Court ultimately to make a fair and effective determination in the light of the arguments and the evidence then before it. It is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based. As the Court has stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*:

> "[u]ltimately . . . however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof." (*Ibid.*, p. 437, para. 101.)

102. The Court consequently rejects the sixth preliminary objection raised by Nigeria.

* *

SEVENTH PRELIMINARY OBJECTION

103. In its seventh preliminary objection Nigeria contends that there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court.

104. Nigeria says that this is so for two reasons: in the first place, no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula. Secondly, at the juncture when there is a determination of the question of title over the Bakassi

concernant la presqu'île de Bakassi, les demandes concernant les questions de délimitation maritime n'en seraient pas moins irrecevables faute d'action antérieure suffisante des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international». De l'avis du Nigéria, la Cour ne saurait être valablement saisie par voie de requête unilatérale d'un Etat de la délimitation d'une zone économique exclusive ou d'un plateau continental, si l'Etat en cause n'a fait aucune tentative pour parvenir à un accord avec l'Etat défendeur au sujet de cette frontière, contrairement aux prescriptions des articles 74 et 83 de la convention des Nations Unies sur le droit de la mer. Selon le Nigéria, une telle requête unilatérale est irrecevable.

105. Le Cameroun estime que le premier moyen invoqué par le Nigéria ne se rapporte ni à la compétence de la Cour ni à la recevabilité de la requête, mais concerne simplement la méthode la plus indiquée pour examiner l'affaire au fond, décision qui relève du pouvoir discrétionnaire de la Cour. Quant au second moyen avancé par le Nigéria, le Cameroun conteste que des négociations soient une condition préalable à l'introduction d'une instance devant la Cour dans des affaires de délimitation. Le Cameroun considère le paragraphe 2 de l'article 74 et le paragraphe 2 de l'article 83 de la convention des Nations Unies sur le droit de la mer, dont les libellés sont identiques, non comme interdisant le recours au règlement par tierce partie, mais comme rendant obligatoire un tel recours en vue d'éviter des délimitations unilatérales.

Le Cameroun indique, en tout état de cause, qu'il a suffisamment négocié avec le Nigéria avant de saisir la Cour, et qu'il n'a saisi cette dernière que lorsqu'il est devenu évident que toute nouvelle négociation serait vouée à l'échec. Sur ce point, il soutient que depuis l'occupation effective de la presqu'île de Bakassi par le Nigéria, toute négociation concernant la délimitation de la frontière maritime est devenue impossible.

106. La Cour examinera tout d'abord le premier moyen présenté par le Nigéria. La Cour reconnaît qu'il serait difficile, sinon impossible, de déterminer quelle est la délimitation de la frontière maritime entre les Parties aussi longtemps que la question du titre concernant la presqu'île de Bakassi n'aura pas été réglée. La Cour relèvera, toutefois, que, dans sa requête, le Cameroun prie non seulement la Cour

> «de procéder au prolongement du tracé de sa frontière maritime avec la République fédérale du Nigéria jusqu'à la limite des zones maritimes que le droit international place sous leur juridiction respective» (requête du Cameroun du 29 mars 1994, p. 14, par. 20, alinéa *f)*),

mais aussi:

> «de dire et juger:
>
> *a)* que la souveraineté sur la presqu'île de Bakassi est camerounaise, en vertu du droit international, et que cette presqu'île fait partie intégrante du territoire de la République du Cameroun» (*ibid.*, par. 20).

Peninsula, the issues of maritime delimitation will not be admissible in the absence of prior sufficient action by the Parties, on a footing of equality, to effect a delimitation "by agreement on the basis of international law". In Nigeria's view, the Court cannot properly be seised by the unilateral application of one State in relation to the delimitation of an exclusive economic zone or continental shelf boundary if that State has made no attempt to reach agreement with the respondent State over that boundary, contrary to the provisions of Articles 74 and 83 of the United Nations Convention on the Law of the Sea. Any such unilateral application, in the view of Nigeria, is inadmissible.

105. Cameroon is of the view that the first argument invoked by Nigeria concerns neither jurisdiction nor the admissibility of its Application, but simply the method whereby the merits of the case are best addressed, a decision which falls within the discretion of the Court. As to the second argument put forward by Nigeria, Cameroon denies that the conduct of negotiations is a precondition for instituting proceedings before the Court in cases of delimitation. Cameroon views the identical paragraphs 2 of Articles 74 and 83 of the United Nations Convention on the Law of the Sea not as barring recourse to third party settlement, but as an obligation for such recourse in order to avoid unilateral delimitations.

Cameroon says that, in any event, it had sufficiently negotiated with Nigeria before it seised the Court, and it seised the Court only when it became clear that any new negotiation would be doomed to failure. In this respect, it contends that since the actual occupation of the Bakassi Peninsula by Nigeria, any negotiation on the delimitation of the maritime boundary has become impossible.

106. The Court will initially address the first argument presented by Nigeria. The Court accepts that it will be difficult if not impossible to determine the delimitation of the maritime boundary between the Parties as long as the title over the Peninsula of Bakassi has not been determined. The Court notes, however, that Cameroon's Application not only requests the Court

> "to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions" (Application of Cameroon of 29 March 1994, p. 15, para. 20 *(f)*),

but also,

> "to adjudge and declare:
>
> *(a)* that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon" (*ibid.*, para. 20).

Les deux questions étant ainsi soumises à la Cour, c'est à elle qu'il appartient de régler l'ordre dans lequel elle examinera ces questions, de telle sorte qu'elle puisse traiter au fond chacune d'entre elles. C'est là une question qui relève du pouvoir discrétionnaire de la Cour et qui ne saurait fonder une exception préliminaire. Par voie de conséquence, le moyen doit être écarté.

107. Quant au second moyen du Nigéria, la Cour notera tout d'abord qu'alors que son premier moyen concernait la totalité de la frontière maritime, le second ne semble viser que la délimitation à partir du point G vers le large. C'est ce qu'a reconnu un conseil du Nigéria et cela semble correspondre au fait que de nombreuses négociations ont eu lieu entre les Parties de 1970 à 1975 en ce qui concerne la frontière maritime à partir des atterrages de Bakassi jusqu'au point G, négociations qui ont abouti à la déclaration de Maroua sur laquelle les Parties sont en désaccord.

La Cour rappellera en outre que, lorsqu'elle traite des affaires qui sont portées devant elle, elle doit s'en tenir aux demandes précises qui lui sont soumises. Or, le Nigéria demande ici à la Cour de conclure que:

> «dans l'éventualité où la question du titre concernant la presqu'île de Bakassi serait réglée, les demandes concernant les questions de délimitation maritime ne seront pas recevables faute de mesures suffisantes des Parties pour effectuer, sur un pied d'égalité, une délimitation «par voie d'accord conformément au droit international».

Ainsi, ce qui est en litige entre les Parties et ce que la Cour doit trancher dès maintenant est la question de savoir si l'absence alléguée d'efforts suffisants pour négocier empêche la Cour de déclarer ou non recevable la demande du Cameroun.

Une telle question revêt un caractère véritablement préliminaire et doit être tranchée conformément aux dispositions de l'article 79 du Règlement de la Cour.

108. A cet égard, le Cameroun et le Nigéria se réfèrent à la convention des Nations Unies sur le droit de la mer à laquelle ils sont parties. L'article 74 de la convention, relatif à la zone économique exclusive, et l'article 83, concernant le plateau continental, disposent en leur paragraphe 1, en termes identiques, que la délimitation

> «entre Etats dont les côtes sont adjacentes ou se font face est effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à une solution équitable».

Ces paragraphes sont suivis de paragraphes 2 identiques qui se lisent comme suit: «S'ils ne parviennent pas à un accord dans un délai raisonnable, les Etats concernés ont recours aux procédures prévues à la partie XV.» L'une de ces procédures consiste à soumettre l'affaire à la Cour en vue de son règlement par la voie contentieuse.

109. La Cour observera cependant qu'en l'espèce elle n'a pas été saisie sur la base du paragraphe 1 de l'article 36 du Statut et, par application de

Since, therefore, both questions are before the Court, it becomes a matter for the Court to arrange the order in which it addresses the issues in such a way that it can deal substantively with each of them. That is a matter which lies within the Court's discretion and which cannot be the basis of a preliminary objection. This argument therefore has to be dismissed.

107. As to the second argument of Nigeria, the Court notes that, while its first argument concerned the whole maritime boundary, the second one seems only to concern the delimitation from point G seawards. That was accepted by counsel for Nigeria and seems to correspond to the fact that there were extensive negotiations between the two Parties in the period between 1970 and 1975 on the maritime boundary from the landfall on Bakassi to point G, which resulted in the disputed Maroua Declaration.

Moreover, the Court recalls that, in dealing with the cases brought before it, it must adhere to the precise request submitted to it. Nigeria here requests the Court to hold that,

> "at the juncture where there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law' ".

What is therefore in dispute between the Parties and what the Court has to decide now is whether the alleged absence of sufficient effort at negotiation constitutes an impediment for the Court to accept Cameroon's claim as admissible or not.

This matter is of a genuinely preliminary character and has to be decided under Article 79 of the Rules of Court.

108. In this connection, Cameroon and Nigeria refer to the United Nations Convention on the Law of the Sea, to which they are parties. Article 74 of the Convention, relating to the exclusive economic zone, and Article 83, concerning the continental shelf, provide, in their first identical paragraphs, that the delimitation

> "between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

These are followed by identical paragraphs 2 which provide that "If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV." One of these procedures is the submission of the case to the Court for settlement by contentious proceedings.

109. However, the Court notes that, in this case, it has not been seised on the basis of Article 36, paragraph 1, of the Statute, and, in pursuance

cet article, conformément à la partie XV de la convention des Nations Unies sur le droit de la mer, relative au règlement des différends surgissant entre les parties à la convention à propos de l'interprétation ou de l'application de cette dernière. Elle a été saisie sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut, déclarations qui ne contiennent aucune condition relative à des négociations préalables à mener dans un délai raisonnable.

Le second moyen du Nigéria ne peut donc être retenu.

*

110. En sus de ce qui a été avancé par les Parties, la question pourrait se poser de savoir si, au-delà du point G, le différend entre les Parties a été défini de manière suffisamment précise pour que la Cour puisse en être valablement saisie. La Cour observera non seulement que les Parties n'ont pas soulevé ce point, mais que le Cameroun et le Nigéria ont entamé des négociations en vue de la fixation de l'ensemble de leur frontière maritime. C'est au cours de ces négociations que la déclaration de Maroua, relative au tracé de la frontière maritime jusqu'au point G, avait été arrêtée. Par la suite, cette déclaration a été considérée comme obligatoire par le Cameroun, mais non par le Nigéria. Les Parties n'ont pas été en mesure de se mettre d'accord sur la continuation des négociations au delà du point G, comme le Cameroun le souhaite. Il en résulte qu'il existe à ce sujet un différend entre les Parties qui, en définitive et compte tenu des circonstances de l'espèce, est suffisamment précisé pour pouvoir être porté devant la Cour.

*

111. La Cour, par voie de conséquence, rejette la septième exception préliminaire.

* *

HUITIÈME EXCEPTION PRÉLIMINAIRE

112. La Cour examinera maintenant la huitième et dernière exception préliminaire présentée par le Nigéria. Selon cette exception, le Nigéria soutient, dans le contexte de la septième exception préliminaire et aux fins de compléter celle-ci, que la question de la délimitation maritime met nécessairement en cause les droits et intérêts d'Etats tiers et que la demande correspondante est pour ce motif irrecevable.

113. Le Nigéria évoque la configuration particulière du golfe de Guinée et sa forme concave, le fait que cinq Etats sont riverains de ce golfe et qu'aucune délimitation n'a été effectuée par voie d'accord entre ces Etats

of it, in accordance with Part XV of the United Nations Convention on the Law of the Sea relating to the settlement of disputes arising between the parties to the Convention with respect to its interpretation or application. It has been seised on the basis of declarations made under Article 36, paragraph 2, of the Statute, which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period.

The second argument of Nigeria cannot therefore be upheld.

*

110. In addition to what has been put forward by the Parties, the question could arise whether, beyond point G, the dispute between the Parties has been defined with sufficient precision for the Court to be validly seised of it. The Court observes not only that the Parties have not raised this point, but Cameroon and Nigeria entered into negotiations with a view to determining the whole of the maritime boundary. It was during these negotiations that the Maroua Declaration relating to the course of the maritime boundary up to point G was drawn up. This declaration was subsequently held to be binding by Cameroon, but not by Nigeria. The Parties have not been able to agree on the continuation of the negotiations beyond point G, as Cameroon wishes. The result is that there is a dispute on this subject between the Parties which, ultimately and bearing in mind the circumstances of the case, is precise enough for it to be brought before the Court.

*

111. The Court therefore rejects the seventh preliminary objection.

* *

EIGHTH PRELIMINARY OBJECTION

112. The Court will now deal with the eighth and last of the preliminary objections presented by Nigeria. With that objection Nigeria contends, in the context of and supplementary to the seventh preliminary objection, that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that extent inadmissible.

113. Nigeria refers to the particular concave configuration of the Gulf of Guinea, to the fact that five States border the Gulf and that there are no agreed delimitations between any two of those States in the disputed

pris deux à deux dans la zone en litige. Dans ces conditions, la délimitation des zones maritimes relevant de deux des Etats riverains du golfe aura nécessairement des incidences directes sur les autres. Le Nigéria soutient aussi que la situation existant entre le Cameroun et le Nigéria est différente de celle qui était à la base de l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* (*arrêt, C.I.J. Recueil 1986*, p. 554), puisque cette affaire concernait une frontière terrestre pour la délimitation de laquelle les principes applicables sont différents de ceux qui gouvernent la délimitation de frontières maritimes. L'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)* (*requête à fin d'intervention, arrêt, C.I.J. Recueil 1984*, p. 3) diffère aussi de la présente affaire en ce sens que les zones auxquelles avaient trait les revendications d'un Etat tiers (l'Italie) étaient connues; enfin, dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* (*requête à fin d'intervention, arrêt, C.I.J. Recueil 1981*, p. 3), la Cour s'est bornée à énoncer des principes applicables à la délimitation du plateau continental dans un contexte donné sans pour autant tracer une ligne particulière. Le Nigéria reconnaît qu'en vertu de l'article 59 du Statut les Etats tiers ne sont pas formellement liés par les décisions de la Cour; il soutient néanmoins que la protection qu'offre l'article 59 du Statut est insuffisante, du fait qu'en dépit des dispositions de cet article des décisions de la Cour pourraient, dans certaines situations particulières, avoir à l'évidence des effets juridiques et pratiques directs à l'égard d'Etats tiers, ainsi que sur le développement du droit international.

114. Le Cameroun soutient que la délimitation maritime qu'il prie la Cour de confirmer pour une partie et de déterminer pour une autre concerne exclusivement les Parties au présent différend. De l'avis du Cameroun, les intérêts de tous les autres Etats sont préservés par l'article 59 du Statut et par le principe selon lequel toute délimitation entre deux Etats est *res inter alios acta*. Se référant à la jurisprudence de la Cour, le Cameroun soutient que la Cour n'a pas hésité à procéder à des délimitations maritimes dans des affaires dans lesquelles les droits des Etats tiers étaient plus clairement en cause qu'ils ne le sont dans la présente espèce. Le Cameroun estime aussi que la pratique conventionnelle des Etats confirme qu'une délimitation n'est nullement rendue impossible par l'existence des intérêts d'Etats voisins.

115. La Cour estime, comme les Parties, que le problème des droits et des intérêts des Etats tiers ne se pose en l'espèce qu'en ce qui concerne le prolongement, au-delà du point G, de la frontière maritime vers le large, tel que le Cameroun le demande. Quant à la section de la frontière maritime allant du point G vers la côte jusqu'aux atterrages de la presqu'île de Bakassi, il est certain qu'un différend est né du fait des revendications contraires des Parties concernant Bakassi et du fait que la déclaration de Maroua est considérée comme obligatoire par le Cameroun mais non par le Nigéria.

Mais ce différend ne met pas en cause les droits et intérêts d'Etats tiers. Cela tient au fait que l'emplacement géographique du point G est nette-

area. In these circumstances, the delimitation of the maritime zones appertaining to two of the States bordering the Gulf will necessarily and closely affect the others. Nigeria also holds that the situation between Cameroon and Nigeria is distinct from that underlying the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*Judgment, I.C.J. Reports 1986*, p. 554) as that case concerned a land boundary to the delimitation of which apply principles that are different from those applying to the delimitation of maritime boundaries. The case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 3) was different from the present case in the sense that the areas to which the claims of the third State (Italy) related, were known; and in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 3) the Court was merely laying down principles applicable to the delimitation of the continental shelf in a given context without actually drawing any particular line. Nigeria acknowledges that by virtue of Article 59 of the Statute, third States are not formally bound by decisions of the Court; it maintains nevertheless that Article 59 of the Statute gives insufficient protection, since in specific situations, in spite of that Article, decisions of the Court may have clear and direct legal and practical effects on third States, as well as on the development of international law.

114. Cameroon holds that the maritime delimitation which it is requesting the Court in part to confirm and in part to determine, concerns only the Parties to the present dispute. In Cameroon's view, the interests of all other States are preserved by Article 59 of the Statute and by the principle according to which any delimitation as between two States is *res inter alios acta*. Referring to the jurisprudence of the Court, Cameroon claims that the Court has not hesitated to proceed to maritime delimitations in cases where the rights of third States were more clearly in issue than they are in the present case. Cameroon also finds that practice of State treaties confirms that a delimitation is in no way made impossible by the existence of the interests of neighbouring States.

115. The Court notes, as do the Parties, that the problem of rights and interests of third States arises only for the prolongation, as requested by Cameroon, of the maritime boundary seawards beyond point G. As to the stretch of the maritime boundary from point G inwards to the point of landfall on the Bakassi Peninsula, certainly a dispute has arisen because of the rival claims of the Parties to Bakassi and the fact that the Maroua Declaration is considered binding by Cameroon but not by Nigeria.

That dispute however does not concern the rights and interests of third States. That is so because the geographical location of point G is clearly

ment plus proche de la côte continentale du Nigéria et du Cameroun que ne l'est le tripoint Cameroun-Nigéria-Guinée équatoriale.

116. Ce que la Cour doit examiner au titre de la huitième exception préliminaire est donc de savoir si le fait de prolonger la frontière maritime au-delà du point G mettrait en cause les droits et intérêts d'Etats tiers, et si cela aurait pour effet d'empêcher la Cour de procéder à un tel prolongement. La Cour note que la situation géographique des territoires des autres Etats riverains du golfe de Guinée, et en particulier de la Guinée équatoriale et de Sao Tomé-et-Principe, démontre qu'en toute probabilité le prolongement de la frontière maritime entre les Parties vers le large au-delà du point G finira par atteindre les zones maritimes dans lesquelles les droits et intérêts du Cameroun et du Nigéria chevaucheront ceux d'Etats tiers. Ainsi, les droits et intérêts d'Etats tiers seront, semble-t-il, touchés si la Cour fait droit à la demande du Cameroun. La Cour rappelle qu'elle a affirmé «que l'un des principes fondamentaux de son Statut est qu'elle ne peut trancher un différend entre des Etats sans que ceux-ci aient consenti à sa juridiction» (*Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26). Toutefois, elle a précisé dans la même espèce «qu'elle n'est pas nécessairement empêchée de statuer lorsque l'arrêt qu'il lui est demandé de rendre est susceptible d'avoir des incidences sur les intérêts juridiques d'un Etat qui n'est pas partie à l'instance» (*ibid.*, p. 104, par. 34).

De même, dans l'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, elle a suivi la même ligne de pensée:

> «toute décision de la Cour sur l'existence ou le contenu de la responsabilité que Nauru impute à l'Australie pourrait certes avoir des incidences sur la situation juridique des deux autres Etats concernés, mais la Cour n'aura pas à se prononcer sur cette situation juridique pour prendre sa décision sur les griefs formulés par Nauru contre l'Australie. Par voie de conséquence, la Cour ne peut refuser d'exercer sa juridiction.» (*C.I.J. Recueil 1992*, p. 261-262, par. 55.)»

La Cour ne saurait donc, en la présente espèce, prendre sa décision sur la huitième exception préliminaire en la considérant simplement comme une question préliminaire. Pour pouvoir déterminer quel serait le tracé d'une frontière maritime prolongée au-delà du point G, en quel lieu et dans quelle mesure elle se heurterait aux revendications éventuelles d'autres Etats, et comment l'arrêt de la Cour affecterait les droits et intérêts de ces Etats, il serait nécessaire que la Cour examine la demande du Cameroun au fond. En même temps, la Cour ne saurait exclure que l'arrêt demandé par le Cameroun puisse avoir sur les droits et intérêts des Etats tiers une incidence telle que la Cour serait empêchée de rendre sa décision en l'absence de ces Etats, auquel cas la huitième exception préliminaire du Nigéria devrait être retenue, tout au moins en partie. La question de savoir si ces Etats tiers décideront d'exercer leurs droits à intervention dans l'instance conformément au Statut reste entière.

117. La Cour conclut que, par voie de conséquence, la huitième excep-

closer to the Nigerian/Cameroonian mainland than is the location of the tripoint Cameroon-Nigeria-Equatorial Guinea to the mainland.

116. What the Court has to examine under the eighth preliminary objection is therefore whether prolongation of the maritime boundary beyond point G would involve rights and interests of third States and whether that would prevent it from proceeding to such prolongation. The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties seawards beyond point G will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request. The Court recalls that it has affirmed, "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26). However, it stated in the same case that, "it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case" (*ibid.*, p. 104, para. 34).

Similarly, in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, it adopted the same approach:

> "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

The Court cannot therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. Whether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen.

117. The Court concludes that therefore the eighth preliminary objec-

tion préliminaire du Nigéria n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire.

* * *

118. Par ces motifs,

LA COUR,

1) *a)* Par quatorze voix contre trois,

Rejette la première exception préliminaire;

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge;* M. Ajibola, *juge* ad hoc;

b) Par seize voix contre une,

Rejette la deuxième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; MM. Mbaye, Ajibola, *juges* ad hoc;

CONTRE: M. Koroma, *juge;*

c) Par quinze voix contre deux,

Rejette la troisième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: M. Koroma, *juge;* M. Ajibola, *juge* ad hoc;

d) Par treize voix contre quatre,

Rejette la quatrième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: MM. Oda, Koroma, Parra-Aranguren, *juges;* M. Ajibola, *juge* ad hoc;

e) Par treize voix contre quatre,

Rejette la cinquième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: MM. Oda, Koroma,Vereshchetin, *juges,* M. Ajibola, *juge* ad hoc;

tion of Nigeria does not possess, in the circumstances of the case, an exclusively preliminary character.

* * *

118. For these reasons,

THE COURT,

(1) *(a)* By fourteen votes to three,

Rejects the first preliminary objection;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge* ad hoc Ajibola;

(b) By sixteen votes to one,

Rejects the second preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judges* ad hoc Mbaye, Ajibola;

AGAINST: *Judge* Koroma;

(c) By fifteen votes to two,

Rejects the third preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judge* Koroma; *Judge* ad hoc Ajibola;

(d) By thirteen votes to four,

Rejects the fourth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judges* Oda, Koroma, Parra-Aranguren; *Judge* ad hoc Ajibola;

(e) By thirteen votes to four,

Rejects the fifth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judges* Oda, Koroma, Vereshchetin; *Judge* ad hoc Ajibola;

f) Par quinze voix contre deux,

Rejette la sixième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

contre: M. Koroma, *juge,* M. Ajibola, *juge* ad hoc;

g) Par douze voix contre cinq,

Rejette la septième exception préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: MM. Oda, Koroma, M^me^ Higgins, M. Kooijmans, *juges;* M. Ajibola, *juge* ad hoc;

2) Par douze voix contre cinq,

Déclare que la huitième exception préliminaire n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire;

POUR: M. Schwebel, *président*; M. Weeramantry, *vice-président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: MM. Oda, Koroma, M^me^ Higgins, M. Kooijmans, *juges;* M. Ajibola, *juge* ad hoc;

3) Par quatorze voix contre trois,

Dit qu'elle a compétence, sur la base du paragraphe 2 de l'article 36 du Statut, pour statuer sur le différend;

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge;* M. Ajibola, *juge* ad hoc;

4) Par quatorze voix contre trois,

Dit que la requête déposée par la République du Cameroun le 29 mars 1994, telle qu'amendée par la requête additionnelle du 6 juin 1994, est recevable.

POUR: M. Schwebel, *président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, M^me^ Higgins, MM. Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: M. Weeramantry, *vice-président*; M. Koroma, *juge*; M. Ajibola, *juge* ad hoc.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le onze juin mil neuf cent quatre-vingt-dix-huit, en

(f) By fifteen votes to two,

Rejects the sixth preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judge* Koroma; *Judge* ad hoc Ajibola;

(g) By twelve votes to five,

Rejects the seventh preliminary objection;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judges* Oda, Koroma, Higgins, Kooijmans; *Judge* ad hoc Ajibola;

(2) By twelve votes to five,

Declares that the eighth preliminary objection does not have, in the circumstances of the case, an exclusively preliminary character;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Judges* Oda, Koroma, Higgins, Kooijmans; *Judge* ad hoc Ajibola;

(3) By fourteen votes to three,

Finds that, on the basis of Article 36, paragraph 2, of the Statute, it has jurisdiction to adjudicate upon the dispute;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge* ad hoc Ajibola;

(4) By fourteen votes to three,

Finds that the Application filed by the Republic of Cameroon on 29 March 1994, as amended by the Additional Application of 6 June 1994, is admissible.

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Mbaye;

AGAINST: *Vice-President* Weeramantry; *Judge* Koroma; *Judge* ad hoc Ajibola.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eleventh day of June, one thousand

trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République du Cameroun et au Gouvernement de la République fédérale du Nigéria.

Le président,
(Signé) Stephen M. SCHWEBEL.

Le greffier,
(Signé) Eduardo VALENCIA-OSPINA.

MM. ODA, VERESHCHETIN, M^me^ HIGGINS, MM. PARRA-ARANGUREN et KOOIJMANS, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

M. WEERAMANTRY, vice-président, M. KOROMA, juge, et, M. AJIBOLA, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) S.M.S.
(Paraphé) E.V.O.

nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Cameroon and the Government of the Federal Republic of Nigeria, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN and KOOIJMANS append separate opinions to the Judgment of the Court.

Vice-President WEERAMANTRY, Judge KOROMA and Judge *ad hoc* AJIBOLA append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.

crowell moring

Reference Material 30.

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The

election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

crowell moring

Reference Material 31.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT Nº 49/00
CASE 11.182
CARLOS FLORENTINO MOLERO COCA RODOLFO GERBERT ASENCIOS LINDO,
RODOLFO DYNNIK ASENCIOS LINDO,
MARCO ANTONIO AMBROSIO CONCHA, and
PERU
April 13, 2000

I. SUMMARY

1. In a petition submitted to the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") by the nongovernmental organization APRODEH on June 23, 1993, it was denounced that the Republic of Peru (hereinafter "Peru," "the State," or "the Peruvian State") violated the human rights of Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca (hereinafter "the victims") by detaining and torturing them and, subsequently, by sentencing the first three to 10 years and the fourth to 12 years in prison on terrorism charges at trials that were totally lacking in due judicial guarantees and that concluded with sentences handed down by "faceless" courts. The petitioner alleges that in doing so, the State violated the victims' right to personal freedom, right to humane treatment, and right to a fair trial as set forth in Articles 7, 5, and 8 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"). The State denies having violated the victims' rights. The Commission concludes that Peru violated, in respect of these named persons, the rights enshrined in Articles 7, 5, and 8 of the Convention, in connection with the terms of its Article 1(1), and extends the relevant recommendations to the Peruvian State.

II. PROCESSING BY THE COMMISSION

A. Processing prior to admissibility

2. On July 30, 1993, the Commission opened this case, transmitted the relevant parts of the complaint to the Peruvian State, and requested it to provide information within 90 days. The State responded on December 2, 1993, and the petitioner submitted comments on that response on January 17, 1994. Both parties submitted additional information on different occasions. On May 10, 1998, Mr. Carlos Florentino Molero Coca appointed Dr. Luis Alberto Molero Miranda and Dr. Luis Alberto Molero Coca to act as his representatives.

B. Admissibility — Friendly settlement

3. On September 28, 1998, the Commission adopted Report on Admissibility Nº 53/98 with regard to this case. In that report, the Commission agreed to make itself available to the parties in order to reach a friendly settlement based on respect for the rights set forth in the Convention and it invited the parties to respond regarding that possibility with a period of two months. The report was sent to the parties on October 20, 1998. On January 13, 1999, the State replied that it did not believe it was appropriate for it to submit to the friendly settlement procedure.

III. POSITIONS OF THE PARTIES

A. The petitioners

4. The petitioners allege that on April 30, 1992, during a security operation conducted on the streets of Lima, a group of police officers stopped a public transport vehicle and proceeded to search the passengers' belongings. As a result, they arrested one of the passengers—named Gladys Helen Ramos Vargas—who was found to be carrying four homemade explosive devices of the type known as *quesos rusos* and an ID card identifying her as a sociology student at San Marcos University.

5. They state that the detainee was handed over to police officers from the anti-terrorist division, DINCOTE, who arrived at the scene; these officers immediately went to her home, where they found her mother, Mrs. Dolores Vargas Vergaray, with her grandson. The officers entered the home and searched it. They then drew up a report stating they had found subversive printed materials; the report did not speak of any arrests being made.

6. They state that as a result of Gladys Helen Ramos Vargas's arrest, the police immediately launched an operation in the neighborhood *(La Curva del Diablo*, in *Villa El Salvador* district). They asked several people who were in the area for their IDs and arrested several of them, simply because they identified themselves as students. The victims were among the people arrested on the street: Rodolfo Gerbert Asencios Lindo, a biology student at San Marcos National University, and his twin brother Rodolfo Dynnik Asencios Lindo, an anthropology student at the same university; Marco Antonio Ambrosio Concha, a sociology student at San Martín de Porres University (a private school); and Carlos Florentino Molero Coca, an anthropology student from San Marcos National University.

7. Mr. Rodolfo Gerbert Asencios Lindo and Mr. Rodolfo Dynnik Asencios Lindo report that they were in the vicinity of the Curva del Diablo neighborhood on their way to the home of Fortunato Bajonero Trujillo, a relative of theirs, when a group of police officers asked them for their ID. They identified themselves as students at San Marcos University, whereupon the officers began to accuse them of being terrorists. One of the officers asked them if they were related to the lawyer Rodolfo Ascencios Martel, to which they replied that he was their father. The officers then arrested them and took them to DINCOTE headquarters; there they told the two students that since they could do nothing against their father, who as a lawyer belonging to the Association of Democratic Lawyers had defended individuals accused of terrorism, they were going to do it to them.

8. They claim that once with the police, they were both tortured in order to force them into stating that they had been arrested at the home of the student Gladys Helen Ramos; they never made any such admission, since they did not know that person and had not been arrested at her home. Regarding the torture they suffered, Mr. Rodolfo Gerbert Asencios Lindo made the following statement before the 45th Criminal Judge of Lima:

> They punched me in the pit of the stomach and, when I bent over with the pain, they punched me in the head and kicked me in the shin; they then took us out to anther room, turned the volume up on the television, and on a table with a mattress they laid my face against the inclined desk and twisted my arms. They then punched me in the kidneys and threatened me with rape, blows with the knee to the thigh. Then they put me in a dark room, I was blindfold all the time, and they continued with my brother. On May 1st, they also mistreated me when they were taking my fingerprints, with blows to the lungs and slapping my face. We are constantly being threatened that they are going to take us to the beach and that we won't get out alive.

9. They state that this torture was even recorded by a forensic physician, who, during a *habeas corpus* action that was brought, went to DINCOTE headquarters with the judge, examined the two brothers, and declared that they had been mistreated and were displaying recent wounds caused by a blunt object. This *habeas corpus* action was admitted by the 3rd Criminal Chamber, which ordered the 46th Prosecutor in Lima to file the corresponding criminal complaint against Capt. Manuel Arriola Cueva of the Peruvian National Police (PNP). However, no such complaint was filed by the prosecutor.

10. They also report that Mr. Marco Antonio Ambrosio Concha was in the *Curva*

del Diablo neighborhood on April 30, 1992, waiting for a bus to take him to the home of his friend Víctor Oré Ucharina. When he identified himself as a student of San Martín de Porres University, he was arrested by several police officers and, along with a number of other individuals, taken to the DINCOTE's facilities.

11. Mr. Carlos Florentino Molero Coca, in turn, states that he was preparing to return to his home in the Surco district when he was suddenly intercepted by several police officers who were conducting an operation in the *Curva del Diablo* neighborhood. The officers asked Mr. Molero Coca to identify himself, which he did by showing them an ID that accredited his status as an anthropology student at San Marcos National University. Upon discovering he was a student, the police officers covered his face and rushed him into a van along with several other persons unknown to him. They were then all taken to a DINCOTE police facility.

12. They allege that upon arriving at that police facility, Mr. Molero Coca received brutal and inhumane treatment and was brought before all the other persons arrested during the operation, in an attempt to get them to admit they knew each other and had ties with Ms. Gladys Helen Ramos Vargas, who had been arrested while carrying explosives and subversive material.

13. They claim that Mr. Molero Coca was tortured in an attempt to get him to confess and identify the other detainees as members of the Shining Path (SL). However, he repeatedly refused, since he did not know any of the individuals placed alongside him.

14. They state that during the interrogation, Mr. Molero Coca said that his father, Dr. Luis Alberto Molero Miranda, had been a magistrate and that the officers must know him, because as an investigating judge in Lima he had handled a number of well-known cases, including many involving terrorism. The officers' reaction was surprising and violent: they proceeded to insult him, beat him savagely, and make threats along the lines that "they were going to destroy me, because my father had done the same to some police officers when he was a judge, by admitting *habeas corpus* remedies brought against them."

15. They state that the police officers, who never prepared an arrest report specifying the circumstances under which they arrested the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, decided to describe the incident differently, making out that they had discovered and arrested a group of terrorists instead of simply arresting a single person with alleged terrorist ties.

16. They claim that two days after the victims were arrested—that is, May 2, 1992—the police officers went to Gladys Helen Ramos Vargas's house and conducted a "home interview" of her mother, Mrs. Dolores Vargas Vergaray. After threatening that her daughter would be hurt, as she later claimed in court, they made her sign a statement that the four victims were arrested at her home while allegedly waiting for her daughter to arrive.

17. They claim that the police also searched Mr. Molero Coca's home and, in order to create doubts, took a notebook containing notes for a research project titled "The Influence of Linguistics on Anthropology," carried out during the 1992 academic year for a class at university, in which he had copied out the text of a poster on display on the university campus. This text would later be used as evidence of Mr. Molero Coca's alleged status as a terrorist.

18. They state that based on these false assumptions and biased actions, with no evidence whatsoever, without a deed of arrest or a report covering the victims' detention, and without an identification parade being conducted so that the owner of the house where the police claimed the victims were arrested could identify them, the police drew up the corresponding police affidavit (Nº 095-D3-DINCOTE) in which they maliciously concluded that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were members of Shining Path and should be brought to justice.

19. They claim that on May 14, 1992, when the victims had been under arrest for two weeks, the police affidavit was received by Lima's 43rd Provincial Criminal Prosecutor,

responsible for terrorism cases, which drew up criminal charges against the detainees for the crimes described in Articles 319 and 320 of the Criminal Code in force on the date of their arrest, covering actions intended to cause terror, unrest, and alarm in urban areas.

20. They state that on May 15, 1992, the Judge of the 43rd Criminal Court in Lima drew up judicial file Nº 082-92, began preliminary proceedings, and issued arrest warrants for all the defendants; she also specified that regarding the substance of the allegations, the terms of Articles 319 and 320 of the Criminal Code would apply, but that adjective or procedural matters would be handled in accordance with the procedure set forth in Decree Law Nº 25475 of May 5, 1992.

21. They claim that in their statements to the investigating judge, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca repeated that they were innocent and kept to the story they had told the police: that they did not know each other prior to their arrest, that they had no personal relationships of any kind, that they were not arrested at the address given in the police report, that they were not members of any subversive organization, and that they were not involved in any sort of political activity. They also stated that they had been falsely accused by the police to justify their arbitrary arrest and the abuses committed during their time in the DINCOTE's cells.

22. They claim that during this preparatory phase, the accused Gladys Helen Ramos Vargas specifically stated that she did not know Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, or Carlos Florentino Molero Coca, and that it was untrue that they were arrested at her home. Similarly, on June 12, 1992, her mother made a statement under oath in these preparatory proceedings to the effect that she did not know the Asencios Lindo brother or Messrs. Ambrosio Concha and Molero Coca and that they were not arrested at her home. In this statement she recanted her earlier statement to the police, claiming that:

> If I said what appears there in that statement it was because that same Thursday afternoon, when they brought my daughter to my house, they told me that was what I had to say. I was threatened as well, with them telling me they were going to take my daughter to the beach to do away with her, and that was why I made that declaration in the statement before me.

23. They state that the representative of the Attorney General's office then drew up her decision, concluding that the responsibility of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca had not been proven and stating that the investigation had revealed no ties between them and any subversive group or any evidence of their involvement in terrorist acts. The 43rd Criminal Judge stated in her final conclusions that "no deed was drawn up in connection with the arrest of these four accused showing the date, place, and circumstances of their arrest" and concluded that they were not criminally liable since no ties between them and subversive organizations were established and no evidence was provided of their involvement in any terrorist acts. She did, however, identify criminal responsibility on the part of the accused Gladys Helen Ramos Vargas.

24. They state that on August 19, 1992, the 43rd Criminal Judge ordered the release of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, and decided to consult the Superior Court regarding her decision prior to carrying it out. She thus ordered an extra document to be added to the case file for this consultation to take place, including with it the relevant parts of the proceedings. Both files--the main one and the one dealing with the release of Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca-- were sent to the higher court.

25. They claim that Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha filed a *habeas corpus* motion to secure compliance with the decision of the 43rd Criminal Judge ordering their release. On August 25, 1992, this motion was dismissed by Lima's 15th Criminal Judge in accordance with the terms of Decree Law 25475, under which no releases of any kind would be granted at that time, and

with the terms of Decree Law 25859, which stipulated that guarantee actions were not admissible at any stage of police or criminal investigations into the crimes covered by Decree Law 25475. An appeal against this ruling was heard by the Supreme Court of Justice, which upheld it in a decision dated October 5, 1992.

26. They state that the main case file was sent to the Special Chamber of the Superior Court, composed of "faceless" judges, which in turn sent it to the "faceless" superior prosecutor. This superior prosecutor, instead of only filing charges against the accused Gladys Helen Ramos Vargas in accordance with the conclusions reached by the provincial prosecutor and the investigating judge, included the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca in his accusation, based on the terms of Articles 319 and 320 of the Criminal Code, and asked for their conviction and expressed his opinion that they should appear at trial.

27. They report that this trial was held on October 22-24, 1992, in accordance with the terms of Decree Law Nº 25475, before the Special Chamber of the Superior Court, composed of "faceless" judges, in a room furnished for the purpose in Miguel Castro Castro prison in Lima.

28. They claim that the trial at which they appeared was plagued by limitations of the right of defense and that it came to end with a sentence handed down on October 24, 1992, condemning Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha to ten years in prison and Carlos Florentino Molero Coca to twelve years.

29. They maintain that although the investigation carried out in their case and the charges drawn up by the superior prosecutor of the office of the Attorney General had been prepared in accordance with Articles 319 and 320 of the Criminal Code, which typified as crimes actions intended to cause terror, unrest, and alarm in urban areas, the sentence convicted them under entirely different provisions: Articles 321 and 322 of the Criminal Code, for actions related to "criminal association" which were covered in neither the "investigation, judgment, or accusation."

30. They say that this sentence from the Special Chamber of the Superior Court did not resolve objections and challenges that were filed at the appropriate time, nor did it rule on questions of substance posed during the judicial proceedings. The three basic pieces of evidence upon which the sentence was based were the following: the police report of April 30, 1992, dealing with the search conducted at Gladys Helen Ramos Vargas's home, which does not state that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero were arrested there; the record of the interview with Gladys Helen Ramos Vargas's mother, who later recanted her statement in court, claiming that the police had forced her to say that the four of them were arrested at her home; and the police affidavit drawn up by the DINCOTE, in which the police offered a series of subjective, malicious, and utterly unfounded conclusions.

31. They report that an appeal for annulment against this sentence was filed with the Supreme Court which, in a ruling dated September 30, 1994, decided there were no grounds for its annulment and upheld it. This ruling was reached in secret by "faceless" judges of the Supreme Court's Special Chamber, who were solely identified by the numbers 10913297, 11329027, 11709197, 11004297, 10829137, and 29202405.

32. They note that the terrorism convictions handed down to Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca were widely reported in the media and received special coverage and emphasis because they were among the first sentences given under the procedure set by Decree Law Nº 25475. They add that the convictions, and the accompanying publicity, caused both the defendants and their families moral injuries and other damages.

33. They report that national and international campaigns were subsequently waged to get the Peruvian State to accept the innocence of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca and to release them. Mr. Molero Coca and Mr. Ambrosio Concha were declared prisoners of conscience by Amnesty International.

34. The petitioners claim that as a result of these incidents, the State violated the victims' right to personal liberty, right to humane treatment, and right to a fair trial, as set forth in Articles 7, 5, and 8 of the American Convention.

B. The State

35. On December 2, 1993, Peru gave the Commission a report on this case, drawn up by the Ministry of Defense, according to which the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested by officers of the San Juan de Miraflores national police and taken to the DINCOTE, the agency responsible for investigating and later drawing up police affidavits for terrorist crimes.

36. This report added that the criminal proceedings against the individuals in question were lodged with the Special Chamber of the Supreme Court, by virtue of an appeal for annulment filed against a sentence of the Special Chamber of the Superior Court that sentenced the Asencios Lindo brothers and Mr. Ambrosio Concha to 10 years in prison and Mr. Molero Coca to 12 years. This report specified that these individuals were being held at the Yanamayo and Castro Castro prisons in Lima.

37. On April 21, 1994, Peru gave the Commission a report on this case, drawn up by the Ministry of the Interior, according to which the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca "were brought before the DINCOTE under deed Nº 1833-D3-DINCOTE of April 30, 1992, after being arrested by national police personnel from this specialized unit inside the home of the suspected terrorist criminal Gladys Helen Ramos Vargas (21), in whose possession national police personnel from the San Juan de Miraflores detachment found four explosive devices (homemade bombs known as *quesos rusos*) and subversive documents. After investigations were conducted, affidavit Nº 095-D3-DINCOTE of May 12, 1992, was drawn up, it having been established that they were suspected perpetrators of terrorist crimes after it was shown that they belonged to or worked within the subversive organization PCP-SL."

38. On April 22, 1994, Peru gave the Commission another report on this case, drawn up by the Ministry of the Interior, according to which "on September 30, 1993, a supreme writ of execution declared there were no grounds for the annulment of the ruling of October 24, 1992, that sentenced Gladys Helen Ramos Vargas and others as perpetrators of crimes against public order and terrorism to the detriment of the State. The case file has been returned to the Special Chamber of the Lima Superior Court for applicable legal purposes, and that is its current status."

39. On July 8, 1994, Peru gave the Commission a report on this case, drawn up by the Ministry of the Interior, according to which "report Nº 20-93 by the Health Division of the PNP in Puno shows that citizens (. . .) Asencios Lindo and (. . .) Ambrosio Concha are clinically healthy. Attached documents also show that the aforesaid inmates receive the correspondence, foodstuffs, and personal items sent by their relatives."

40. On August 5, 1994, Peru sent the Commission a report on this case, drawn up by the Ministry of Justice for the Executive Secretariat of the National Human Rights Council. This report states that:

> With the issuing of the supreme writ of execution on September 30, 1993, which stated that there were no grounds for annulling the sentence of October 24, 1992, against which the appeal was made and which convicted Gladys Helen Ramos Vargas and others for crimes against public order and terrorism to the detriment of the State, it would be impertinent to base dismissals on facts and police actions that have been seen by the competent judicial bodies in accordance with the rules of due process. Thus, I suggest the following: Reply to the IACHR that the university students GERBERT ASENCIOS LINDO and others were not arbitrarily detained but arrested by the police and submitted to a judicial process in accordance with the normal procedures of our domestic law, which concluded with the issuing of the supreme writ of execution on

September 30, 1993.

41. In a communication dated August 11, 1994, the content of which was ratified on February 1, 1996, the State said that the sentence of October 24, 1992, convicting the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, was definitively upheld on September 30, 1993, when the Supreme Court ruled there were no grounds for annulling the sentence of October 24, 1992.

42. On January 13, 1999, the State indicated that it was unable to begin friendly settlement proceedings, because that would imply its acceptance of responsibility in these incidents, which would have been contradicted by the documents submitted to the Commission.

IV. ANALYSIS

A. Introduction

43. Based on an analysis of the petitioners' allegations and the reply given by the Peruvian State, the Commission notes that Peru has not disputed the incidents on which the petitioners' claim is based. The Peruvian State expressly stated that, "it would be impertinent to base dismissals on facts and police actions that have been seen by the competent judicial bodies in accordance with the rules of due process," and went on to say that the students in question "were not arbitrarily detained but arrested by the police and submitted to a judicial process in accordance with the normal procedures of our domestic law, which concluded with the issuing of the supreme writ of execution on September 30, 1993."

44. In accordance with the above, the Commission accepts the facts not disputed by the parties, which are basically all those set forth by the petitioners: to summarize, that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested on July 30, 1992, by police officers and taken to the DINCOTE, where they were tortured to get them to admit that they were members of Shining Path and that they had been arrested at the home of the student Gladys Helen Ramos Vargas. Their torture was even corroborated by a forensic physician, as a result of which the 3rd Criminal Chamber ordered Lima's 46th Prosecutor to prepare criminal charges against Capt. Manuel Arriola Cueva of the national police; charges which were not made. In their statements to the police and in spite of the torture they suffered, the students declared that they did not know each other prior to their arrest, that there was no personal relationship of any kind between them, that they were not arrested at the address given in the police report, that they were not members of any subversive organization, and that they were not involved in any kind of political activity. The police later drew up the corresponding police affidavit (Nº 095-D3-DINCOTE), in which they concluded that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were members of Shining Path and should be brought to justice.

45. The parties agree that on May 14, 1992, after the victims had been in detention for two weeks, the police affidavit was received by the 43rd Provincial Criminal Prosecutor in Lima, responsible for terrorism cases, who drew up criminal charges against all the detainees for the crimes referred to in Articles 319 and 320 of the Criminal Code in force on the day of their arrest: actions intended to cause terror, unrest, and alarm in urban zones. On May 15, 1992, the judge of Lima's 43rd Criminal Court drew up case file Nº 082-92, began preliminary investigations, and issued arrest warrants for all the defendants; she also specified that regarding the substance of the allegations, the terms of Articles 319 and 320 of the Criminal Code would apply, but that adjective or procedural matters would be handled in accordance with the procedure set forth in Decree Law Nº 25475 of May 5, 1992. In their statements to the judge, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca repeated their innocence and kept to the version of events they had told the police.

46. Neither do the parties dispute the fact that, during this phase of the investigations, the accused Gladys Helen Ramos Vargas stated explicitly that she did not know the students and that it was untrue that they were arrested at her home. Ramos Vargas's mother made a statement under oath in these preparatory proceedings on June 12, 1992,

stating that she did not know the Asencios Lindo brothers or Messrs. Ambrosio Concha and Molero Coca and that they had not been arrested at her home. In this statement she recanted her earlier testimony to the police and claimed that her previous declarations had been made under duress in the form of police threats that her daughter would come to harm. The representative of the Attorney General's office then drew up her ruling, concluding that the responsibility of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca had not been proven and stating that the investigation had revealed no ties between them and any subversive group and had revealed no evidence of their involvement in any terrorist act. The 43rd Criminal Judge, in a decision dated August 19, 1992, found that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were not responsible of the crimes with which they were charged, ordered their release, and decided to consult the Superior Court regarding her decision prior to carrying it out.

47. The parties also agree that the Asencios Lindo brothers and Mr. Ambrosio Concha filed a *habeas corpus* motion to ensure enforcement of the 43rd Criminal Judge's decision ordering their release. This motion was dismissed by Lima's 15th Criminal Judge on August 25, 1992. The basis for this decision was Decree Law 25475, under which no releases of any kind would be granted at that time, and Decree Law 25859, which stipulated that guarantee actions were not admissible at any stage of police or criminal investigations into the crimes covered by Decree Law 25475. The appeal against this ruling was heard by the Supreme Court of Justice, which upheld it in a decision handed down on October 5, 1992.

48. Neither do the parties dispute the fact that the main case file was sent to the Special Chamber of the Superior Court, composed of "faceless" judges, which in turn sent it to the "faceless" superior prosecutor. This superior prosecutor filed charges against the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, based on Articles 319 and 320 of the Criminal Code, asked for them to be convicted, and expressed his opinion that they should appear at trial. This trial was held on October 22-24, 1992, in accordance with the terms of Decree Law Nº 25475, before the Special Chamber of the Superior Court, composed of "faceless" judges," in a room furnished for the purpose in Miguel Castro Castro prison in Lima. This trial ended with a sentence issued on October 24, 1992, the relevant part of which condemned Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha to ten years in prison, and Carlos Florentino Molero Coca to a twelve-year prison term.

49. The parties do not dispute the fact that that although the investigation carried out in this case and the charges drawn up by the superior prosecutor of the office of the Attorney General had been prepared in accordance with Articles 319 and 320 of the Criminal Code, dealing with actions intended to cause terror, unrest, and alarm in urban areas, the sentence convicted the victims under different provisions: Articles 321 and 322 of the Criminal Code, on charges related to "criminal association" that were not an issue in either the investigation, the judgment, or the accusations. Neither do the parties deny that the three basic pieces of evidence upon which the sentence was based were the police report of April 30, 1992, regarding the search conducted at Gladys Helen Ramos Vargas's home, the record of the interview with Gladys Helen Ramos Vargas's mother, and the police affidavit drawn up by the DINCOTE.

50. Both parties concur that a motion for annulment was filed against this sentence with the Supreme Court of Justice, which, in a ruling dated September 30, 1994, and arrived at in secret by a bench of "faceless" judges, decided there were no grounds for its annulment and upheld the sentence.

51. Where the parties do not agree is regarding the place where the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested. The petitioners maintain they were detained in public, on the street; the State, in contrast, holds that the arrests took place at the home of Ms. Gladys Helen Ramos Vargas. The Commission notes, however, that the parties do not dispute the fact that the sentence convicting the students failed to take into account the judicial statement made by Mrs. Gladys Vargas Vergaray on June 12, 1992, in which she recanted her earlier testimony to the police in which she had said that the students were arrested at her home and claimed that the police statement had been

obtained under police duress.

52. Hence, the Peruvian State does not dispute the facts, and its defense centers on the fact that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tried and convicted pursuant to normal procedures under Peruvian domestic law: specifically, Decree Law Nº 25475, of May 6, 1992, dealing with terrorist crimes.

53. Consequently, the issue before the Commission is whether the aforesaid Decree Law Nº 25475 and its ancillary provisions are compliant with the obligations Peru assumed by ratifying the American Convention on Human Rights, in light of the undisputed facts of the present case. In this regard, it should be noted that the Commission is competent to determine whether the effects of enforcing a domestic law constitute violations of the obligations of a State that is a party to the American Convention. In this regard, the Inter-American Court has said that:

> There should be no doubt that the Commission has in that regard the same powers it would have if confronted with any other type of violation and could express itself in the same way as in other cases. Said in another way, that it is a question of "domestic legislation" which has been " adopted pursuant to the provisions of the Constitution" is meaningless if, by means of that legislation, any of the rights or freedoms protected have been violated. The powers of the Commission in this sense are not restricted in any way by the means by which the Convention is violated.
> (. . .)
> At the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention.[1]

54. In accordance with this, the Commission will now undertake an analysis of Decree Law Nº 25475 and its ancillary provisions, in light of the undisputed facts of the present case, in order to determine whether they comply with the obligations Peru acquired by ratifying the American Convention on Human Rights. The Commission will then be able to determine whether those procedures constituted in and of themselves a legal structure contrary to the rights and guarantees enshrined in the American Convention (a violation *per se*), the application of which to persons brought to trial under such legal parameters would have meant a violation of the human rights set forth in the Convention. The starting point for this analysis is the present case, in which those procedures were applied to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, who were among the first people to be tried and convicted under those provisions.

B. Context of the anti-terrorist legislation

55. Between 1980 y 1992, Peru underwent a period of armed internal conflict that led to the death and disappearance of thousands of people and caused massive material losses. The main participants in this conflict were, on the one hand, individuals associated with the "Shining Path" (SL) and "Tupac Amaru Revolutionary Movement" (MRTA) dissident groups, and, on the other, the State's police and military forces.

56. On April 5, 1992, President Alberto Fujimori promulgated Decree Law Nº 25418, establishing an Emergency Government for National Reconstruction. Among his reasons for this, he stated, was the desire to reorganize the judiciary to purge it of corruption and prevent terrorism-related crimes from going unpunished. The Emergency Government dissolved Congress and summarily dismissed judges and public prosecutors at all echelons of the system.

57. Against this backdrop, in 1992 Lima suffered its most violent wave of terrorist attacks. Consequently, on July 24, 1992, President Fujimori addressed the nation and announced drastic new legal measures to counter the situation. Among these were two Decree

Laws (Nos. 25475 and 25659) for prosecuting, trying, and punishing persons guilty of the crimes of terrorism and treason against the fatherland.

58. The State's national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty, but only the guilty. The State must function within the rule of law, punishing only the guilty and refraining from punishing the innocent. The administration of justice according to the law and with due judicial guarantees acts as a safeguard of the fundamental right of freedom inherent to all human beings who have committed no punishable crimes. The only way in which the State can perform that jurisdictional function with true justice is by ensuring that the accused are guaranteed a fair trial.

59. For this reason the American Convention on Human Rights expressly sets forth the right to freedom and the right to due process. A trial with due guarantees is the best way to avoid the injustice of convicting the innocent. In this regard, the aforesaid Decree Law Nº 25.475--which was intended, along with other related provisions, to prosecute, try, and punish the perpetrators of terrorism--led to human rights violations, as shall be seen in this report, by establishing procedures that undermined the guarantees of due process of the individuals tried under them and sentenced innocent people to lengthy prison terms, as occurred in the case at hand with the convictions of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca.

60. The Commission notes that the Peruvian State has made efforts to resolve some cases of individuals convicted without ties of any sort to terrorist activities or organizations. Thus, on 15 August 1996, the Peruvian State enacted Law Nº 26655, creating an Ad Hoc Commission charged with evaluating cases and suggesting to the President of the Republic that pardons be granted to individuals accused or convicted of terrorist crimes when it could be reasonably assumed that they had no connections to terrorist organizations or activities.[2] This Commission, which continues to operate, is composed of three members: People's Defender (ombudsman) Dr. Jorge Santistevan de Noriega, who serves as its chairman; Father Hubert Lanssiers, representing the President of the Republic; and the Justice Minister. To date the Commission has received some 3,000 petitions and, as of November 8, 1998, had presented President Alberto Fujimori with proposals for 494 pardons, of which 457 have been granted.[3]

61. With regard to this Ad Hoc Commission, the Special Rapporteur of the UN Commission on Human Rights responsible for the independence of the judiciary and lawyers said that he:

> . . . welcome[d] the establishment of the Ad Hoc Commission by the Government as an attempt to correct the wrong done to the innocent people who were tried and sentenced by "faceless" civil and military tribunals; however, the Special Rapporteur would like to point out that the establishment of the Commission is itself an acknowledgement by the Government of the serious irregularities that surrounded the procedures for trying cases of terrorism and treason, which amounted to a miscarriage of justice.[4]

62. The Commission believes it should clarify that Article 27 of the American Convention stipulates that during times of war, public danger, or other emergencies that threaten its independence or security, a state party may suspend some of the international obligations to which it is subject. Thus, Article 27 of the Convention reads as follows:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles:

Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

63. In accordance with Article 27 of the Convention and the guidelines set down by the Court, a fundamental principle of respect toward the representative democratic regime is needed and certain requirements must be met for a country to validly declare a state of emergency.

64. Regarding the principle that the representative democratic regime is to be respected, it should be noted that under Article 3.d of the Charter of Bogotá (1948), one of the basic principles governing the Organization of American States is the requirement that its members must be organized politically on the basis of the effective exercise of representative democracy. Consequently, the preamble to the Convention reiterates its "intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." Similarly, Article 29 of the Convention prohibits the interpretation of any of its provisions as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government," while Articles 15, 16, 22, and 32 also refer to the democratic principle within the political organization of the member states.

65. Regarding the requirements for declaring a state of emergency, the Inter-American Court has said that the starting point for a legally sound analysis of Article 27 of the Convention:

> . . . is the fact that it is a provision for exceptional situations only. It applies solely "in time of war, public danger, or other emergency that threatens the independence or security of a State Party." And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, religion or social origin."[5]

66. Thus, the prerequisites for declaring a state of emergency are the following:

67. Need: Under Article 27 of the Convention, for a true emergency to be deemed to exist, the country must be facing a situation of extreme gravity, such as a state of war, public danger, or other emergencies that threaten the independence or security of the member state. The Commission has ruled that measures relating to states of emergency "can only be justified when there is a real threat to law and order or the security of the state."[6]

68. Nonpermanence: This requirement refers to the duration of the suspension which, as stipulated by Article 27(1) of the Convention, must last only for the period of time strictly required by the exigencies of the situation. In this regard the Commission has said that it is a matter of great gravity to declare states of emergency for lengthy or indefinite periods of time, particularly when they grant heads of state broad powers, including the submission of the judiciary to measures decreed by the executive, which in certain cases can lead to the suspension of the rule of law itself.[7]

69. Proportion: Article 27(1) of the Convention states that the suspension can only take place to the extent strictly required by the exigencies of the situation. This requirement prevents the unnecessary suspension of certain rights, the imposition of greater

restrictions than are necessary, and the extension of the suspension into areas not affected by the emergency.

70. Nondiscrimination: As stipulated by Article 27(1) of the Convention, in conjunction with Articles 1 and 24, the suspension of rights cannot entail discrimination of any kind against any person or group.

71. Consistency with other international obligations: The suspension of given rights must be consistent with all other obligations imposed by other international instruments ratified by the country.

72. Notice: In compliance with Article 27(3) of the Convention, notice of the declaration of the state of emergency must immediately be given to the Convention's other states parties, through the Secretary General of the OAS.

73. Even when these conditions are met, the Convention contains certain rights and guarantees that states cannot suspend.

74. Non-derogable rights: With regard to the rights that can be suspended when a state of emergency is imposed, the Inter-American Court has said that:

> It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27(1) – are met. . . . Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.[8]

75. The rights that the State cannot suspend, regardless of the gravity of the emergency, are for the most part listed in Article 27(2) of the Convention and are those contained in the following Articles: 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from *ex post facto* laws), 12 (freedom of conscience and religion), 17 (rights of the family), 18 (right to a name), 19 (rights of the child), 20 (right to nationality), and 23 (right to participate in government). As stipulated by Article 27(1) of the Convention, the suspension of rights must be consistent with all other obligations imposed by other international instruments ratified by the country.

76. The Inter-American Court has stated that the suspension of guarantees must not entail the suspension of the rule or law or the principle of legality:

> The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A Nº 6, para. 32).[9]

77. Thus, "in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms

may be suspended even temporarily, it is imperative that the judicial guarantees essential for their protection remain in force."[10] Similarly, the independence of the judiciary is vital, since that independence is the keystone of the rule of law and of human rights protection. The Court has therefore ruled that *habeas corpus* and *amparo* remedies are judicial guarantees that protect non-derogable rights and those "judicial remedies [are] essential to ensure the protection of those rights. "[11] The judiciary serves to protect legality and the rule of law during a state of emergency.

78. Non-derogable guarantees: The Inter-American Court of Human Rights has stated that, "guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms."[12]

79. In addition to the rights mentioned above, according to the final part of Article 27(2) of the Convention, the judicial guarantees that are essential for protecting non-derogable rights cannot be suspended either; as the Court has said:

> It must also be understood that the declaration of a state of emergency--whatever its breadth or denomination in internal law--cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.[13]

80. The Inter-American Court of Human Rights has concluded that:

> The judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.[14]

81. In conclusion, as indicated by the jurisprudence of the Inter-American Court quoted above, the judicial guarantees that cannot be suspended during states of emergency are essentially *habeas corpus*, *amparo*, remedies intended to preserve the rule of law, and, in general, all other judicial procedures ordinarily used to guarantee full enjoyment of the non-derogable rights referred to in Article 27(2) of the Convention, which, even during states of emergency, must be followed.

82. If it had fully complied with the principles and prerequisites described above, Peru could have, under certain conditions, suspended either in whole or part the enjoyment of some of the rights and guarantees enshrined in the American Convention, provided that said rights and guarantees were not non-derogable. However, since it failed to comply in full with the requirements set forth in Article 27 of the Convention, the obligations acquired by Peru through its free and sovereign ratification of the American Convention remain in full force and effect.

83. The Commission is not unaware of the situation prevailing in Peru when the anti-terrorist legislation was enacted, with constant incursions by armed groups having caused a state of permanent alarm among the populace. For that reason, a state of emergency had been declared in several of the country's departments, which would appear, *prima facie,* to be justified by the crisis faced by the Peruvian State in combating terrorism. Under this state of emergency, Article 2.20.g[15] of the 1979 Peruvian Constitution had been suspended in many departments, and the police and armed forces had been given the power to legally arrest individuals without an order from a competent judge and without their being caught *in flagrante delicto*.

84. It must nevertheless be noted that, in spite of the *prima facie* legitimacy of

this measure, the authority to conduct arrests does not grant the security forces unlimited power for arresting citizens arbitrarily. Suspending the need for a court-provided arrest warrant does not mean that public officials have been freed from the legal prerequisites needed to legally decree such a measure, nor that the jurisdictional controls over how arrests are conducted have been cancelled.

85. The suspension of some of the components of the right to personal liberty, authorized in certain cases by Article 27 of the American Convention, can never be total. In any democratic society there are underlying principles that the security forces must observe in making an arrest, even during a state of emergency. The legal grounds for an arrest are obligations that state authorities must respect, in compliance with the international commitment to protecting and respecting human rights that was acquired under the Convention.

86. Similarly, based on the above principles, police or military arrest as a precautionary measure must solely be intended to prevent the flight of an individual suspected of a criminal act, thereby ensuring his appearance before a competent judge to be tried within a reasonable delay or, if appropriate, released. No state can impose punishments without the guarantee of a prior trial.[16] In a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person's guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi.*

87. The Commission will next analyze Decree Law Nº 25475 and its ancillary provisions in light of the undisputed facts of this case, in order to determine whether by enacting and enforcing them--specifically, to the cases of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca--the Peruvian State violated the obligations it acquired by ratifying the American Convention on Human Rights.

C. Decree law Nº 25475 on the crime of terrorism

88. Article 2 of Decree Law Nº 25475 of May 6, 1992, defines terrorism as an act aimed at "provoking, creating, or maintaining anxiety, alarm, and fear in the public, or a sector thereof; making attempts to harm the life, body, health, freedom, and safety of the individual, or property, the security of public buildings, modes and means of communication and transportation of any kind, electric towers and power lines, power plants, or any other facility or service, through the use of weapons or explosive devices or substances, or any other means capable of inflicting damage or seriously disrupting the peace or adversely affecting international relations or the security of society and the State." This decree expressly repealed the provisions of the Criminal Code that, since April 1991, had applied to terrorism-related offenses, and it also established prison terms ranging from a minimum of 20 years up to a maximum of life imprisonment for those found guilty.

89. The definition of terrorism contained in this decree is totally abstract and inaccurate and, as such, the decree violates the principle of legality, an inherent part of criminal law that is ultimately intended to secure the juridical certainty an individual needs in order to know exactly what actions or omissions will give rise to criminal responsibility.

90. The Commission stands by the comments it offered in its 1993 report on the general human rights situation in Peru regarding the inadequate definition of terrorist crimes: the criminal actions that constitute terrorism are defined and described in Article 2 of Decree Law Nº 25475 with a patent lack of clarity, using very broad terminology and thus creating open definitions of crimes that use very inexact terms and are therefore "contrary to one of the basic principles of modern criminal justice, which is that the language used to describe the prohibited conduct must be precise so as to leave as little discretionary latitude as possible to those whose function it is to enforce and interpret the law."[17] On that occasion the Commission reached the following conclusion, which it now reiterates: "This new body of law is contrary to universally accepted principles of legality, due process, judicial guarantees and the right of self-defense; under these laws, merely being suspected of a terrorist act or of in any way collaborating in

terrorist acts is sufficient cause to hold someone in prison for long periods, regardless of whether that person actually committed an act classified as terrorism or treason. In the opinion of the Commission, this is a grave threat to the people's juridical security."[18]

91. In connection with this, the Inter-American Court of Human Rights has pointed out that the right enshrined in Article 7(2) of the American Convention--that no one shall be deprived of his physical liberty except for reasons established beforehand by law--involves a principle under which "no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[19]

92. Continuing with the analysis of Decree Law Nº 25475, Article 12 stipulates that Peru's National Police is charged with investigating terrorist crimes through the DINCOTE, its National Anti-Terrorist Directorate. The DINCOTE is empowered to decide whether the evidence it gathers is enough to bring charges. In addition, it also decides what charges are to be brought and whether the defendant is to appear before a civilian or a military court.

93. The UN's Special Rapporteur on the independence of the judiciary and lawyers stated, in the report quoted above, that Decree Nº 25475 gave the police excessive powers,

> . . . enabling them to impose incommunicado detention unilaterally, without consulting with a judge, and the restrictions of the right of defence at both civil and military "faceless" tribunals are inconsistent with provisions of international human rights treaties to which Peru is a party, in particular those that provide for the right to due process and its components. Article 8 of the American Convention on Human Rights is of particular relevance because it provides for the right to due process and is regarded as a non-derogable right even during a state of emergency.[20]

94. Thus, under Article 12(c) of the Decree, the national police is empowered to detain suspects for fifteen days and is merely required to notify the judge and the office of the Attorney General within 24 hours of their arrest. Article 12(d) further states that during this time, the police can keep detainees completely incommunicado, while Article 12(f) stipulates that defendants' appointed lawyers can only act in their defense after the detainees have given a statement to the office of the Attorney General.[21] Article 18 of the Decree stated that in terrorism trials, defense lawyers could not simultaneously represent more than one defendant, and excepted court-appointed attorneys from the terms of that provision.[22],[23]

95. In the case at hand, the ban preventing defense lawyers from representing more than one defendant at once was applicable to the defense of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, since they were arrested on April 30, 1992, and appeared at trial on October 22-24, 1992, when the provision was in force.

96. The UN's Human Rights Committee, set up under the Covenant on Civil and Political Rights, has also recorded its concern regarding the provisions of Decree Law Nº 25475 that authorize extension of preventive detention in certain cases for up to 15 days, and it has stated that those provisions raise serious issues with regard to Article 9 of the Covenant, which deals with personal liberty and is similar in content to Article 7 of the American Convention.[24]

97. The Commission believes that the aforesaid provisions of Decree Nº 25475 constitute a violation *per se* of Articles 7 and 8 of the American Convention, in that the power given to the police under which they can arrest a person and keep him incommunicado for 15 days clearly contravenes the terms of Article 7(5) of the American Convention, according to which "any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power", as well as those of Article 8(2)(d), which establishes as a minimum procedural guarantee the right of the accused "to communicate freely and privately with his counsel." In addition, the restriction limiting each lawyer to the representation of a single defendant affected the defendants' right to freely choose their own legal counsel enshrined

in Article 8(1)(d) of the American Convention.

98. In this case it can be seen that, pursuant to these provisions, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were detained for 15 days (April 30 through May 14, 1992), during which time they were kept incommunicado. Thus, as explained above, the Peruvian State violated the rights enshrined in Articles 7 and 8 of the American Convention with respect to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca.

99. It is important to stress the numerous statements regarding the fact that while they were detained and kept incommunicado, the defendants were subjected to serious torture, frequently with the aim of securing a self-incriminating "confession" from them. In 1992, the Commission of International Jurists noted that:

> During this critical period, the detainee is completely controlled by the police and is not subject to any effective judicial supervision. We have been told that a suspect when questioned normally is kept bound and blindfolded and never sees his interrogators. The entire police squad that made the arrest frequently takes part in the interrogations, which means that generally there are eight to ten police officers exerting tremendous pressure on the detainee. For the most part, the suspect is questioned during his first days in custody. These sessions can take place at any time, day or night, although, as a rule, they are conducted at night. A representative of the Public Prosecutor's Office is required to be present during the police interrogations. However, we have been told that this is not always the case, and that when a prosecutor is present his attendance is merely a formality since he exercises no control over the interrogators. We believe that this period of prolonged incommunicado detention is, *prima facie,* incompatible with the guarantees stipulated in Articles 7 and 9 of the American Convention and the International Covenant, respectively[25]

100. Similarly, the Inter-American Court of Human Rights has established that, "during the period when Ms. María Elena Loayza-Tamayo was detained [1993] there was a widespread practice in Peru of cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason and terrorism."[26] The UN's Human Rights Committee also made the following statement in this regard:

> The Committee is deeply concerned by persistent reports of torture or cruel, inhuman or degrading treatment of persons detained under suspicion of involvement in terrorist activities or other criminal activities. It regrets the failure of the State party to provide the Committee with detailed information on the measures adopted to prevent torture and cruel, degrading or inhuman treatment, and to punish those responsible. It draws attention to the legislation which permits incommunicado detention in certain cases. In this connection, the Committee reiterates its view, as expressed in its General Comment 20 on article 7, that incommunicado detention is conducive to torture and that, consequently, this practice should be avoided.[27]

101. The Commission also stresses that under Article 5 of the Inter-American Convention to Prevent and Punish Torture, ratified by Peru on March 28, 1991, "the existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture."

102. Article 10 of the Convention to Prevent and Punish Torture also states that: "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

103. In accordance with the foregoing, the Commission also concludes that the provisions of Decree Law 25475, granting the police power to conduct arrests and to keep detainees incommunicado for fifteen days, created conditions that allowed individuals under investigation for terrorist crimes to be systematically tortured during this period of police arrest in order to secure criminal confessions from them. This is a violation of Article 5 of the American Convention, which states that "every person has the right to have his physical, mental, and moral integrity respected," and that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." In this case, the "confessions" obtained by torture were the main evidence used to convict the detainees.

104. In the case at hand and in accordance with the facts that the Commission has established, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tortured[28] at the DINCOTE facility, a fact that was even certified by a forensic physician.[29] By doing this, as explained above, the Peruvian State violated, to the detriment of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca, the right to humane treatment enshrined in Article 5 of the American Convention.

105. Aggravating the defenselessness and isolation of individuals being investigated and tried for terrorist crimes, Article 6 of Decree Law 25669 stipulated that at no time during police investigations or criminal proceedings would relief injunctions be admitted, including the *habeas corpus* action provided for in Articles 295 and 200 of the Peruvian Constitutions of 1979 and 1983, respectively.[30] A suspect arrested and held incommunicado was thus denied the only legal remedy available for challenging the reasonableness of his arrest and for enabling a judge to verify that the arrest was properly made.

106. In order to analyze the consequences of this denial of the right to *habeas corpus* relief vis-à-vis the terms of the American Convention, it must first be noted that Article 25 of the Convention stipulates that: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention." In turn, Article 7(6) of the Convention, which deals with the right of personal liberty, states that anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. Similarly, as analyzed in detail above, Article 27 of the Convention states that there are certain rights that cannot be suspended even during a state of emergency and, further, that the judicial guarantees needed to protect those rights can never be suspended.

107. In this regard, the Inter-American Court of Human Rights has stated that: "Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms."[31]

108. The Court has maintained that *habeas corpus* constitutes a fundamental guarantee that States Parties may not suspend even during a state of emergency, ruling that:

> The judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.[32]

109. Thus, suspending the right to the judicial guarantee of *habeas corpus* relief

of those facing trial for terrorist offenses is also a violation *per se* of Article 7(6) of the American Convention, which deals with the right to personal freedom in the following terms:

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

110. Denying access to *habeas corpus* relief is also a violation of Article 25 of the American Convention, which provides that, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."

111. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that the illegal denial of *habeas corpus* relief indeed took place when on August 5, 1992, the 15th Criminal Judge in Lima invoked the terms of the aforesaid Decree Law Nº 25859 to dismiss the *habeas corpus* action that had been brought by the Asencios Lindo brothers and Mr. Ambrosio Concha to ensure compliance with the decision of the 43rd Criminal Judge ordering their release. With this, as explained above, the Peruvian State violated the right of *habeas corpus* set forth in Article 7.6 of the American Convention, in conjunction with the terms of Article 25 thereof.

112. Continuing with its analysis of Decree Law Nº 25475, the Commission notes that it requires the DINCOTE, at the end of its investigation, to prepare a police report (affidavit) and send it to the prosecutor at the office of the Attorney General, who, in theory, assesses it independently and decides what charges to bring before the corresponding criminal court judge. Nevertheless, the ICJ reports that: it has "been repeatedly told by knowledgeable persons both within and outside the government that, in actual practice, DINCOTE formalizes the charges which then are invariably endorsed by the prosecutor. Thus, DINCOTE ultimately decides whether the prisoner will be tried by a civilian court for terrorism or by a military court for treason."[33] This situation is obviously anomalous, in that it implies that the police--which is not a judicial body, nor independent, nor impartial--is performing jurisdictional functions.

113. The office of the Attorney General then submits formal charges to a criminal judge, who has 24 hours to issue an order beginning the investigation phase, with arrest warrants. Article 13.a of Decree Law Nº 25475 stipulates that the criminal judge can rule on no prior issues, objections, or defense, and neither can he order the defendant's release. Thus, even were he convinced of the prisoner's innocence, he could not have him freed. This clearly constitutes another violation *per se* within the procedure, infringing on the right to presumption of innocence enshrined in Article 8(2) of the American Convention, under which "every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." It should be noted that Law Nº 26248 of November 25, 1993, amended this provision, stipulating that the investigating judge, either on an *ex officio* basis or at the party's request, could order a prisoner's conditional release, but that this decision had to be confirmed by a superior court and the release could not be carried out until this had taken place. In the case at hand, however, on August 19, 1992, the 43rd Criminal Judge ordered the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca to be released and, when a *habeas corpus* action was filed to bring about enforcement of that decision, Lima's 15th Criminal Judge declared it inadmissible in a ruling dated August 25, 1992, later upheld by the Supreme Court of Justice on October 5, 1992, on the grounds that Decree Law Nº 25475 disallowed any sort of release during judicial investigations.

114. Decree Law Nº 25475 required that once the initial phase was concluded, the investigating judge would send the case file to the presiding magistrate of the

corresponding Superior Court of Justice. This magistrate would then in turn refer it to the chief superior prosecutor, who would appoint a superior prosecutor to present the charges within a period of three days. Once the superior prosecutor had formulated the charges, the presiding magistrate would appoint the members of the Specialized Chamber charged with the judgment from among all the judges in the judicial district. In accordance with the terms of Article 15 of Decree Law Nº 25475:

> The identities of magistrates and members of the Office of the Attorney General, as well as of judicial auxiliaries involved in trying terrorism cases shall be secret, to which end the necessary arrangements shall be made. Court decisions shall not bear the signatures or initials of the magistrates involved, nor of the judicial auxiliaries. Codes will be used for that purpose, which shall also be kept secret.[34]

115. Such a system of secret justice constituted a flagrant violation *per se* of the right--that is an integral part of due process--to be tried by an independent and impartial judge or tribunal, enshrined in Article 8(1) of the American Convention, and of the guarantee providing for the public nature of criminal proceedings, enshrined in Article 8(2)(5). Iin connection with this, in its 1993 Report on the Situation of Human Rights in Peru, the Commission stated that: "If no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. This in itself is questionable, given the measures adopted by the Executive Power in relation to the Judiciary since April 5 [1992]."[35] Furthermore, Article 13(h) of Decree Law Nº 25475 provided that in terrorism proceedings, challenges to judges or judicial auxiliaries were inadmissible. To some extent, this last provision was certainly redundant, since the secret identities of the aforesaid officials prevented defendants and their attorneys from learning of the existence of any grounds for challenges.

116. In connection with this, the UN's Human Rights Committee has criticized the fact that defendants did not know who was judging them and were denied the right to a public trial.[36] Evidently, the right of the accused in any proceedings to know who is judging him and to be able to determine that judge's subjective competence--that is, whether there are any grounds for challenging or removing the judge--is a basic guarantee. The anonymity of judges deprives the accused of this basic guarantee and violates his right to be tried by an impartial court, since he is unable to object to a judge when there are grounds for a challenge.

117. The reason given for establishing the aforementioned system of secret justice seemingly has to do with the protection of judges, prosecutors, and other officials involved in the trial from possible reprisals by terrorist groups. In this regard, the UN's Special Rapporteur on the independence of judges and lawyers made the following remarks:

> The main argument presented by the Government for providing "faceless" judges was to protect the physical integrity of the judges, given the terrorist threat. Based upon the testimony received from the judges themselves, the general impression of the Special Rapporteur was that the judges and prosecutors who are supposed to benefit from the fact that they operate anonymously do not feel protected by the system. In their opinion, it is quite easy to discover who the judges and prosecutors are, in particular in the provinces or small towns; therefore, they consider that the system does not serve the purpose for which it was established (i.e. the protection of the judges and prosecutors), and the majority of those interviewed acknowledged that under this system there is a lack of guarantees for due process. In this respect, international standards provide that derogatory measures shall be implemented only if they are strictly necessary. According to the information received by the Special Rapporteur, from 1992 to 1997, judges were not targets of the terrorist-related violence. Therefore, the use of "faceless" tribunals does not meet the principle of strict necessity. Moreover, even if a real need existed to implement measures to protect the physical integrity of the judges and of judicial auxiliaries, these measures should be consistent with other international obligations of the Government and they should not impair the

right of the accused to due process.[37]

118. In accordance with the above, the Commission reiterates that this system of secret justice constituted a flagrant violation *per se* of the guarantee--inherent to due process--of being judged by an independent and impartial tribunal, set forth in Article 8(1) of the American Convention, and of the guarantee of public criminal proceedings, enshrined in Article 8(2)(5) thereof.

119. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that this system of secret justice was applied in full in convicting the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca: their trial was conducted by "faceless" prosecutors and decided on by the Special Chamber of the Superior Court, composed of "faceless" judges, in a ruling handed down on October 24, 1992. In addition, the members of the Supreme Court of Justice who heard the annulment motion filed against that ruling were also "faceless" judges. Thus, as explained above, the Peruvian State violated the victims' right to due process, as set forth in Article 8 of the American Convention.

120. Continuing with its analysis of Decree Nº 25475 and its ancillary provisions, the Commission notes that under Article 16, terrorism trials are held in the respective penitentiary centers, in rooms equipped so as to prevent judges, prosecutors, and judicial auxiliaries from being visually or aurally identified by the defendants and their defense counsel. Regarding these trials, the UN's Special Rapporteur on the independence of judges and lawyers offered the following comments:

> The main characteristic of the proceedings before "faceless" courts, both civilian and military, is secrecy. Judges and prosecutors are identified by codes. When handling treason cases, Supreme Court judges also identify themselves by secret codes. The judges are at all times invisible to the defendants and their counsel, and trial proceedings are conducted in private. Hearings take place in specially equipped courtrooms inside high-security prisons or, in treason cases, at military bases. The courtrooms are small, with a single door and a large one-way mirror along one wall. In an adjoining room on the other side of the mirror, the judges, prosecutor and court secretaries have their seats. They communicate with the accused persons and their counsel through voice-distorting microphones. Since the sound system does not always function properly, it is sometimes impossible for the defendant or his or her counsel to understand what is being said, which has in many cases seriously obstructed the proceedings or affected the defence.[38]

121. In turn, Article 13(c) of Decree Law Nº 25475 and Article 2.b of Decree Law 25744 prohibit the officers involved in preparing the police affidavit and the members of the armed forces who captured or arrested the accused from appearing as witnesses at trials dealing with the crimes of terrorism and treason against the fatherland.

122. The Commission finds that the aforementioned legal denial of the right of defendants to cross-examine the persons who arrested them or who otherwise played a major part in gathering--and even fabricating--the evidence later used to convict them constitutes another violation *per se* of the guarantee of due process enshrined in Article 8(2)(f) of the American Convention, under which the defense has the right to "examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts."

123. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that pursuant to the aforesaid provisions, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were unable to cross-examine the police officers who had arrested them. This was of particular relevance since the victims never accepted that they had been detained at the home of Mrs. Gladys Vargas Vergaray, as the police claimed; it was thus vitally important that the victims' defense lawyers were allowed to question the arresting officers. By denying them that, the Peruvian State violated, with respect to the victims, the right set forth in Article 8(2)(f) of the American Convention,

according to which the defense is entitled to "examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts."

124. In addition to the restriction preventing the defense from examining the police officers who produced the evidence for the prosecution, and to the above-mentioned initial limitation under which an individual lawyer can only represent one person indicted for terrorism, the UN's Special Rapporteur on the independence of judges and lawyers, among other sources, has stated that:

> In the civil "faceless" tribunals, defence attorneys claim that they have restricted access to evidence. Further, they are not allowed to cross-examine police or military witnesses whose identities are not revealed prior to, during or after the trial. In the military "faceless" tribunals, defence lawyers claim that they have serious difficulties in accessing trial documents.[39]

125. As a result of the various restrictions imposed on defendants and their attorneys, the defense of persons on trial for terrorism implied a virtual inversion of the burden of proof, to the point where it could be said that, in practice, irrespective of the evidence that might exist, the accused was presumed guilty and not innocent, in flagrant violation of Article 8(2) of the American Convention. As the Commission has previously remarked, such circumstances turn the defense counsel into a "mere spectator to the proceedings."[40] This role was even more symbolic when defense counsel was provided by the Justice Ministry and appointed on an *ex officio* basis by the police, in accordance with Article 12(f) of Decree Law Nº 25475. For example, during its on-site visit to Peru in November 1998, the Commission was told by inmates at Ayacucho prison that in such cases, affecting all defendants who were unable to pay for an attorney's services, suspects were even more defenseless, since the appointed lawyers did not even attempt to conduct any sort of conscientious defense of their clients, with whom they had one brief formal meeting at the most. In practice, therefore, such defendants were convicted from a position of total defenselessness.

126. Similarly, pursuant to the terms of Decree Law Nº 25475, once the Superior Court has issued a conviction, the defendant can challenge the sentence or apply for annulment with the Supreme Court of Justice, for the matter to be decided by other "faceless" judges within a Specialized Chamber. It has been reported that defense attorneys at the Supreme Court faced practically the same difficulties as at the superior courts; in addition, on account of the provisional status of the Supreme Court's judges, their independence was not guaranteed. As a result, the possibilities of a successful appeal, regardless of how well grounded it was, were practically nonexistent.[41]

127. The Commission must note that according to the information it has obtained from complaints brought before it, from different general reports on the human rights situation in Peru, from press reports, and from its direct contacts with detainees during its on-site visits to the country, the actions of the police officers, prosecutors, judges, and judicial auxiliaries were generally aimed at convicting defendants regardless of whether they were innocent or guilty. In light of this, the temporary status of the vast majority of judges and prosecutors, the result of steps taken by the Government after April 5, 1992 obviously, affected their independence and impartiality to the extent that they were unable to make decisions based on the facts of the case and their legal knowledge and experience; instead, their rulings were more in response to their natural interest in preserving their positions and their earnings: they were expected to act blindly to secure convictions, and that was what they provided.

128. The foregoing characteristics of terrorism trials thus constituted violations of the right of every person to a hearing, with due guarantees, in order to substantiate any accusation of a criminal nature made against him; to be presumed innocent so long as his guilt has not been proven according to law; to prior notification in detail of the charges against him; and to adequate time and means for the preparation of his defense. All these are guarantees that are expressly enshrined in Article 8 of the American Convention.

D. Human rights violations in trials for the crimes of terrorism

129. It is therefore clear that procedures in terrorism trials violate the minimum standards necessary for a fair trial. In this regard, after analyzing the case of one person who was tried and convicted under those procedures, the Inter-American Court of Human Rights stated that:

> Ms. María Elena Loayza-Tamayo was tried and convicted by application of an exceptional procedure in which it is obvious that the fundamental rights embodied in the concept of due process were greatly restricted. Those proceedings do not meet the criteria of a fair trial, since the presumption of innocence was not observed; the defendants were not allowed to challenge or examine the evidence; the defense attorney's power was curtailed in that he could not communicate freely with his client or intervene in all stages of the proceeding in full possession of the facts.[42]

130. Similarly, the Special Rapporteur on the independence of judges and lawyers of the UN Commission on Human Rights has stated that:

> The shortcomings of the anti-terrorist legislation enacted by the Government have already been pointed out by different national and international organizations. The consensus is that Peru did not observe the general conditions provided in international law for a state of emergency; in particular, the Peruvian Government, in vaguely defining the crimes of terrorism and treason and by punishing them with disproportionate penalties, failed to observe the rule of proportionality. In enacting such measures it failed to abide by its international obligations, and it suspended fundamental rights that are non-derogable even during a state of emergency, principally the right to due process and the right to have an independent and impartial judge to hear one's case.[43]

131. Pursuant to the above and in accordance with the analysis of the procedures for trying the terrorist crimes contained in Decree Law Nº 25475 and its ancillary provisions, the Commission reaffirms its conclusion that said procedures constitute a violation *per se* of the right to personal freedom enshrined in Article 7 of the American Convention, which reads as follows:

> Article 7. Right to Personal Liberty
>
> 1. Every person has the right to personal liberty and security.
>
> (. . .)
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.
>
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
>
> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of

such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

132. In this case, as has already been said, the violation of Article 7 of the Convention occurred when the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were arrested and kept incommunicado for a period of 15 days (from April 30 to May 14, 1992) under the terms of Decree Law Nº 25475. As has also been shown, and in accordance with the jurisprudence of the Inter-American Court quoted above, the State also violated Article 7 of the Convention in respect of the victims by denying them the right to *habeas corpus* relief.

133. The Commission also reaffirms its conclusions that the procedure in question established a legal framework that facilitated violations of the right to humane treatment, through the power granted to the police to arrest people and keep them incommunicado, and that created conditions that meant that people under investigation for the crime of terrorism were coerced or even tortured during those periods of detention and isolation in order to secure confessions from them, which were then used as the main evidence at their trials and in their convictions, in contravention of the aforesaid provisions of the Inter-American Convention to Prevent and Punish Torture and in violation of Article 5 of the American Convention, which reads as follows:

Article 5. Right to Humane Treatment
1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

134. In this case, as has already been said, the violation of Article 5 of the Convention occurred with the torture inflicted on the victims during their detention at the DINCOTE facility, which was even documented by a forensic physician.

135. The Commission also reaffirms its conclusion that the procedure in question constituted a violation *per se* of the right to a fair trial set forth in Article 8 of the American Convention, which states the following:

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

136. In this case, as has already been said, the violation of Article 8 of the Convention occurred when the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were subjected to a secret trial for terrorist offenses under the provisions of Decree Law Nº 25475, which was heard and ruled on by "faceless" judges, with the cited restrictions of the fundamental rights that make up due process.

137. In light of the above considerations, the Commission concludes that trials and convictions in Peru for terrorist crimes conducted in accordance with the procedure set forth in Decree Law Nº 25475 and its ancillary provisions constituted violations *per se* by the Peruvian State of the aforesaid human rights enshrined in the Convention, to the detriment of the individuals tried and convicted under that procedure — specifically, in the case at hand, Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca; this does not imply that every person tried and convicted under that procedure was necessarily subjected to torture.

V. DEVELOPMENTS SINCE THE ADOPTION OF REPORT Nº 91/99

138. The Commission adopted Report Nº 91/99 (Article 50) on this case at its 104th session. This report, containing the Commission's recommendations, was transmitted to the Peruvian State on October 21, 1999. The State was granted a period of two months following that date to comply with the recommendations.

139. In Note Nº 7-5-M/561, dated December 20, 1999, Peru sent the Commission its comments on Report Nº 91/99; it said was in disagreement with some matters of fact and law contained therein and with the conclusion reached by the Commission. Specifically, the State said, *inter alia,* that it disagreed with the IACHR's conclusion that Decree Law Nº 25475 violated human rights *per se,* that the petition did not make claims questioning the anti-terrorist legislation, and that the legislation in question has since been toned down, at the State's initiative.

140. Peru added that the IACHR had not duly assessed the state of internal political emergency that required the enactment of extraordinary legislative measures, which did accord with the exceptions in international human rights instruments under which certain rights could be suspended. The State noted that the IACHR did not recommend that the Ad Hoc Commission conduct a review of the cases of the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca and indicated that, as regards the payment of damages, the complainants could initiate such legal action as they deem appropriate.

141. In concluding, the Peruvian State said that the IACHR did not have the authority to review a judicial proceeding that had concluded within the State and that the Commission's recommendations were inadmissible because "even under conditions of complex terrorist violence, the rule of law was respected and the investigations and judgments were serious and impartial."

142. Peru ended by saying that "the Peruvian State, at its own initiative, has taken the steps necessary to determine whether the cases of the aforesaid citizens are being studied by the Ad Hoc Pardons Commission, bearing in mind the restricted nature of that Commission's files, and it will notify the IACHR in due course. If they are not under analysis, the Government will conduct prior assessments in order to recommend the relevant study."

143. The Commission refrains from analyzing the Peruvian State's comments that do not address its compliance with the recommendations made by the Commission in Report Nº 91/99 since, pursuant to Article 51(1) of the Convention, what the Commission must determine at this stage in the proceedings is whether the State did nor did not resolve the matter. In this regard, the IACHR notes that the Peruvian State has not complied with any of the recommendations made by the Commission in Report Nº 91/99.

144. Irrespective of the above and in connection with Peru's claim that Decree Law Nº 25475 did not constitute a violation *per se* of the American Convention, the Commission must point out that, as has been demonstrated in the case at hand, the very structure of the Decree is intrinsically incompatible with the Convention. It is not that the police officers, judges, and prosecutors interpreted the terms of the Decree incorrectly; instead, they enforced it strictly and rigorously and, in doing so, violated a series of rights and guarantees that were due to the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca. In connection with this, the Commission notes the Peruvian State's report that some of the Decree Law Nº 25475's provisions have been modified, which has been reflected by the Commission in the corresponding paragraphs of this report. Nevertheless, those modifications do not change the fact that the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were tried in accordance with the original parameters of Decree Law Nº 25475 and that they have been denied physical freedom for the past eight years.

145. The Peruvian State argued that the petition covering this case made no claims questioning Decree Law Nº 25475. In this regard, it should be remembered that the Commission is competent to determine whether the effects of implementing laws lead to violations of the obligations assumed by states under the American Convention. The Inter-American Court has said that:

> At the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention.[44]

146. Regarding Peru's claim that the IACHR did not give due consideration to the situation of internal political emergency that required the introduction of extraordinary legislative measures that were in line with the exceptions allowed by international human rights instruments for suspending certain rights, the IACHR refers back to the content of paragraphs 55 through 87 above, in which the Commission offers an extensive analysis of the context behind the anti-terrorist legislation, including the conflict that led to the death and disappearance of thousands of people, massive material losses, the terrorist attacks in Lima in 1992, the international obligations of States in situations of this kind, and the non-derogable nature, even during states of emergency, of some of the rights and guarantees enshrined in the American Convention.

147. Regarding the State's claim that the IACHR lacks the authority to review judicial proceedings that have concluded within the State, the Commission must inform Peru that, as was recently pointed out by the Inter-American Court of Human Rights:

> In order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings. In this respect, the European Court has indicated that the proceedings should be considered as a whole, including the decisions of the courts of appeal, and that the function of the international court is to determine if all the proceedings, and the way in which the evidence was produced were fair.
>
> (…)
>
> To this end, in view of the characteristics of the case and the nature of the violations alleged by the Commission, the Court must examine all the domestic judicial proceedings in order to obtain an integrated vision of these acts and establish whether or not it is evident that they violated the norms on the obligations to investigate, and the right to be heard and to an effective recourse, which arise from Articles 1.1, 8 and 25 of the Convention.[45]

148. Although Peru has not to date complied with the IACHR's recommendations, the Commission hopes that the Peruvian State will continue with "the prior assessments in order to recommend the relevant study" to which it refers and that these will lead to a review of the aforesaid proceedings, which ended with the conviction of four innocent people who, more than eight years later, are still being denied the basic human rights of liberty.

VI. CONCLUSIONS

The Commission repeats the following conclusions that it reached in its aforesaid Report Nº 91/99:

149. The conviction of Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca was handed down by "faceless" judges in accordance with the procedure for terrorist cases set forth in Decree Law Nº 25475 and its ancillary provisions. Also involved in those proceedings were "faceless" prosecutors. The case shows that they were tortured, as was duly certified by a forensic physician. The case also reveals that victims were denied the immediate execution of the decision ordering their release handed down by the 43rd Criminal Judge on August 19, 1992, pursuant to the terms of Decree Law Nº 25475 forbidding the release of defendants during police or judicial investigations. The same Decree Law was also used as a the basis for denying Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, and Marco Antonio Ambrosio Concha the *habeas corpus* relief they filed to secure execution of the August 19 decision.

150. The Commission also notes that the conviction handed down on October 24, 1992, by the Special Chamber of the Superior Court did not take into account the judicial statement made by Mrs. Gladys Vargas Vergaray on June 12, 1992, in which she recanted her earlier police statement according to which the victims were arrested at her home, since said police statement was obtained under duress from the police. The Commission must therefore point out that the sentence appears to be totally arbitrary in that it contains no evidence that, assessed in accordance with sound criticism, could reasonably indicate that the defendants were guilty of the crimes with which they were charged; consequently, the proceedings appear to have concluded with the conviction of four innocent men.

151. In connection with this, and since the Commission has ruled that judgments and convictions in Peru for terrorist crimes under the procedure set forth in Decree Law Nº 25475 and its ancillary provisions constituted violations *per se* of human rights enshrined in the American Convention by the Peruvian State, the Commission concludes that Peru violated, with respect to the persons tried and convicted under those parameters--in the specific case at hand, Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca--the right to personal freedom contained in Article 7 of the American Convention, the right to humane treatment contained in Article 5 of the American Convention, and the right to a fair trial contained in Article 8 of the same

Convention, by trying and convicting them under the terms of Decree Law Nº 25475.

152. These conclusions additionally imply that the Peruvian State has not complied with the terms of Article 1(1) of the Convention--to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms--that it violated the rights of the victims enshrined in Articles 7, 5, and 8 of the Convention.

153. Similarly, the second obligation arising from Article 1(1) of the Convention is that States must ensure the free and full exercise of the rights and freedoms the instrument contains. In this regard, the Inter-American Court's jurisprudence has stated that: "This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention."[46] It is clear that Peru also failed to meet that obligation, by establishing government practices and judicial and police procedures that curtailed the full exercise of the rights enshrined in the American Convention.

VII. RECOMMENDATIONS

Based on the foregoing analysis and conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ONCE AGAIN RECOMMENDS THAT THE PERUVIAN STATE SHOULD:

1. Conduct a serious, impartial, and effective official investigation into the torture reported by Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca; punish the guilty, if applicable; and take the steps necessary to put an end to this practice.

2. Make full amends for, by means of different applicable measures, the human rights violations committed against Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca, including the immediate review of their convictions by an independent and impartial body, with all pertinent guarantees of due process.

3. Compensate Messrs. Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha, and Carlos Florentino Molero Coca for the physical, moral, and material harm arising from the aforesaid violations of their human rights by the Peruvian State.

4. Amend Decree Law Nº 25475 and its ancillary provisions in order to bring it into line with the rights and guarantees enshrined in the American Convention.

VIII. PUBLICATION

154. On March 2, 2000, the Commission transmitted Report 18/00--the text of which precedes--to the Peruvian State and to the petitioners, according to article 51(2) of the Convention, and granted Peru a one-month period to comply with the recommendations set above. On April 10, 2000 the State forwarded the Commission a note and reiterated its considerations pertaining the conclusions of fact and of law of the Commission, and did not exposed any action taken towards the compliance of the recommendations made by the Commission.

155. According to the above considerations, and to Articles 51(3) of the American Convention and 48 of the Commission's regulations, the Commission decides to reiterate the conclusion and the recommendations set forth in chapters V and VI; to make public the present report and to include it in its Annual Report to the OAS General Assembly. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the Peruvian State in respect to

the above recommendations, until they have been complied with by the Peruvian State.

Done and signed by the Inter-American Commission on Human Rights.on the 13 day of the month of April, 2000. (Signed): Hélio Bicudo, Chairman, Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commissioners, Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.

[Table of Contents | Previous | Next]

---

[1] Inter-Am.Ct.H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13, July 16, 1993, Series A No. 13, paragraphs 27 and 30.

[2] Article 1 of Law 26655 stipulates the following: "An Ad Hoc Commission shall be established, charged with evaluating, assessing, and, in exceptional cases, proposing to the President of the Republic the granting of pardons to individuals convicted of the crimes of terrorism or treason against the fatherland based on inadequate evidence that would allow the Commission to reasonably assume that they had no connections of any kind with terrorist elements, activities, or organizations."

[3] Ad Hoc Commission, Pardon Recommendations, Statistical Report, October 1998; drawn up for the Inter-American Commission on Human Rights on the occasion of its on-site visit to Peru, Lima, 1998.

[4] UN, Commission on Human Rights, Report on the Mission to Peru by the Special Rapporteur on the independence of the judiciary and lawyers, Mr. Param Cumaraswamy, Doc. E/CN.4/1998/39/Add.1 (1998), paragraph 85.

[5] Inter-Am.Ct.H.R., Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Series A Nº 8, paragraph 19.

[6] IACHR, Annual Report 1980-1981, p. 115.

[7] *Idem.*

[8] Inter-Am.Ct.H.R., Habeas Corpus in Emergency Situations . . ., *op. cit.,* paragraph 21.

[9] *Ibid.,* paragraph 24.

[10] *Ibid.,* paragraph 27.

[11] *Ibid.*

[12] *Ibid.,* paragraph 25.

[13] Inter-Am.Ct.H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Series A Nº 9, paragraph 25.

[14] *Ibid.,* paragraph 38.

[15] According to which: "All persons shall have the following rights: . . . 20. To personal freedom and personal security. Consequently, . . . (g) No person may be detained except under a written, grounded order from a judge or by police authorities *in flagrante delicto*."

[16] The Commission has established that: "The rationale behind this guarantee is that no person should be punished without a prior trial which includes a charge, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk." IACHR, Report Nº 12/96, paragraph 76 (Case 11.245, Argentina), published in Annual Report, 1995.

[17] IACHR, Annual Report, 1993, p. 807.

[18] *Ibid.*

[19] Inter-Am.Ct.H.R., Gangaram Panday Case, Judgment of January 21, 1994, Series C Nº 16, paragraph 47.

[20] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.,* paragraph 71.

[21] Later legislation partially amended Decree Law 25475, allowing defendants in terrorism cases the right to receive counsel from their defense lawyers immediately following arrest.

[22] This article was repealed by Law Nº 26248 of November 25, 1993.

[23] In a recent report the Commission concluded that the right to defense had been restricted and, consequently, that Article 8(2) of the Convention had been violated by a series of restrictions that were imposed on a defense lawyer, such as forcing her to undress prior to visiting her client in prison, forbidding her to converse in private with her client, and refusing to issue her with the ID card needed to enter the prison facility. See Report Nº 2/99, Case 11.209 (Mexico), IACHR, Annual Report, 1998, paragraphs 88-102.

[24] UN, Human Rights Committee, Examination of the Third Report Submitted by Peru to the Committee, Documents of the 51st Session, Vol. I, Supplement Nº 40 (A/51/40), paragraph 356.

[25] Report of the Commission of International Jurists on the Administration of Justice in Peru, Instituto de Defensa Legal, Lima 1993, pap.60.

[26] Inter-Am.Ct.H.R., Loayza Tamayo Case, Judgment of September 17, 1997, paragraph 46.

[27] UN, Human Rights Committee, *op. cit.,* paragraph 355.

[28] As an example of the torture that was inflicted, Mr. Rodolfo Gerbert Asencios Lindo made the following statement before the 45th Criminal Court in Lima: "They punched me in the pit of the stomach and, when I bent over with the pain, they punched me in the head and kicked me in the shin; they then took us out to anther room, turned the volume up on the television, and on a table with a mattress they laid my face against the inclined desk and twisted my arms. They then punched me in the kidneys and threatened me with rape, blows with the knee to the thigh. Then they put me in a dark room, I was blindfold all the time, and they continued with my brother. On May 1st, they also mistreated me when they were taking my fingerprints, with blows to the lungs and slapping my face. We are constantly being threatened that they are going to take us to the beach and that we won't get out alive."

[29] Among the documents before the Commission is a copy of a decision handed down by the 45th Criminal Court in Lima, dated May 15, 1992, in which the existence and content of the forensic report can be inferred. This decision reads as follows: "Since (. . .) the deed drawn up by the Criminal Court (. . .) indicates that the citizens (. . .) were examined by the forensic physician, who verified that they presented traces of wounds caused by a blunt object, and that those wounds were recent—that is, not more than about seven days old—thus indicating that they were indeed inflicted during the time when the aforesaid citizens were detained at the premises of the National Police's Anti-Terrorism Directorate."

[30] Law Nº 26248 of November 25, 1993, reinstated the admissibility of habeas corpus in cases involving

terrorism and treason against the fatherland.

[31] Inter-Am.Ct.H.R., Habeas Corpus in Emergency Situations . . ., *op. cit.,* paragraph 25.

[32] Inter-Am.Ct.H.R., Judicial Guarantees in States of Emergency . . ., *op. cit.,* paragraph 38.

[33] Report of the Commission of International Jurists, *op. cit. (Note 25).*

[34] Law Nº 26671 was published on October 12, 1996, which stipulated that as of October 15, 1997, terrorist trials would be judged by the corresponding competent judges, thus abolishing trials by "faceless" judges.

[35] IACHR, Report on the Situation of Human Rights in Peru, 1993, paragraph 64.

[36] UN, Human Rights Committee, *op. cit.,* paragraph 355.

[37] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.,* paragraph 74.

[38] *Ibid.,* paragraph 73.

[39] *Ibid.*, paragraph 72.

[40] IACHR, Annual Report, 1993, p. 845.

[41] See, for example, UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.,* paragraph 53.

[42] Inter-Am.Ct.H.R., Loayza Tamayo Case, Judgment of September 17, 1997, paragraph 62.

[43] UN, Commission on Human Rights, Report by Special Rapporteur Param Cumaraswamy, *op. cit.,* paragraph 70.

[44] Inter-Am.Ct.H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13, July 16, 1993, Series A Nº 13, paragraph 30.

[45] Inter-Am.Ct.H.R., Case of Villagrán Morales *et al.,* Judgment of November 19, 1999, paragraphs 222 and 224.

[46] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 166.